Companies- reasons.

[2020]JRC049

ROYAL COURT
(Samedi)

17 March 2020

Before : R. J. MacRae, Esq., Deputy Bailiff, and Jurats Thomas and Hughes.

IN THE MATTER OF THE REPRESENTATION OF LYDIAN INTERNATIONAL LIMITED

Advocate S. J. Alexander for the Representor.

JUDGMENT

THE DEPUTY BAILIFF:

1. On 25th February, 2020, the Court made various orders in response to a letter of request dated 23rd December, 2019, addressed to the Royal Court and transmitted to the Court under an order made by Chief Justice Morawetz of the Ontario Superior Court of Justice dated 23rd January, 2020.

2. We now give reasons for our decision.

3. Lydian International Limited ("Lydian International") is a Jersey company. It is the ultimate holding company for the wider Lydian Group. It is not necessary to set out the identity of all the companies in the Lydian Group. But Lydian International holds 100% of the shares in Lydian Canada Ventures Corporation, a company registered in British Columbia. Lydian Canada Ventures Corporation in turn owns 100% of the shares in Lydian UK Corporation Limited, a United Kingdom company.

4. Ultimately, through two companies registered in the British Virgin Islands, the companies that we have described wholly own an Armenian company which holds the principal asset of the group, a gold mine in Armenia.

5. The three companies identified, Lydian International, Lydian Canada Ventures Corporation and Lydian UK Corporation Limited were the three companies within the Group which were the subject of an application made to the Ontario Supreme Court under the Companies' Creditors Arrangement Act ("the CCAA").

6. The CCAA is a Canadian federal statute allowing insolvent debtors to restructure their business and financial affairs. In particular, it allows a company to continue its business whilst it seeks to make arrangements with its creditors. This includes "debtor in possession" insolvency proceedings whereby the debtor (in this case the three companies referred to) remains in possession of their property and are able to carry on their business until conclusion of the proceedings. The proceedings are carried out under the supervision of the court with the assistance of an independent insolvency practitioner known as the "Monitor".

7. The financial difficulties which the Lydian group companies are currently encountering are a consequence of difficulties in completing the construction of the gold mine which are said to have been caused by arbitrary measures taken by the government of Armenia. It is not necessary to describe further the difficulties this has caused to the Lydian Group.

The judgment of the Supreme Court of Justice, Ontario ("the Ontario Court")

8. The judgment of the Ontario Court recognised that Lydian International is a Jersey company, initially incorporated in Alberta. The applicants to the Ontario Court submitted that the Lydian Group business was completely integrated and its business directed primarily out of Canada, with most of its strategic decision making being conducted in Toronto and Vancouver. The Lydian Group's loan agreements were governed primarily by the laws of Ontario. It was clear from the judgment of the Ontario Court that the restructuring arrangements for the Lydian Group are complex and that it may be appropriate for the insolvency regime of one jurisdiction to oversee the process.

9. The Ontario Court held that the Jersey and UK companies, although foreign incorporated were "companies" pursuant to the CCAA, as they either had assets or did business in Canada. They were also "debtor companies" for the purpose of the CCAA as they were insolvent and had liabilities in excess of C$5m.

10. The Ontario Court held *"The registered offices for Lydian International and Lydian UK are in Jersey and the UK respectively, however, both entities have assets in Ontario, those being funds on deposit with the Bank of Nova Scotia in Toronto. Further, it seems to me that both Lydian*

International and Lydian UK have a strong nexus to Ontario and accordingly I am satisfied that Ontario is the appropriate jurisdiction to hear this application. I am also satisfied that, in the circumstances, it is appropriate for this court to issue to the Royal Court of Jersey a letter of request as referenced in the application record."

11. The Ontario Court has made interim orders which need to be renewed frequently and are under the supervision of the Monitor. These orders have, *inter alia*, the effect that the applicants remain in possession and control of their current and future assets; may continue to carry on business in a manner consistent with the preservation of their business; are entitled to pay various expenses; are directed not to make payments of principal or interest to any of their creditors and are protected from any proceedings or enforcements against them except with consent of the applicants and the Monitor, or leave of the Court. These protections extend to the directors and officers of the applicants. The Monitor has been ordered to monitor the receipts and disbursements of the three companies; report to the Court at such time and intervals as the Monitor may deem appropriate with respect to matters relating to the property of the companies; advise the companies in the preparation of their cash flow statements; have full and complete access to the affairs of the companies and, be at liberty to engage counsel or such other persons as the Monitor deems appropriate respecting the exercise of its powers and obligations.

