In The Supreme Court of Bermuda

COMPANIES (WINDING-UP)

COMMERCIAL COURT

2006: No. 315

IN THE MATTER OF SEA CONTAINERS LTD-IN LIQUIDATION

AND IN THE MATTER OF THE COMPANIES ACT 1981

REASONS FOR DECISION

(In Chambers)

Date of Hearing: May 9, 2012

Date of Reasons: May 10, 2012

Ms. Sarah-Jane Hurrion, Cox Hallett Wilkinson, for the Joint Provisional Liquidators ("JPLs")

Background

1. On October 16, 2006, I appointed Mr. Gareth Hughes and Mr. John McKenna (then of Ernst & Young England and Bermuda respectively) to be JPLs to monitor the restructuring of the Company under the management of its Board of Directors. The JPLs were empowered under paragraph 1 of that Order:

> "*(j) if necessary, to seek the assistance of the US Court and any other courts in which such proceedings are brought, as appropriate*…"

2. On November 23, 2008, the Company and certain affiliates commenced Chapter 11 Proceedings in the United States Bankruptcy Court in Delaware. On January 9, 2009, Bell J modified the initial JPL appointment Order, replacing Mr. Gareth Hughes with Mr. Stephen Harris and limiting the JPLs' powers to those expressly set out in the Order. On January 21, 2010, Stephen Harris was replaced by Ms. Elizabeth Bingham of Ernst & Young in London, and she and Mr. McKenna are the current JPLs, continuing as such without seeking permanent appointment because of the nature of the restructuring process. By the January 21, 2010 Order, the Chief Justice broadened the JPLs' powers to include:

    (a) serving as Plan Administrators and "*the oversight and management of the Company's interest in equalisation matters currently pending in the United Kingdom*" (paragraph 1(a)(ii));

    (b) "*all the powers contained in Section 175 of the Companies Act 1981*" (paragraph 1(b)).

3. On January 22, 2010, the Company was wound-up by Ground CJ.

4. By Ex Parte Summons dated May 7, 2012, the JPLs sought the following substantive relief:

    "*1. a direction pursuant to section 176 (3) of the Companies Act 1981 sanctioning the JPLs application in The High Court of Justice , England & Wales, Chancery Division (the "**English High Court**") pursuant to sections 112 and 153 of the Insolvency Act 1986 substantially in accordance with the draft annexed hereto";*

    (2) an Order that a Letter of Request in the form annexed hereto be issued and directed to the English Court."

5. The Company is the parent of four UK companies in liquidation in the English High Court. It has an interest in certain assets held by a Bermuda Trust (the EREC Trust) to meet potential claims under a 1983 Group Pension Scheme which may be asserted by UK-based employees ("EREC Claims"). The adjudication of these claims turns on matters of English law (turning upon gender equality rights) which the JPLs sought to have determined finally by the English High Court.

6. Ms. Hurrion, after a careful review of the complicated background to the application, persuaded me that England and Wales was clearly the most appropriate forum to

determine the relevant English law questions and that it was appropriate for the JPLs to seek the assistance of the English High Court in this regard. The legal questions fell to be determined by English law and needed to be determined in any event in the English liquidation proceedings involving other members of the Company's corporate group. I made the Order sought.

7. As counsel suggested that there was no direct authority on the Court's jurisdiction to issue a Letter of Request in present circumstances, and merely invoked the inherent jurisdiction of the Court, I now give reasons for the jurisdictional basis of the Order made.

8. When the original JPLs were appointed, they were empowered in general terms to seek assistance from foreign courts in aid of the provisional liquidation proceedings. Such orders are routinely made without any conscious reflection as to the legal basis for so doing, but without any doubt that the jurisdiction must exist. The short answer is that the jurisdiction to issue letters of request arises in large part from statute, while the circumstances in which the jurisdiction is exercised involves the application of common law principles and the inherent jurisdiction of the Court to manage cases before it.

Statutory basis of jurisdiction to direct that liquidators may seek assistance from overseas courts

9. Section 175(1)(a) of the Companies Act 1981 provides as follows:

> "*175 (1) The liquidator in a winding-up by the Court shall have power, with the sanction either of the Court or of the committee of inspection —*
>
> *(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company…"*

10. So the JPLs may seek the sanction of the Court to bring "*any action or other legal proceeding in the name and on behalf of the company*". It has been long settled that liquidators can bring proceedings both locally and abroad.

11. Typically, in a traditional liquidation, such proceedings are commenced with a view to collecting assets. However, where there are parallel proceedings involving related entities incorporated abroad, the involvement in insolvency proceedings overseas may often be motivated by the more pragmatic goal of having issues determined by the most appropriate forum for determining common insolvency issues. Whether the Court accedes to such an application involves the exercise of a statutory discretion the scope of which is primarily informed by common law principles.

12. However, the underlying jurisdictional basis for the Court's sanctioning the decision to commence or continue proceedings abroad is statutory in nature, and derives from section 175(1)(a) of the Companies Act.

