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1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

3
4 CAUSE NO: 343 of 2006

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6 IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER
7 JURISDICTIONS) (CAYMAN ISLANDS) ORDER 1978

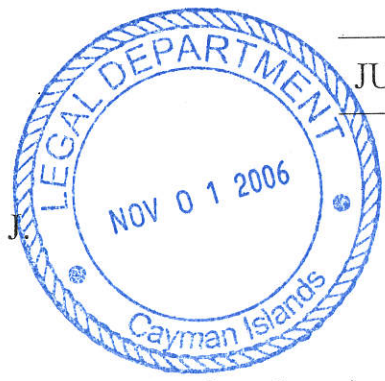
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9 AND IN THE MATTER OF A REQUEST FOR INTERNATIONAL
10 JUDICIAL ASSISTANCE FROM THE SUPERIOR COURT OF JUSTICE
11 OF ONTARIO, CANADA

12
13 BEFORE: The Hon. Madam Justice Levers

14
15 Appearances:

16 Mr. K. Broadhurst with Ms. T. Caudeiron for the Canadian Receiver
17 Ms. L. Hatfield with Mr. Blake for the Liquidators
18 Mr. N. Robinson for Unified Diversified Fund II
19 Mr. M. Crawford for Mr. David Bree

20
21 Heard: 21st September 2006



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23 _____
JUDGMENT



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25 Levers, J.

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27 This is an application by the Joint Voluntary Liquidators of Univest
28 Convertible Arbitrage Fund II Limited and several other companies,
29 collectively called the Strategy Funds and Mr. David Bree, a director and the
30 Univest Diversified Fund II to set aside an ex parte Order dated 24th August
31 2006 which provided for the examination of witnesses and the provision of

1 documents within the Cayman Islands pursuant to the Letter of Request of
2 the Ontario Supreme Court of Justice dated the 18th August 2006.

3

4 The Applicant to the original application was appointed Receiver over the
5 companies known as the Norshield Financial Group, pursuant to the Order
6 of the Ontario Supreme Court dated 29th June 2005. The Order was made up
7 on the application of the Ontario Securities Commission pursuant to Section
8 129 of the Securities Act (Ontario).

9

10 The Applicant's powers as Receiver are set out under the Appointment
11 Order as well as any subsequent Order made by the Court in the
12 proceedings. The receivership of the Norshield Financial Group, the
13 Applicant submits is an ongoing proceeding which is supervised by the
14 Ontario Supreme Court of Justice.

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16 The Applicants in this summons (the Respondents in the matter of the
17 Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order
18 1978) base their objections on three limbs:

19

20 1. That the Court has no jurisdiction;

1 2. That the order is oppressive; and

2 3. That the Order is tantamount to a fishing expedition.

3

4 The question to be answered initially in this application is, whether the
5 appointment of a Receiver in the Canadian Courts is considered a civil
6 proceeding under the Evidence (Proceedings in Other Jurisdictions)
7 (Cayman Islands) Order 1978.

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9 This Court's jurisdiction to enforce a Letter of Request for the purposes of
10 investigations in connection with Multinational Insolvencies is governed by
11 the Order of 1978. Regrettably, there is no provision in our law explicitly
12 providing for the recognition of foreign insolvency proceedings.

13 Jurisdiction is the preliminary question to be answered by this Court before
14 undertaking the exercise of deciding on oppression or fishing. Does this
15 Court have the jurisdiction to enforce the Letter of Request issued by a
16 foreign court for the purposes of permitting a liquidator/receiver to conduct
17 investigatory examinations in connection with a multinational insolvency.

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19 This particular Letter of Request reads as follows and sets out in Schedule
20 A, the specific documents that are being requested:

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Court File No. 05-CL-5792

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:
ONTARIO SECURITIES COMMISSION
Applicant

-and-

GESTION DE PLACEMENTS NORSHEILD (CANADA)
LTÉE/NORSHEILD ASSET MANAGEMENT (CANADA) LTD.,

NORSHIELD INVESTMENT PARTNERS HOLDINGS
LTD./GESTION DES PARTENAIRES D'INVESTISSEMENT
NORSHIELD LTÉE,

OLYMPUS UNITED FUNDS HOLDINGS CORPORATION,
OLYMPUS UNITED FUNDS CORPORATION /CORPORATION
DE FONDS UNIS OLYMPUS,

OLYMPUS UNITED BANK AND TRUST SCC,

GROUPE OLYMPUS UNITED INC./OLYMPUS UNITED GROUP
INC.,

HONEYBEE SOFTWARE TECHNOLOGIES
INC./TECHNOLOGIES DE LOGICIELS HONEYBEE INC.
(FORMERLY NORSHIELD INVESTMENT
CORPORATION/CORPORATION D'INVESTISSEMENT
NORSHIELD),

AND

NORSHIELD CAPITAL MANAGEMENT
CORPORATION/CORPORATION GESTION DE L'ACTIF
NORSHIELD

LETTER OF REQUEST

Section 129 of the Securities Act, R.S.O. 1990, C. S-5

TO THE GRAND COURT OF THE CAYMAN ISLANDS:

A RECEIVERSHIP PROCEEDING IS PENDING IN THIS COURT
AT THE city of Toronto, in the Province of Ontario, Canada in
respect of the Respondent companies.