The letter of request

12. The letter of request ordered to be sent to this Court is entitled *"Letter of Request (Comity Application)". The letter requests the assistance of this Court and invites the Court to give various relief. Importantly, the Ontario Court confirms "that, as a matter of international comity, the courts of the provinces and territories of Canada will consider giving effect to orders made by the Royal Court of Jersey relating to the bankruptcy of an individual or company (save for the purpose of enforcing the fiscal laws of Jersey)".*

13. The Ontario Court requests the assistance of the Royal Court to act in aid of the applicants and the Monitor in the conduct of the reorganisation of the applicants and in particular, in summary, by recognising the appointment of the Monitor; by recognising the rights and powers of the applicants and the Monitor in respect of the property of Lydian International; by declaring that no action shall be taken or proceeded with against Lydian International except by leave of the Ontario Court and by granting such further or other relief as the Royal Court shall think fit in aid of the applicants and the Monitor in the reorganisation of Lydian International.

14. The Court was concerned to satisfy itself firstly that it had jurisdiction to grant the orders made and secondly, if it had such jurisdiction, whether it would be appropriate to exercise it in favour of granting some or all of the orders sought in the letter or request.

The Court's jurisdiction

15. There is no statutory basis to assist the Ontario Court.

16. Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 provides that:

> ***"(1) The court may, to the extent it thinks fit, assist the courts of 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 for 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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> ***…***
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> ***(4) In this Article "relevant country or territory" means a country or territory prescribed by the Minister."***

17. However, the provisions of the order made by the Minister under Article 49, as contained in the Bankruptcy (Désastre) Jersey Order 2006, list a number of countries and territories which do not include Canada.

18. We were assisted by various Jersey cases cited to us in the course of argument in which the Royal Court, in the exercise of its discretion and having regard to the principles of comity, decided to make orders having the effect of implementing orders made by foreign courts in respect of bankruptcies in those jurisdictions.

19. The authority of most assistance was the decision of the Royal Court in Tacon –v- Nautilus Trust Company Limited, John Grimshaw and Montrow International Limited [2007] JRC 107 and the decision of the Court of Appeal on appeal in Montrow International –v- Tacon [2007] JCA 144.

20. In that case the Royal Court was considering an application made by the respondents to stay an order previously made by the Royal Court whereby it had recognised the appointment by the High Court of the British Virgin Islands of a provisional liquidator and authorised him to exercise in Jersey various powers as provisional liquidator of companies, including Montrow International Limited. At paragraph 24 the Court said:

> ***"24. The second preliminary objection was that this Court does not have power to order a director to provide information etc at the instance of a provisional liquidator of an overseas company because Jersey does not have the concept of a provisional liquidator. Reliance was placed upon a dictum of Lord Hoffmann in <u>Cambridge Gas Transport Cooperation v the Official Committee of Unsecured Creditors of Navigator Holdings plc</u> [2006] 3 WLR 689 where he said at para 22***
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> ***"What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do……..At common law, their Lordships think it doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."***
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> ***25. However, that comment was made in the context of what powers the domestic court could exercise in aid of the foreign court. It was not concerned with the question of to whom such assistance could be given. In that respect Lord Hoffmann had at para 20 said the following:-***
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> ***"Corporate insolvency is different in that, even in the case of movables, there is no question of recognising a vesting of the company's assets in some other person. They remain the assets of the company. But the underlying principle of universality is of equal application and this is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England."***
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> ***26. The person entitled under BVI law to act on behalf of Montrow is Mr Tacon as provisional liquidator. The Court should therefore recognise him***

even though Jersey does not have the concept of a provisional liquidator. The same point would arise in respect of a duly appointed administrator of an English company. Jersey does not have the concept of placing a company in administration but, given that under English law, an administrator once appointed is the person empowered to act for the company, this Court would, in conformity with the remarks of Lord Hoffmann, recognise the administrator of an English company as being the person entitled to act on behalf of that company.

27. No one suggested in argument that the liquidator of a Jersey company does not have a comparable power to obtain information from a director as is envisaged by Para 2(g) of the order and accordingly we reject the argument that this Court is unable to make the order in question merely because Jersey does not have the concept of a provisional liquidator."

21. The single judge of the Court of Appeal, Michael Beloff QC, refused leave to appeal.

22. It is true that the relief available under the CCAA including, for example, the appointment of the Monitor and certain other orders made by the Canadian Court, are not features of Jersey law. Accordingly, the Court would be going rather further than the Royal Court went in Tacon –v- Nautilus and others in granting the relief sought. In that case, although Jersey does not have the concept of a provisional liquidator, it was not suggested that a liquidator of a Jersey company did not have the power to obtain information envisaged by the order that was sought.

23. In this case, the Court is being invited to make orders ancillary to those made in the Ontario Court which could not be obtained in any Jersey bankruptcy or insolvency procedure, as there is no equivalent process in Jersey.

