Disclosure - letters of request from a foreign court seeking our assistance.

[2018]JRC156

ROYAL COURT
(Samedi)

29 August 2018

Before : Sir William Bailhache, Bailiff, and Jurats Ramsden and Thomas

Between	**Miss Margaret Smith (as Chapter 7 Trustee in Bankruptcy of the Estate of Joseph M De Mauro)**	**Plaintiff**
And	**Nedbank Private Wealth Limited, Jersey Branch**	**Defendant**

Advocate C. F. D. Sorensen for the Plaintiff.

Advocate I. C. Jones for the Defendant.

JUDGMENT

THE BAILIFF:

1. On 30th May, Advocate Sorensen appeared before this court, differently constituted, with an application on notice to the Defendant for a Norwich Pharmacal order in the terms set out in an Order of Justice. The purpose of the application was to obtain specified disclosure from the Defendant in relation to the estate of the bankrupt Mr Joseph M De Mauro.

2. On 17th April 2013, Mr De Mauro filed a voluntary petition for bankruptcy under Chapter 7 of the US Bankruptcy Code (Title 11 USC ¶ 701 et seq). The Plaintiff, who is one of the panel of private trustees selected and supervised by the United States Trustee, an arm of the United States Department of Justice, was appointed as Trustee in Bankruptcy. The Plaintiff sought information from the Defendant which it claimed had been innocently muddled up in wrongdoing by the bankrupt and, it was said, the information was necessary in connection with the identification, prosecution and recovery of claims, value and assets outside the United States in order to satisfy the debts owed to the creditors of the bankrupt's estate.

3. Through the Viscount Substitute, Mrs Allo, the Viscount expressed a number of concerns in May 2018 when this application was first brought, to the effect that the title of the trustee had not been registered in this island. Argument took place on 30th May when Mr Sorensen argued vigorously before the court that it was not necessary for the Trustee's title to be so registered, but as Advocate Sorensen was faced with concerns raised by the court of which he had not received much notice, he ultimately sought an adjournment as to whether it was necessary to have a letter of request from the US bankruptcy court before dealing with the application. That request for an adjournment was granted, and the court reconvened differently constituted, on 2nd August when Advocate Sorensen produced a letter of request from the United States Bankruptcy Court, Southern District of Florida, West Palm Beach Division seeking the assistance of this court in connection with the estate of the bankrupt, represented by the Plaintiff as trustee.

4. Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 ('the Désastre Law') provides as follows:-

> ***"(1) The court may, to the extent it thinks fit, assist the courts with a relevant country or territory in all matters relating to the insolvency of a person, and when doing so may have regard to the extent it considers appropriate to the provisions of the time being of any model law on cross border insolvency prepared by the United Nations Commission on international trade law.***
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> ***(2) For the purposes of paragraph (1), a request from a court of a relevant country or territory for assistance shall be sufficient authority for the court to exercise, in relation to the matters to which the request relates, any jurisdiction which it or the requesting court could exercise in relation to these matters if they otherwise fell within its jurisdiction.***
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> ***(3) In exercising its discretion for the purposes of this article, the court shall have regard to the rules of private international law.***
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> ***(4) In this article 'relevant country or territory' means a country or territory prescribed by the Minister."***

5. The only prescribed countries and territories as of today's date are Australia, Finland, Guernsey, the Isle of Man, the United Kingdom and the Republic of Ireland.

6. It is clear from previous practice in this Court that the Court is willing to grant aid to a requesting court on the grounds of comity between courts. Although we have not been referred to particular cases, we are confident that this practice has continued after the enactment of the Désastre Law. Whether that is or is not so, Article 49 is expressed permissively, and the court may therefore assist a foreign Court to the extent that it thinks fit, whether the requesting court is in a relevant country or territory or not.

7. Here we have a request from a foreign court which has assured us of reciprocity of treatment if we were to make such a request and we considered it right to give assistance in that respect.

8. Accordingly the letter of request seeking the recognition of the appointment of the Plaintiff as Trustee in Bankruptcy of Joseph De Mauro and May International Properties Limited was granted and effect given in this jurisdiction to that appointment on terms which are set out in the Act of Court. In particular, the Plaintiff gave through her advocate undertakings to pay the reasonable costs of the Defendant incurred as a result of the order, to comply with any order that the Royal Court might make as to damages if the Court were later to find that the order has caused loss to the Defendant and decide that the Defendant should be compensated for that loss by the Trustee; and undertakings not to use the information obtained except for the purposes of discharging the duties and obligations of the Trustee pursuant to the terms of her appointment by the US Bankruptcy Court, in whichever jurisdiction, and finally to advertise in the Jersey Gazette within seven days to ascertain whether there are in Jersey any creditors of either Joseph De Mauro or May International Properties Limited, and in the event that any such Jersey creditors are identified, to seek further directions from this Court.

9. Upon this basis, and as set out in the order in question in more detail, the Defendant has been directed to disclose the relevant material in question to the Plaintiff.

10. It is only because Advocate Sorensen contended in the first instance that it was unnecessary for the trustee's appointment to be registered in this court through a letter of request that we have resolved it might be appropriate to deliver this short judgment.

