

JERSEY / JUDGMENT

re Leisure Net v [2002]

JRC 104 (25 May 2002)

[2002] JRC 104

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judgment

the COMMISSIONER: 1. On the 26 th February, 2002, this Court, (Birt, Deputy Bailiff, and Jurats Rumfitt and Le Breton) delivered a judgment giving assistance to joint liquidators following a letter of request that issued from the High Court of South Africa on the 11 th February, 2002. An amended order and a further letter of request widening the scope of the assistance requested of this Court was made on the 5 th February. The background to the request is set out in the judgment of 26 th February, 2002, and we respectfully adopt it for the purposes of what we have to decide:

- (1) Robert John Walters and Gavin Cecil Gainsford are the joint liquidators of LeisureNet Limited ("LeisureNet"), a public company which was listed on the Johannesburg Securities Exchange in South Africa. LeisureNet was ordered to be wound up on 30th November, 2000, by the High Court of South Africa on the grounds that it was insolvent. It is estimated that its liabilities exceed its assets by some R681million (£42million at current exchange rates).
- (2) The joint liquidators now seek the assistance of this Court in relation to the liquidation and winding up of LeisureNet in the following circumstances. On 30th November 2000 the High Court in South Africa appointed a Commissioner pursuant to Sections 417 and 418 of the Companies Act of South Africa in order to enquire into the trade, dealings, affairs and property of LeisureNet. We have received evidence on affidavit concerning the evidence which emerged from the hearings before the Commissioner.
- (3) The story is a complicated one but, for our purposes, can be reduced to the following: LeisureNet, through subsidiaries, was the owner of 50% of Healthland Germany Limited ("Healthland Germany"), a United Kingdom company, which in turn owned Healthland Germany GmbH, a company incorporated and carrying on business in Germany. The other 50% of Healthland Germany was owned by Dalmore Limited ("Dalmore") a company incorporated in Jersey and administered by Royal Bank of Canada Trust Company (International) Limited. It was said before the Commissioner that the joint chief executive officers of LeisureNet, namely Peter Gardener and Rodney Mitchell, each beneficially owned 20% of Dalmore.

- (4) On 16th April 1999 LesiureNet - through a subsidiary called LeisureNet International Limited - purchased Dalmore's 50% interest in Healthland Germany for DM10million. It is said that this was a fraudulent transaction in a number of respects:-
- (i) The price was grossly inflated. At the time Healthland Germany was technically insolvent and worth almost nothing. (ii) The beneficial interest of Mr Gardener and Mr Mitchell in Dalmore was unknown to the remaining members of the board of directors of LeisureNet when they agreed to the transaction. (iii) The board of LeisureNet understood that the purchase price was to be funded by the issue of shares in LeisureNet but, in fact, the price was paid by way of a cash payment.
- (5) It is also alleged, on the basis of evidence given before the Commissioner, that unjustified commissions of some £245,000 were paid to Dalmore and other sums were paid to four companies incorporated in the British Virgin Islands but administered in Jersey.
- (6) In short, it is alleged that the two chief executive officers have improperly extracted company funds for their own benefit and the joint liquidators wish, if appropriate, to trace and recover these monies. They have obtained a letter of request from the High Court of South Africa seeking the Court's assistance. 2. On the 12 th March, 2002, Mr Gardener and Mr Mitchell made an application in the High Court of South Africa. That application sought to set aside the letters of request which had been made ex-parte and apparently not as a matter of urgency. They sought a stay of any orders made in Jersey. The relevant part of the Order was stayed by agreement in Jersey awaiting the outcome of the judgment. 3. Judgment was delivered on 3 rd May, 2002. Nel J was not sparing in his criticism of Mr Gardener and Mr Mitchell. At page 17 of his judgment he said this:- "In these circumstances where millions of LeisureNet funds have disappeared into pockets created by Gardener and Mitchell in offshore havens a proper and thorough investigation is not only warranted but essential for the proper winding up of LeisureNet. On reconsideration of the matter I will certainly not set aside the orders. The contention that the orders should not have been granted because the information sought by the liquidators is private and confidential borders on the grotesque. It is illustrative of so many managers of companies who seem to believe that they should be allowed to walk away scot-free from financial disasters which they have created." 4. Later in his carefully reasoned judgment Nel J said this: "As indicated above the effect of the issue of the letters of request following upon the orders of Louw J amounted to nothing more than a request to the Court of Jersey to allow the liquidators to perform the functions conferred upon them by the South African Companies Act. No order was sought against Gardener and Mitchell, no order was granted against them and no rights or interests of either are affected by the orders. Subsequent proceedings which might affect them are governed by the laws and procedures of the Island of Jersey". 5. The result of Nel J's judgment was to dismiss, with the attendant costs, the application to set aside the orders granted by Louw J on the 8 th February, and the 22 nd February, and to dismiss the application to strike out a number of paragraphs in the liquidators' affidavit. 6. As part of the voluntary stay in Jersey, Advocate Speck wrote to Ogier and Le Masurier to say that he would