24. It was accepted by counsel for Lydian International that there were elements of the Canadian process which were not known to Jersey law, but it was said that there was nothing about the relief that was sought that was inconsistent with public policy or contrary to any fundamental principles of Jersey law. We accepted this argument.

25. Accordingly, the Court found that it did have jurisdiction to make the order sought in the letter of request.

Exercise of our jurisdiction

26. This is not a case (unlike, for example, the Montrow International case) where the foreign insolvency process was itself heavily contested. Nor is it a case where such process was undertaken in the absence of representation by or on behalf of the creditors.

27. We were shown a list of the principal creditors, of whom six are secured and ten are unsecured. Some of the secured creditors were represented by counsel at the hearing before the Chief Justice of the Ontario Court.

28. We note that there are no secured or unsecured creditors (with the exception of the applicant's Jersey lawyers) in Jersey so no Jersey creditors will be prejudiced by any order that this court may make. Further, in accordance with the orders made at the convening hearing in this matter, all creditors were notified of the hearing. There was a delay in notifying certain of the unsecured creditors, but they still had sufficient time (five days) to respond prior the deadline of 18th February 2020 and, in the event, none of the secured or unsecured creditors have expressed any opposition to the orders being sought.

29. The only creditor who can be described as an objector to the proceedings is Caterpillar Financial SARL which is one of the six secured creditors of the three companies that are applicants in the CCAA proceedings (but not the largest). Caterpillar has been in communication with counsel for Lydian International, and its concern relates to the fact that Lydian International is a guarantor of a loan granted by Caterpillar to another company in the Lydian Group which is not the subject of the CCAA proceedings; Caterpillar objects to the CCAA court attempting to apply the Canadian stay "extra judicially" to collateral in Armenia and protests that any order by a Jersey court would not be effective against either Lydian International or the Armenian collateral.

30. We were shown evidence showing that at the most recent hearing before the Ontario Court, Caterpillar elected to reserve its position in respect of any challenge to the Ontario Court orders. In any event, as set out below, we ordered that any affected creditor (including Caterpillar) may have liberty to apply in relation to the orders that we made.

31. As to Lydian International itself, we were told that it is Jersey tax resident; that its registered office is in Jersey; it has an employee in Jersey; board meetings have occurred here in the past and we note that one of the six directors of the Company is resident in the Channel Islands.

32. There has been correspondence between Lydian International's Jersey advocates and the office of the Viscount in order to see if she has any substantive views on the application made. She did not express any views that were hostile to this application.

33. Although there is no precedent in Jersey for a Canadian CCAA order or similar order being enforced or recognised in relation to a Jersey company, we had no doubt that we should assist the Canadian Court in this case. There were no reasons of Jersey public policy impeding the court making the orders sought. To the contrary, it is consistent with Jersey's status as a responsible jurisdiction for the Royal Court to lend assistance in order to facilitate an international insolvency process in a friendly country that has a potential to benefit the creditors of the Lydian Group as a whole.

34. Further, whilst of course this court retains a discretion as whether or not to assist an overseas court and as to the nature and degree of assistance, the fact remains that it is the Ontario Court which is exercising the principal insolvency jurisdiction in this case, and this court should have regard to the decisions of that court particularly where, as in this case, we have been supplied with a substantial body of material explaining the background to this matter, together with a reasoned judgment of the Ontario Court, following a hearing to which the creditors were convened and certain of the creditors represented by counsel.

35. The Court gave substantial weight to the indication in the letter of request that the Canadian court would consider giving effect to equivalent orders made by the Royal Court in respect of the bankruptcy of an individual or company and ordered that:

    (i) Alvarez & Marsal Canada Inc. ("the Monitor") be appointed as the Monitor of Lydian International with such appointment registered in the rolls of the Royal Court, and the appointment of the Monitor be notified to the Jersey Financial Services Commission;

    (ii) Lydian International shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever in Jersey and, subject to further order of the Ontario Court, Lydian International shall continue to carry on business in a manner consistent with the preservation of its business and property;

    (iii) No proceeding or enforcement process in or out of any court or tribunal shall be commenced or continued against or in respect of Lydian International, or affecting its business or its property, except with the written consent of Lydian International, or with leave of the Ontario Court; and

(iv) Lydian International and any party affected by this Representation, including the creditors of Lydian International, shall have liberty to apply.

Authorities

Creditors Arrangement Act

Bankruptcy (Désastre) (Jersey) Law 1990.

Bankruptcy (Désastre) Jersey Order 2006

Tacon –v- Nautilus Trust Company Limited, John Grimshaw and Montrow International Limited [2007] JRC 107

Montrow International –v- Tacon [2007] JCA 144.