

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2010/CLE/GEN/00176

BETWEEN

KPMG INC.

(In its capacity as the receiver and manager of New Life Capital Corp., New Life Investments Inc., New Life Advantage Inc., New Life Capital Strategies Inc., 1660690 Ontario Ltd., 2126375 Ontario Inc., 2126533 Ontario Inc., 2152042 Ontario Inc., 2100228 Ontario Inc. and 2173817 Ontario Inc.)

AND

JEFFREY POGACHAR 1st Defendant

AND

PAOLA LOMBARDI 2nd Defendant

AND

LEXINGTON CONSULTING INC. 3rd Defendant

AND

AMARCORD INTERNATIONAL INC 4th Defendant

Before: His Lordship The Honourable
Mr Justice K Neville Adderley

Appearances: Mr Philip Davis, Darron Ellis with him for the Defendants

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30 Nov 2011
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correct
2 Dec 2011
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Mrs Diane Stewart, Mrs Justine Smith and Ashley Sands
with her for the plaintiff

Mr Luther McDonald, Ms Keri Sherman with him for First
Caribbean International Bank (Bahamas) Ltd

DECISION

Adderley, J

1. The short facts of this case are that based on cogent evidence obtained as a result of an investigation commenced in 2008 The Ontario Securities Commission ("the OSC") under section 127 of the Securities Act (Ontario) ("the Act") brought an action for fraud ("the fraud case") against certain Canadian companies allegedly controlled by the first and second defendants who now reside in The Bahamas. It is also claimed that the first and second defendants wholly own and control the third defendant and control the fourth defendant all of whom received proceeds from the alleged fraud perpetrated in Canada. The third and fourth defendants are International Business Companies incorporated under the laws of The Bahamas having their registered offices therein.

2. The defendants in the fraud case are the first and second defendants, New Life Capital Corp., New Life Capital Investments Inc, New Life Capital Advantage Inc., New Life Capital Strategies Inc, 1660690 Ontario Ltd., and Alan S Price. The case is set to be heard on the merits commencing 5 December 2011.

3. The OSC regulates the issue of trading of securities in the Province of Ontario pursuant to the Securities Act (Ontario). The OSC brought a separate action ("the Receivership Action") Court File No. 08-CL-7832 under section 129 of the Act against the defendants in the fraud case and others but minus any of the defendants. The defendants in that case are New Life Capital Corp., New Life Capital Investments Inc, New Life Capital Advantage Inc., New Life Capital

Strategies Inc ,1660690 Ontario Ltd., 2126375 Ontario Inc., 2108335 Ontario Inc., 2126533 Ontario Inc., 2152942 Ontario Inc., and 2100228 Ontario Inc.(“the company”). They were at all material times engaged in the life settlement business.

4. In the Receivership Action OSC obtained an Order dated the 18 December 2008 (“the Receivership Order”) appointing the plaintiff as a Receiver

“...of all of the property, assets and undertakings of the company of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the “Property”)”

The order then went on to set out specific powers of the receiver to take possession and control of the Property and to manage the same including, inter alia, the power

“to sell., convey, transfer, lease or assign the Property or any part or parts thereof”

with the requirement that a sale for a price in excess of \$100, 000 or over a \$1,000,000 in aggregate must be approved by the court.

None of the defendants were parties to the Receivership Action although their counsel in Canada were served with notice of the proceedings.

5. In Action number 2009/Cle/gen/01569 wherein the Receiver was plaintiff and First Caribbean International Bank (Bahamas) Ltd (“First Caribbean”) was defendant, relying in part on the affidavit of J Bradley Butcher , vice president of KPMG, filed 12 February 2010 Sir Michael Barnett CJ: ordered inter alia that:

“3 The receivership Orders and the Order of 18th September, 2009 referred to in the Originating Summons be hereby recognized.”

This referred to the Receivership Order, the 18 March 2009 Order which approved the First Report of the Receiver and authorized among other things adding 2173817 Ontario Inc. as a defendant, and the 18 September Order which authorized the Receiver to trace and attempt to recover funds including the sum of \$3,000,000.00 transferred by the company to the 3rd defendant and to seek a Norwich Order against First Caribbean.

6. Chernienka Rolle an attorney with the firm of Munroe and Co who provided some legal services to the defendants swore an affidavit on their behalf, but such part of her affidavit that did not contain inadmissible hearsay was neutralized by cross examination.

7. Based on his affidavit filed 17 August 2011 I accept Mr James H. Grout a barrister and solicitor of 28 years from the firm of Thornton Grout and Finnigan L.L.P. in Canada as an expert in Canadian Law and in particular bankruptcy and insolvency law. According to him the Receivership Order is a final order on the issue of the appointment of the Receiver only: He further stated at paragraph 20 of his opinion:

"The only relief sought by the OSC pursuant to its application was the appointment of the Receiver. There was no relief sought by the OSC against the 1st or 2nd Defendants."