11. The arguments which Advocate Sorensen put up were essentially these:-

    (i) The trustee was an office holder and should not be required to undertake an expensive and timely application in order merely to be heard on a Norwich Pharmacal application of this kind. In that sense the trustee should not be in an inferior position to any other sort of office holder. He referred to the case of Fletcher Wilson, in which the Royal Court gave

interlocutory relief to the administrator of an English estate in her capacity as an administrator without any grant of administration in this island.

(ii) The Norwich Pharmacal jurisdiction is a self-contained common law jurisdiction. There is a test that needs to be satisfied and the trustee in bankruptcy was an applicant like any other applicant. There was in his submission no difference between someone who achieved their *locus standi* to bring proceedings from a court appointment as opposed to an appointment as a matter of private law, such as a trustee.

(iii) There was a difference between a Norwich Pharmacal application, which was for limited relief, and a recognition application which might be much wider.

(iv) There might well be occasions when a foreign trustee asserted that trust assets had been subject to fraudulent misappropriation, and required urgent relief with a Mareva injunction, or a search order, or a Norwich Pharmacal order. Why should such a person be in any better position than the Plaintiff who came to this court as a Trustee in Bankruptcy?

12. In his skeleton argument in May, Advocate Jones on behalf of the Defendant did not contend that a trustee in bankruptcy must have his title to sue recognised before bringing a Norwich Pharmacal application but he did indicate that he was concerned about the force of the undertakings that were given by the trustee – simply put, if the Royal Court made its orders on the terms sought, neither the Royal Court nor the Defendant would have in practice any substantial control over the trustee in terms of enforcing the undertakings if not complied with. That was not in any sense a submission of suspected bad faith, but rather a recognition that the trustee was being funded by a litigation funder and of course the Defendant was not privy to the arrangements between the litigation funder and the trustee.

13. We think Advocate Sorensen was right to seek an adjournment of his application and to return to court subsequently with an application seeking recognition of the Plaintiff's appointment as Trustee in Bankruptcy with an appropriate letter of request from the US Bankruptcy Court. A trustee in bankruptcy acts in most jurisdictions to the direction of the court which appointed him or her. The trustee comes into our jurisdiction giving effect in one form or another to the orders of that court or to comply with the obligations which arise out of some foreign statute. Indeed, the trustee in bankruptcy has no title to sue unless this court recognises it, because under our law nothing has taken place until that recognition to displace the presumption that the bankrupt has retained his, her or its natural capacity. The act of commencing proceedings would be a form of trespass on the jurisdiction of this Court, unless it had our approval. That is because only the

Royal Court (or of course on appeal, the Court of Appeal and the Judicial Committee of the Privy Council) have jurisdiction in this island.

14. As a matter of comity, before the Désastre Law, this Court would give assistance to a foreign court, and in some cases there is now also a statutory basis for doing so – but the condition always is that the foreign court seeks our assistance, and, when it is given, that assistance is conditional upon the trustee in bankruptcy acting in our jurisdiction to our direction.

15. The concern raised by Advocate Jones in relation to the enforceability of the undertakings of the trustee provides a good example of why this approach is appropriate. We have received a request from a foreign bankruptcy court. If its agent, the Trustee in Bankruptcy which it appointed, breaches the terms of his or her undertaking to us, we would expect to be able to return to the foreign court and require that action be taken to ensure that the undertaking was complied with. There is a mechanism therefore for enforcement, which is not available – or certainly might not be available – otherwise.

16. Furthermore, the letter of request normally comes with a sealed and certified copy of the Act of Appointment, or at any rate of the request. This is a way of protecting the court of original jurisdiction because it ensures that its agent continues to work to its direction. It is relevant in our jurisdiction to know that there are no current difficulties in the jurisdiction of the trustee's appointment and the letter of request provides that comfort.

17. We have not seen all the papers which were before the court in the Fletcher Wilson case to which Advocate Sorensen referred. There is no written judgment indicating why the administrator of an English estate was permitted to take steps in Jersey to recover property in the island without obtaining a grant of letters of administration here, notwithstanding Article 19(1) of the Probate (Jersey) Law 1998. In the circumstances we treat that decision as having been delivered *per incuriam*.

18. At the heart of these arrangements is the recognition that no foreign court should exercise jurisdiction in our island without our consent. A Trustee in Bankruptcy appointed by a foreign court must of course be subject to the direction of that court and it is potentially embarrassing if such a trustee is faced with a circumstance where the obligations to this court are in conflict with the obligations owed to the appointing court. That is another reason why the right approach is for letters of request to be issued by the foreign court seeking our assistance, and any such conflicts can be investigated and indeed avoided at the outset.

19. We recognise that there may be cases of great urgency where there is not time to make an application to a foreign court for a letter of request and an expeditious application needs to be made in this court for an interim order of one kind or another. The answer to that seems to us to be an application to this court, supported by affidavit, seeking interim recognition for the purpose only of obtaining the interim order accompanied by an undertaking to us to apply promptly to the foreign court for a letter of request to be sent here.

20. It is not part of the rationale for this decision, but we also note that the letter of request provides a solution to a potential problem which will otherwise face this court where the wrongdoer (for the Trustee in Bankruptcy stands in his shoes) is effectively asking for Norwich Pharmacal relief in respect of his own wrongdoing. That is a curious concept, but we have not been addressed on it, and it may be that there is authority which overcomes any such difficulty.

21. Order accordingly.

Authorities

Bankruptcy (Désastre) (Jersey) Law 1990.

Probate (Jersey) Law 1998