not seek disclosure of any further documentation pursuant to the Act of Court unless and until he gave 5 days' notice to that effect. Despite that assurance, notice was not given to Advocate Thompson, once the judgment of Nel J had been delivered but notice was given to the Institutions concerned, compelling Advocate Thompson to bringing the action now before us. Fortunately, Advocate Speck explained an administrative error, which was accepted with good grace by Advocate Thompson before us. Nevertheless, the application for a stay is before us today and we must deal with it accordingly. 7. In his affidavit sworn on the day of the hearing the attorney for the liquidators, Leonard Charles Katz, says this in paragraph 18 of his affidavit: "I draw to the attention of this Honourable Court that Gardener and Mitchell do not enjoy an automatic right of appeal. Leave has to be sought from the Cape High Court and generally the application for leave to appeal will be argued before the judge who heard the original application. If leave is refused by the Cape High Court, Gardener and Mitchell are entitled to petition the Supreme Court of Appeal for leave to appeal. If the Supreme Court of Appeal declines to grant leave then the matter is at an end. It is likely that the application for leave to appeal would be argued before the High Court in and during June 2002. If leave to appeal is refused by the High Court, it will be several months before the Supreme Court of Appeal decides whether to grant leave to appeal. If it did grant leave to appeal, the appeal proper would in all probability not be heard until sometime next year". 8. By way of background, the applicants are due to be examined by a Commissioner, appointed by the High Court of South Africa on the 11th November, 2000, at the end of this month or early next month. Both Messrs Gardener and Mitchell have been arrested in South Africa on 4 counts of fraud and in contravention of Section 234 of the South African Companies Act. They are released on bail of SA Rand 1 million each. Apparently no stay of proceedings pending appeal is possible in South African Law and, therefore, the applicants have no alternative but to request a stay in this jurisdiction. 9. The law concerning the granting of stays pending appeal is well known to this Court. Advocate Thompson took us through them. As Crill, Bailiff said in *IBL and Meridian Group (UK) Limited-v- Planet*

- (1990) JLR 316 at 320: "In my opinion, in order to give justice to the parties, I should grant the stay of execution in order to relieve the position as it was logically at the conclusion of the lower court's judgment". It seems to me that, having granted leave to appeal, it would then be illogical and, in fact, render that appeal nugatory if a stay of execution in this particular case were refused." 10. Nine years later in *Veka AG-v-T. A. Picot (C. I.) Limited*
- (1999) JLR 306 CofA, the Court of Appeal reached the same conclusion, holding that in relation to an appeal by an unsuccessful party the Court should make whatever orders, including staying the execution of orders under the judgment appealed from, as would prevent the appeal, if successful, from being nugatory, unless it was satisfied that the appeal was not bona fide, had no realistic chance of success, or there were other exceptional circumstances. 11. By analogy to this well established principle, Advocate Thompson cited a decision of a judgment of Henry J in the High Court of Justice of Ontario in 1988. (*Four Embarcadero Center Venture et al-v-Mr Greenjeans Corp. et al* (1988) 64 OR (2d) 746). On

the facts of that case, while a foreign money judgment in a Californian Court was held to be enforceable, notwithstanding a pending appeal and therefore an action on the Californian judgment was maintainable in Ontario, the rights of the defendant, because of the appeal in California, were safeguarded by way of a stay of execution. 12. The decision we make to day has to be an exercise of discretion, and in our view there was no substantive action before the South African Court. The argument concerns only a letter of request, whereby this Court thought it entirely appropriate to grant the assistance requested of it in that letter of request. The grant was not made without careful consideration and was made subject to certain safeguards. The use to which the information may be put has been limited, and because of the way in which the order is framed, it must be quite clear to the liquidators how the information obtained can be used. Any question that the letter of request was improperly obtained, or was invalid on its face is a question for the court that issued it; but the policing and terms of the order made here are for this Court to decide. 13. The Order was made on an ex parte basis. Nel J is the most senior Judge of the South African High Court. We have considered the question, which has clearly exercised the minds of the applicants, about non-disclosure. Nel J's judgment on this point is clear: "For the purpose of this application I am prepared to accept that if Louw J had been fully informed of the real valuation of the shares in Healthland Germany, and if his attention had been more pertinently drawn to the interpretation of the payment clauses contended for by Mr Gardener and Mr Mitchell, he might have come to a different conclusion. However, I doubt that he would have. In my view as indicated hereafter, it was not necessary for the liquidators to establish a prima facie case or to show a reasonable prospect of success. In any event the uncontradicted allegations of the liquidators show the necessity for enquiries to be made in Jersey." The learned Judge then set out the allegations of misfeasance apparently carried out while Mr Gardener and Mr Mitchell were the joint chief executives of Leisurenet. 14. We cannot see that the question of non-disclosure could ever be a question for this Court to adjudicate upon, but we have had regard to the judgments and the affidavit evidence as to the possibility of the success of an appeal. Not unimportantly Nel J found in his reasoned Judgment that neither Mr Gardener nor Mr Mitchell had any legal standing in the South African application. If the South African Court had found, on examination, a fatal procedural flaw it would surely have said so. Not only did it not say so but it confirmed its decision in forthright terms. It is not for this Court to consider the merits or the demerits of any further appeal in the South African Courts; but after carefully studying the numerous affidavits before us, we have come to the inevitable conclusion that it will defeat all the principles of comity if we were to grant a stay and accordingly, the Orders made originally by this Court must and shall take their course and we order accordingly. Authorities. *Re LeisureNet* (26 th February, 2002) Jersey Unreported [2002/46]. *Veka AG-v-TA Picot (C. I.) Ltd*

(1999) JLR 306 CofA. *IBL and Meridian Group (UK) Limited-v- Planet*

(1990) JLR 316 at 320. Four Embarcadero Center Venture et al-v- Mr Greenjeans Corp. et al (1988)
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