8. The Receivership Order was made on the 17 December 2008. Thereafter upon application by the Receiver amendments thereto were made on 18 March 2009, 18 September 2009 and 22 January 2010 (together called "the Receivership Orders") extending the power of the receivers over specific assets of the defendants. The 22 January Order extended the Receivership Order to include bank accounts of the third and fourth defendants and ordered First Caribbean to pay all funds on deposit to the credit of third and fourth defendant to be paid to the Liquidator. In each Order the Canadian court requested the aid and recognition of courts and tribunals and regulatory agencies elsewhere, including in The Bahamas, to give effect to the orders and

to assist the Receiver. It also requested all such bodies to make such orders as may be "necessary or desirable" to give effect to the orders.

9. Turner J then made a series of orders on application by the Receiver in The Bahamas essentially implementing the Orders made in the Receivership Action. The first was filed 12 February 2010 granting a Mareva injunction and several other Orders. In a separate paragraph labeled "Further Orders" he ordered that the Receivership Orders be extended over the bank accounts of the intended 3rd and 4th defendants (Order filed 12 February 2010 as amended by Order filed 22 February 2010).

10. Then followed an Order filed 1 March whereby the learned Judge directed that the 12 February Order as Amended by the 22 February Order recognize that the Receivership Orders were extended to cover the bank account and assets of the third and fourth defendants, and directed a list of persons and entities named therein including several banks to provide the Receiver with all documentation in their possession custody or control relating to any monies received from the defendants.

11. This was followed by an order filed 15 March 2010. This order incorporated an amendment made by the Canadian court on 5 March to the Receivership Order which in effect was a tracing order directed at defendants and a large class of persons who may have received property from them to deliver it up to the Receiver, and if the property was disposed of by the third party to give full particulars of the transaction relating to the disposal. The Learned judge ordered that his previous Orders recognized the 5 March Order as an amendment to the Receivership Orders, in particular the one he made 22 January 2010. Further by a similar Order filed 19 March 2010 the Learned Judge directed that an amendment made to the Receivership Order in Canada be recognized which extended the assets to include to "2 watches, 2 Ferraris, the Ocean Club Condo, Bonds, and the summer wardrobe and furniture referred to in the affidavit of J Bradley Butcher dated the 18th March, 2010". He

also ordered that the plaintiff be granted an order of possession in respect thereof.

12. By summons filed 1 April 2010 the defendants applied to have the orders discharged against them. In an inter partes hearing on 27 April 2011 the Learned Judge then gave an unless order requiring entry of appearance by the defendants by 27 April and confirmation from counsel for the plaintiffs that the watches had been handed over to them and the filing of certain affidavits.

13. At an inter partes hearing on 12 May 2010 the Learned Judge ordered that the summons be struck out for non-compliance with his order of 27 April 2011. On the record the notice of appearance was filed 30 April 2010.

14. Then followed a recusal application on the part of the defendants. By summons filed 17 June 2010. The Learned Judge ruled on 4 May 2011 in a written decision that the case for recusal had not been made out and he declined to recuse himself. Nevertheless he referred the matter to another Judge.

15. Following that referral a summons was filed on behalf of the defendants on 9 July 2011 and amended on the 23 September 2011 for an order to discharge the orders made 12 and 25 February 2010 on the following grounds;

- i. The plaintiff failed to make full and frank disclosure
- ii. Failed to identify possible or probable defences to the claims
- iii. It was not just and convenient for the order to be made
- d. Alternatively for an order varying the said order to allow for the payment of the Parties/Defendants persons with interest daily living and conduct expenses wherever they are incurred.
- e. And that costs of and incidental to this application be provided for"

The summons also sought the following Orders:

- "2. An Order That the Receiver return to the Defendants all goods, chattels and funds received

3. For a Declaration that the seizure and taken [sic] of possession of the assets of the Defendants were unlawful and as a consequence all goods, chattels and funds should be returned to the Defendants..”

As well, consequential orders were sought that the 1st and 2nd defendants are entitled to return to their home, a monthly living allowance and reasonable conduct money.

16. The summons was set down before me to be heard 24 August 2011 but due to the onset of Hurricane Irene it was rescheduled for 27 September 2011 which was further adjourned to 25 October whereupon it was heard. Closing submissions were laid over on Friday 25 November 2011.

17. The applicants (defendants) advanced several arguments:

1) The appointment of the Receiver is not a judgment of the kind contemplated by the Reciprocal Enforcement of Judgments Act Chapter 77 of The statute Laws of the Bahamas Act or enforceable by way of an action upon it.