Common law principles governing the exercise of the Court's discretion to sanction seeking assistance abroad

13. The concept of issuing letters of request to foreign courts to facilitate task of the liquidator who seeks assistance from a foreign court appears to be a creature of the common law. Letters of request are a private international law response to ancient public international law notions of territorial sovereignty, according to which the jurisdiction of the courts of one sovereign does not run beyond that sovereign's own territorial limits.

14. So-called letters rogatory in relation to obtaining evidence from foreign courts for use in local proceedings are provided for under Order 39 rule 3 of the Rules of the Supreme Court. No equivalent statutory rules exist in the insolvency law context.

15. When will it be appropriate for this Court to approve the determination of legal issues arising in a local liquidation in a foreign insolvency court? The JPLs' counsel conceded that the affected parties might seek to contend in the present case that their rights had in some way been diminished by having the questions determined by the English High Court. However, she indicated that the JPLs would use their best endeavours to ensure that all EREC Claimants were put on notice of the application before the English Court, through direct communications and advertising[1].

16. Whether or not it is appropriate to allow a foreign insolvency court to act as the primary insolvency court <u>generally</u> in relation to a Bermuda company in the context of parallel insolvency proceedings is essentially determined on pragmatic grounds not wholly dissimilar to the centre of main interests (COMI) concept under the UNCITRAL Model Law on Cross-Border Insolvency which has not been implemented under Bermudian law. This was first established in the landmark case of *Re ICO Global Communications (Holdings) Ltd.* [1999] Bda LR 69 (L.A. Ward, CJ). This principle was reflected in general terms in the respective roles played by the Delaware Court and this Court in the present case. However the principle was not engaged by the present application.

17. Whether or not a particular issue should be determined by a foreign insolvency court is also determined on the basis of essentially pragmatic 'case management' considerations. This requires the Court to take into account which is the most appropriate or convenient forum for the determination of the issue in question applying generally applicable jurisdictional principles, criteria upon which Ms. Hurrion aptly relied. Such determinations are not infrequently made by this Court.

18. By way of illustration, in the somewhat analogous receivership context, this Court in *Masri-v- Consolidated Contractors International SAL et al* [2010] Bda LR 21 held that a

[1] I remarked in the course of the hearing that any challenges to the ex parte Order made on the present application were unlikely to be favourably considered unless made in short order after receipt of notice of the application being made by the JPLs to the England and Wales High Court.

locally-appointed Receiver could determine an issue relevant to the local receivership which happened to be governed by English law in the English courts:

> "89. *...The question is: what are the payment obligations of Qatar Shell under the Contract and would they be discharged as between Qatar Shell and CCIC to the extent of any amounts paid to the Receiver instead? Placing this question before the English Court would not represent the Receiver invoking the EJC in any formal sense, which Teyseer further contends is legally impermissible. Mr. Beltrami submitted that the Receiver was entitled to stand in the shoes of CCIC and was not a third party to the EJC. Even if this contention is wrong, the Receiver ought, in any event, to be able to seek an order from the English Court which would be binding between the parties to the Contract by virtue of the EJC.*"[2] *[emphasis added]*

19. By way of contrast, in the insolvency context, this Court has declined to give effect to an exclusive jurisdiction clause so as to permit a legal issue to be determined abroad, again on essentially pragmatic grounds. In *Saad Investments Company Limited (in Caymanian Liquidation)-v- Greenway Special Opportunities Fund Ltd. and Credit Agricole Suisse* [2010] Bda LR 83, I concluded as follows:

> "32. *CAS, hamstrung by its inability to both challenge jurisdiction and apply for the discharge of the injunction, has failed to make out a case for setting aside service of the Writ on it on forum non conveniens or other grounds. However, having regard to the fact that SICL's JOLs appointed in the Plaintiff's domicile have sought the assistance of this Court on behalf of the primary liquidation, I find that Bermuda is the most appropriate forum to determine whether or not redemption monies frozen by the June 8 injunction granted by this Court are beneficially owned by the Plaintiff or the 2nd Defendant, the ECJ notwithstanding. Save to this extent, I would stay the present proceedings until further order in light of the Plaintiff's current election to pursue its entitlement to distributions made in respect of the Shares to CAS in Geneva through the Swiss Mini-Bankruptcy proceedings.*"

Summary

20. In summary, I granted the JPLs' application for a Letter of Request to enable them to seek to have questions relating to the EREC claims determined by the English High Court:

    (a) by way of exercise of the discretion conferred by section 175(1)(a) of the Companies Act 1981 to sanction the decision of the JPLs commence legal proceedings;

[2] This finding was not apparently challenged, and in any event was not disturbed, on appeal: *Teyseer Contracting Co WLL-v- Munib Masri et al* [2011] Bda LR 16.

(b) on the grounds that Court appeared to me to be the most convenient forum for the resolution of the issues in question.

Dated this 10th day of May, 2012

IAN R.C. KAWALEY CJ