

Judgment 9/2006 (i) Terry and (ii) Durette Bradshaw PLC v Butterfield Bank (Guernsey) Limited – (re Vavasaur Corp – in receivership) – Royal Court (Civil Action File 871) – 24th February, 2006

Bahamian Company - proceedings brought in a United States District Court by the Securities and Exchange Commission – receivers appointed by that court – application for recognition by the Royal Court – review of principles relevant to recognition of a receiver appointed by foreign court – application granted

IN THE ROYAL COURT OF GUERNSEY

The 24th day of February, 2006 before Richard John Collas Esquire, Deputy Bailiff; sitting alone

In the matter of:

ROY MADISON TERRY JR
(First Plaintiff)

DURETTE BRADSHAW PLC
(Second Plaintiff)

v.

BUTTERFIELD BANK (GUERNSEY) LIMITED
(The Bank)

Whereas on 28th January, 2006, the Deputy Bailiff considered an application for the recognition of a Receiver and heard thereon Advocates S. H. Davies and M. G. Ferbrache, Counsel for the First and Second Plaintiffs and the Bank respectively, the Deputy Bailiff this day handed down judgment in the terms attached hereto and ORDERED:

- (i) that the appointment of the Plaintiffs as the Receivers of Vavasaur in Guernsey be recognised by the Royal Court of Guernsey;
- (ii) that the Plaintiffs as Receivers of Vavasaur be recognised as having the right to collect funds and assets of Vavasaur in Guernsey, including funds in Vavasaur's bank accounts in Guernsey.

S. M. D. ROSS
Her Majesty's Deputy Greffier

2. In March 2001 Dowdell represented to the United States Securities and Exchange Commission (“SEC”) that Vavas seur had terminated its relationship with Dowdell and had ceased doing business in the USA. Shortly thereafter, Dowdell transferred the ownership of Vavas seur to a corporation controlled by one Ian Collins, a UK citizen. Collins and Dowdell continued to operate the scheme together with two other UK citizens, Shinder Gangar and Alan White who were partners in an accountancy firm called Dobb White and Co.
3. On 14 February 2003 the United States District Court for the Western District of Virginia, Charlottesville Division, in proceedings entitled “Securities and Exchange Commission -v- Terry L Dowdell and Others” appointed the Plaintiffs as Receivers of Vavas seur (the “Receivership Order”).
4. Under the terms of the Receivership Order, the Receivers are appointed:-

“For the benefit of Vavas seur’s investors, to marshal, conserve, protect, hold funds, operate and with the approval of the Court, dispose of any wasting assets, wherever those assets may be found”.
5. The Receivers’ powers and duties included bringing:-

“such legal actions based on law or equity in any state, federal or foreign Court as he deems necessary or appropriate in discharging his duties as Receiver or on behalf of investors whose interests he is protecting”.
6. I am told in paragraph 5 of the First Plaintiff’s affidavit (sworn on the 14 December 2005) that the SEC sought the appointment of receivers for Vavas seur pursuant to the general equity powers granted Federal District Courts with respect of violations of the 1934 Act by Section 27 of the 1934 Act, pursuant to rule 66 of the Federal Rules of Civil Procedure and not pursuant to any specific authority contained in the 1934 Act.
7. On 7 April 2004, a Co-operation Agreement was entered into between the Plaintiffs and one Colin Haig, who with effect from 12 January 2004 had been appointed by the High Court in London as liquidator of Dobb White and Co and trustee in bankruptcy of Gangar and White who, as I have said, were partners in that firm. The Co-Operation Agreement was subsequently approved and sanctioned by the High Court in London on 8 April 2004 and then by the US District Court on 26 April 2004.
8. In the course of investigating the whereabouts of the assets of Vavas seur, the Plaintiffs have identified two deposit accounts held with Butterfield Bank (Guernsey) Ltd (“the Bank”) in Guernsey in the name of Vavas seur namely:-
 - (i) Sterling account number 01/D02/026941 with a nil balance as at 14 June 2002; and
 - (ii) US Dollar Account Number 02/D02/026941 with a credit balance of US\$2,554,506.51 as at 14 June 2002.
9. The Plaintiffs are seeking the following order:-
 - (i) That the appointment of the Plaintiffs as the Receivers of Vavas seur in Guernsey be recognised by the Royal Court of Guernsey.

10. If this application is successful there will be a further application for removal or repatriation of the monies on notice to the parties interested in the monies. I was told that it is the intention of the Plaintiffs to seek an order that they be permitted to transfer the monies to an account in England which will be subject to the terms of the Co-Operation Agreement.