(a) it is not a final and conclusive determinative of any issue between “parties” (at its highest point it is an action between the regulatory entity of Canada and the companies in respect of which the appointment is made)

(b) No sum of money is required to be paid under the order (it is to collect and preserve the assets of the companies for which the appointment relates)

2) It is therefore misconceived to recognize and give effect to the appointment of the Receiver. In any event recognition as a receiver would not vest entitlement to do what was done namely: the plaintiff has taken possession of funds previously held in bank accounts of the Defendants, caused First and Second Defendants to be evicted from their apartment and have taken steps to dispose of the same by way of

sale, all done under the cloak of the orders recognizing and giving effect to the Receivership Orders.

3) The effect of what the Plaintiff has done is, contrary to law, to realize the fruits of a judgment in its favour that is yet to be determined.

18. The defendants further submit that the procedure by which the plaintiff purported to enforce the Canadian Judgment is contrary to statute as well as common law, the appointment of the receiver is a nullity because being a corporate entity the Companies Act Chapter 308 Statute laws of The Bahamas and the International Business Companies Act Chapter 309 prohibit the appointment of a corporate body as a receiver, the Receivership Order is not a final adjudication of the issues between the parties to this action, and there has been non compliance with the Public Accountants Act Chapter 364 of The Statute Laws of The Bahamas.

19. The plaintiff's reply is that the court has the power to recognize foreign judgments either by statute or at common law. It concedes that the recognition did not comply with Bahamian statute but stated that it relies on the common law, and that the court was correct in recognizing the Canadian Orders under common law. The Receiver maintained that although conceding that there was a difference between the court recognizing a judgment and giving effect to it, on the wording of the orders the Bahamian court clearly intended to incorporate them into the existing Bahamian Orders. It claims that the Receivership Orders are final as to the issues as between the parties as required at common law to recognize and give effect to a foreign Judgment.

20. I will not decide on most of the issues raised because some might argue that they are appeal points with which, as a judge of concurrent jurisdiction, I have no jurisdiction to deal. I will only touch on them as necessary but will focus my attention on whether there was material non-disclosure. In such case I have inherent power to exercise my discretion to set aside vary or

otherwise deal with the ex parte orders obtained by the plaintiff from the learned Judge.

21. I find the observations of Cozens-Hardy J in the case of *In re Maudslay Sons & Field, Maudslay v Maudslay, Sons & Field* [1900] 1 Ch. 602 germane to this case when he sought to describe the role of a receiver;

“It is not altogether easy to ascertain the origin, nature, and extent of the powers of a receiver. A receiver is an officer of the Court, and the Court does not allow the possession of its officer to be interfered with without its leave. When the Court appoints a receiver it requires the parties to the action to give up possession to the receiver of all property comprised in the order, and treats them as guilty of contempt if they refuse to do so. The Court will grant a receiver a writ of possession (Order XLVII., r. 2), or a writ of assistance (*Wyman v. Knight* (1)), to enable him to recover possession, and it will order tenants to attorn to the receiver. So long as the property is within the territorial jurisdiction of the Court, there is no difficulty, at least in theory, in putting the receiver in actual possession. And when the receiver is in possession, the Court does not allow his possession to be interfered with without leave. For example, no judgment creditor of the company would be allowed to levy execution upon the property of the company in England now in the possession of the receivers.”

22. Cozens J then dealt with the appointment of receivers over property located outside the jurisdiction:

“It is well settled that the Court can appoint receivers over property out of the jurisdiction. This power, I apprehend, is based upon the doctrine that the Court acts in personam. The Court does not, and cannot attempt by its order to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign country. See *Keys v. Keys* (2), where special directions were given to a receiver as to the best mode of getting in an Indian debt; and *Smith v. Smith* (3), where it was pointed out that a receiver of property in Jersey and in France would have to recover possession according to the laws of those countries; and in *Houlditch v. Marquis of Donegal* (4) the House of Lords held that the Court of Chancery in Ireland ought to appoint a receiver in a suit instituted to carry into effect a decree of the Court of Chancery in England by which a receiver had been appointed over estates in Ireland. In other words, the receiver is not put in possession of foreign property by the mere order of the Court. Something else has to be done, and until that has been done in accordance with the

foreign law, any person, not a party to the suit, who takes proceedings in the foreign country is not guilty of a contempt either on the ground

(1) (1888) 39 Ch. D. 165.

(2) (1839) 1 Beav. 425.

(3) (1853) 10 Hare, App. lxxi.

(4) (1834) 8 Bli. (N.S.) 301; 37 R. R. 181.

of interfering with the receiver's possession or otherwise. For this purpose no distinction can be drawn between a foreigner and a British subject."