Recognition of Receiver

11. Advocate Davies on behalf of the Plaintiffs, in his very helpful submissions to me, said that he had not been able to identify any case where the Royal Court has recognised a receiver appointed by a foreign court.
12. He drew my attention to the case of *Rothuizen –v- Lok* Royal Court 13 January 1988 where the court implicitly recognised a trustee in bankruptcy appointed by a foreign court. Mr Rothuizen was the trustee in bankruptcy of Mr Lok and was seeking to recover assets of Mr Lok located in Guernsey. On his application, the Royal Court declared Mr Lok’s affairs in Guernsey to be *en désastre*.
13. The background to the leading English case of *Schemmer and Others –v- Property Resources Limited [1975] Ch 273* is that the SEC brought proceedings in the United States District Court for the Southern District of New York alleging that a number of people controlling a company called Value Capital Limited (“VCL”) had been involved in fraudulent practices and the judge of the district court appointed Mr Schemmer as receiver to take possession of a great variety of securities and assets including the assets of Property Resources Limited (“PRL”), a company incorporated in the Bahamas but with assets located in the United Kingdom. PRL was effectively controlled by VCL, it had not been a defendant in the American proceedings and there was no evidence that it had carried on business in the USA. Mr Schemmer issued a writ in England seeking the appointment of himself as receiver of the assets of PRL and its subsidiaries located in the United Kingdom. Plowman J, in chambers, granted leave to serve out of the jurisdiction notice of the writ on, *inter alia*, VCL and PRL. Goulding J sitting in the Chancery Division upheld a motion by PRL to discharge the order. Goulding J held, at page 287, that :

“I shall not attempt to define the cases where an English court will either recognise directly the title of a foreign receiver to assets located here or, by its own order, will set up an auxiliary receivership in England. To do either of those things the court must previously, in my judgment, be satisfied of a sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court’s order, on English conflict of law principles, as having effect outside such jurisdiction. Here I can find no sufficient connection”.

14. There are a number of significant facts distinguishing that case from the present case:

- (a) Unlike PRL, which had never carried on business in the USA, Dowdell was the central mind and management of Vavasour and conducted its operations from Charlottesville.
 - (b) The appointment by the US court of the Plaintiffs as receivers over the assets of Vavasour would be recognised in the Bahamas, the place of incorporation of Vavasour according to an opinion prepared by Philip Dunkley of Higgs and Johnson, Counsel and Attorneys at Law in Nassau, Bahamas. He also pointed out that being an International Business Company, Vavasour was required to carry on its business outside the Bahamas and hence there would be no reason to justify the recognition of the receivership in the Bahamas (page 9 of 11 of his opinion).
 - (c) With the exception of the Bahamas, the jurisdiction to which Vavasour was most closely connected is the United States of America.
 - (d) Although Vavasour did not submit to the jurisdiction of the US court, Dowdell did so and admitted the jurisdiction of the US court over himself.
15. The learned authors of *Dicey & Morris on The Conflict of Laws (13th Edition)* consider the circumstances in which courts will recognise the powers of a receiver appointed by a foreign court. They set out the following principles at para 30-118:

“These circumstances seem to obtain where the foreign court had jurisdiction over the defendant whose property is made subject to the receivership. Such jurisdiction has been said to exist if there is a “sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court’s order”. When a sufficient connection will exist cannot be definitively stated. However, first, it seems that an appointment by a court in the country where the company is incorporated will be recognised. Secondly, it is also likely that the appointment will be recognised if the defendant submitted to the jurisdiction of the court by whose order the appointment was made, although such a submission by a subsidiary of the defendant company is likely to be regarded as an insufficient basis for such recognition. Thirdly, it is possible (but no higher than that) that an English court would recognise the order of the foreign court if that order would be recognised by the law of the place where the defendant company was incorporated. Fourthly, there is something to be said for recognising an appointment made by a court where the central management and control of the company is exercised, particularly, perhaps if there is no likelihood of intervention from the courts of its place of incorporation. Similarly, the relevant connection may be found to exist if the appointment is made by the court of the country where the company carries on business, particularly if that is the only country where business is carried on”.

16. The first two circumstances do not exist in this case. Instead Mr Davies relies on the third and fourth categories in support of which he also referred me to

Picarda: The Law Relating to Receivers, Managers and Administrators (3rd edition) who suggests (at page 622) that “It might even be the case that if the law of the company’s place of incorporation would recognise the receivership order, an English court would do so.”

17. *Lightman & Moss: The Law of Administrators and Receivers of Companies* (3rd Ed) at para 25-035 state:

“A sufficient connection, for these purposes, ought to include factual connection between the company and the relevant jurisdiction where the appointment is made. Accordingly, it is, in principle possible to support the view that an appointment made by a court in a country where the central management and control of the company is exercised should be entitled to recognition. The claim to recognition on this ground will, perhaps, be stronger if there is no, or little, likelihood of any intervention by the courts of the place of incorporation. A strong factual link justifying recognition may also be thought to exist where the appointment is made by a court in a country where the company carries on business. The strength of this link may be particularly compelling if that is the only country where the business is carried on”.

18. In this case, I accept Mr Dunkley’s opinion that the appointment of the Plaintiffs as receivers of the assets of Vavas seur would be recognised in the Bahamas, the country of incorporation of the company. I am also satisfied that the appointment was made in the jurisdiction where the central management and control of the company was exercised (the United States of America) and that it is unlikely the courts of the Bahamas would have reason to intervene.

19. Before granting the order sought, I must be satisfied that the Plaintiffs are not seeking to enforce a penal judgment. In *Schemmer*, Goulding J concluded that the 1934 Act was a penal statute and hence unenforceable in the English courts. The Plaintiffs submitted to me that there may have been some inadequacies in the materials placed before him and also that, in any event, there may be factual differences that distinguish the two cases. They drew my attention to decisions of the Supreme Court of British Columbia in *USSEC-v Cosby [2000]BCD Civ J 3751* which distinguished *Schemmer* and also of the English Court of Appeal in *United States of America v Inkley [1989]QB255*. In the latter case Purchas L.J., after reviewing a number of authorities, stated:

“From these authorities the following propositions seem to emerge which are relevant to the present appeal: (1) the consideration of whether the claim sought to be enforced in the English courts is one which involves the assertion of foreign sovereignty, whether it be penal, revenue or other public law, is to be determined according to the criteria of English law; (2) that regard will be had to the attitude adopted by the courts in the foreign jurisdiction which will always receive serious attention and may on occasions be decisive; (3) that the category of the right of action, i.e. whether public or private, will depend on the party in whose favour it is created, on the purpose of the law or enactment in the foreign state on which it is based and on the general context of the case as a whole; (4) that the fact that the right, statutory or otherwise, is penal in nature will not deprive a person, who asserts a personal claim depending thereon, from having recourse to the courts of this country; on the other hand, by

whatever description it may be known if the purpose of the action is the enforcement of a sanction, power or right at the instance of the state in its sovereign capacity, it will not be entertained; (5) that the fact that in the foreign jurisdiction recourse may be had in a civil forum to enforce the right will not necessarily affect the true nature of the right being enforced in this country”.

20. Applying those principles to the facts of this case I note that the main purpose of the Receivership Order is to compensate defrauded investors. The District Court imposed a civil penalty against Vavas seur in the sum of US\$600,000.00 but directed that it is to be paid to the Receivers and will not be payable to the United States Treasury unless investors have been fully reimbursed. The amount Vavas seur was ordered to pay by way of disgorgement is US\$121,235,000.00 plus interest. Any monies available will be distributed by the Plaintiffs to Vavas seur’s investors in accordance with the statutory provisions for pro-rata distribution to unsecured creditors in the US Bankruptcy Code. I was told that the Plaintiffs will not recover sufficient to enable investors to be fully reimbursed so there is no likelihood of the civil penalty being paid and hence no risk that any of the monies held by the Bank in Guernsey would be paid to the US Treasury if I decide to recognise the Receivership Order.
21. I can find no policy reason to deprive the defrauded investors of the opportunity to recover, via the hands of the Plaintiffs, the benefit of the monies held by the Bank in Guernsey in the name of Vavas seur. Quite the contrary, the courts of this Island will not tolerate those who attempt to misuse Guernsey’s financial services for illegal or improper purposes. Having carefully reviewed the authorities cited, I am of the opinion that on the facts of this case the Royal Court has the power to make an order recognising the Receivership Order.
22. At a later date the Plaintiffs will ask for a further order to enable them to collect the funds held at the Bank and at that time consideration will have to be given to the question of whether there are any competing claims over the money. Advocate Mark Ferbrache who appeared on behalf of the Bank did not oppose the making of the order I make today but he made it clear that the Bank wishes to ensure that anyone who may have an interest in the monies will be heard when the next application is made.