23. From the court's official transcripts it is clear that counsel for the plaintiff failed to disclose these material principles to the learned Judge for his consideration. If they had been disclosed the learned judge may or may not have recognize those powers even if he recognized the appointment itself. Fatally, the plaintiff failed to disclose to the learned Judge the very fundamental fact that the Receivership Action did not decide the issues between the parties to this action which is the inescapable inference to be drawn from the expert opinion supplied by Mr Grout on behalf of the plaintiff. A final judgment deciding such issues is a necessary precondition at common law before effect can be given to foreign judgments in this jurisdiction. It should be remembered that the plaintiff's case is that it is relying on the common law. The hearings on the merits in the fraud action are scheduled to commence on 5th December 2011 in Canada. I agree with the defendants that the effect of what the plaintiff has done is to, contrary to law, realize the fruits of a judgment in its favour that is has not yet obtained.

24. Although it is inimical to the public policy embodied in the company laws of The Bahamas for a corporate entity to be appointed as a receiver or liquidator the receiver was validly appointed under the laws of the lex fori. This is confirmed by Mr Grout's expert evidence and I accept that the Receiver's appointment was valid.

25. However as agreed by counsel on both sides the order of the court of Ontario was of a proprietary nature. This is in breach of the principle that it is wrong for one country to reach out and affect title to property in another country. This is another material disclosure that was not put to the learned Judge for his consideration.

26. The failure to make material disclosures to the court destroys the substratum of any ex parte order and so it is a circuitous argument to seek to support one's case on any order thereby obtained as the plaintiff seeks to do.

CONCLUSION

27. Having regard to the foregoing it is clear that this court gave effect to the Receivership Order amendments which purported to affect the title to property in this jurisdiction because of material non disclosures by the plaintiff. It therefore purported to give effect without more to the powers of the Receiver given to it by the Canadian court in relation to tracing immovable and other assets located in The Bahamas without a final Order on the issues between the parties in its own jurisdiction. While it is recognized that the Receiver has the power to sue it was necessary for the Receiver to take additional steps required under Bahamian law as the *lex fori* to take possession of immovable and other property of persons located in The Bahamas who were not party to the action in Canada whether Canadian citizens or not. The recognition of the appointment of the receiver, which I accept, cannot by itself circumvent those legal requirements and give effect to the orders. This is not a case where there is a final Order on the issues in Canada against the defendants; it is a case where there is no order at all on the issues between the parties. Even local regulators would have had to comply with the requirement for taking possession by first proving their right to possession and then complying with the Rules of the Supreme Court or otherwise to make it effective. No authority that would support a contention to the contrary was cited by the plaintiff.

RULING

28. The consequence of the foregoing is that the taking of possession of the property of the defendants by tracing or otherwise was wrongful and such property must be restored to the defendants from whom the property was taken. I therefore order that the plaintiff return to the defendants all goods, chattels and funds received by it or on its behalf. The plaintiff must cause this to happen and the restoration must take place within the next 7 days. The defendants did not seek damages for the wrongful taking into possession and so no Order will be made in that regard.

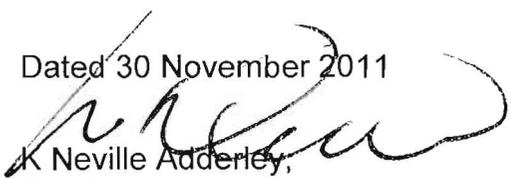
29. The Orders of the court made 12 and 25 February 2010 are hereby discharged.

30. However, having regard to the allegations contained in the fraud case and in the relevant affidavits I consider it just and convenient and hereby make an order replacing the Mareva injunction set out in part of the 12 February 2010 Order with a similar injunction so that, subject to paragraph 31 below, provided that the plaintiff gives the usual undertaking as to damages, the defendants either by themselves their servants agents employees or otherwise are prohibited from disposing of, transferring, withdrawing, or dissipating their assets up to a value of \$7,093,057.00 whether held in their own name or a corporate name or other vehicle or held singly or with others, or in The Bahamas or elsewhere, or from removing from The Bahamas such assets located in The Bahamas, pending determination of the fraud action in Canada or further order of this court.

31. The first and second defendants and each of them is entitled to and must be allowed to return to their home in the Ocean Club Condo, Paradise Island. The plaintiff must cause this to take place within 7 days after the date of this decision. They are also entitled to and must be allowed a reasonable monthly living allowance and reasonable conduct money.

32 I hereby make an order nisi for costs to the defendants and First Caribbean to be taxed if not agreed. The order shall become absolute unless within 14 days the plaintiff makes application to be heard on the issue of costs.

Dated 30 November 2011


J.K. Neville Adderley,
Justice