WHEREAS RSM Richter Inc. has been appointed as Receiver (the
"Receiver") pursuant to Section 129 of the Securities Act, R.S.O.
1990, c. S-5, as amended, of all of the assets, undertaking and
properties of the Respondent companies (the "Norshield Companies")
hereto in order to protect the interests of the approximately 1,900
persons who invested funds with the Norshield Companies.

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AND WHEREAS the Receiver and Brian F. Griffith & Company were appointed Joint Custodians of Olympus United Bank and Trust SCC pursuant to an Order of the Barbados High Court of Justice dated September 28, 2005.

AND WHEREAS Raymond Massi, a partner of RSM Richter Inc. and G. Clifford Culmer, a partner of BDO Mann Judd, an accounting firm located in Nassau, in the Commonwealth of The Bahamas, were appointed Joint Official Liquidators of Olympus Uninvest Ltd. by Order of the Supreme Court of the Commonwealth of The Bahamas dated February 6, 2006.

AND WHEREAS Raymond Massi and G. Clifford Culmer were appointed Joint Receivers of Masaic Composite Limited (U.S.), Inc. by Order of the Supreme Court of the Commonwealth of The Bahamas dated January 20, 2006.

AND WHEREAS Raymond Massi and G. Clifford were appointed Joint Provisional Liquidators of Masaic Composite Limited (U.S.), Inc. by Order of the Supreme Court of the Commonwealth of The Bahamas dated March 22, 2006.

AND WHEREAS Broadhurst Barristers have been named as the solicitors/entity entitled to bring an application in the Cayman Islands on the Receiver's behalf and are located at P. O. Box 2503 GT, 40 Linwood Street, George Town, Grand Cayman, Cayman Islands, BWI.

IT HAS BEEN SHOWN TO THIS COURT that it appears necessary for the purpose of justice that certain witnesses residing within your jurisdiction be examined there.

THIS COURT HAS ORDERED THAT the Receiver be authorized to examine representatives of each of the eight Strategy Funds, as defined herein, in the Cayman Islands, which funds include: Uninvest Convertible Arbitrage Fund II Ltd.; Uninvest Equity Long/Short Fund Ltd.; Uninvest Equity Long/Short Fund II Ltd.; Uninvest Equity Long/Short Fund IV Ltd.; Uninvest Global Macro Fund Ltd.; Uninvest Managed Futures Fund I Ltd.; Uninvest Market Neutral Fund Ltd.; and Uninvest Multi-Strategy Fund Ltd. (the "Strategy Funds"), respecting their knowledge of the matters described in the Affidavit of Eric Rodier sworn August 16, 2006 and Schedule and Exhibits thereto (the "Rodier Affidavit"), and that notices for examination shall be given in the form set forth in the Ontario Rules of Civil Procedure for examinations for discovery, and such individuals are ordered and directed to attend such examinations and to produce such documents as particularized in Schedule "A" hereto.

IT HAS BEEN SHOWN TO THIS COURT that the certain individuals, as described below, are the only persons who can give a proper account of the direction and location of the matters described in the Rodier Affidavit. The abovementioned individuals are therefore material and necessary witnesses in this matter.

IT HAS ALSO BEEN SHOWN TO THIS COURT that it appears necessary for the purpose of justice that documents present within

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your jurisdiction, as described below, be produced and that the keepers of those documents be required to produce affidavits attesting to the authenticity of those documents. Such documents are described in Schedule "A" hereto.

IT HAS ALSO BEEN SHOWN TO THIS COURT that there are grounds to believe that the documents or classes of documents, as described in Schedule "A" hereto, are or were in existence, that they are relevant to the matters before this Court, and that they are or were in the possession or control of persons or corporations within your jurisdiction.

YOU ARE REQUESTED, in furtherance of justice, to compel or to have the Appropriate Judicial Authority in the Cayman Islands compel the appearance of representatives of the Strategy Funds resident within the Cayman Islands including David Bree, a former director of the Strategy Funds, as well as any officer, shareholder (or its representative in the case of a corporate shareholder), director, and/or manager of any or all of the Strategy Funds at the material time with respect to the matters raised in the Rodier Affidavit, all under oath in the Cayman Islands for examination by representatives of the Receiver, and to bring to the examination all books, records and documents relating to the financial affairs of the Strategy Funds as particularized in Schedule "A" hereto and to produce an affidavit attesting to the authenticity of those documents.

YOU ARE FURTHER REQUESTED, in furtherance of justice, to compel or to have the Appropriate Judicial Authority in the Cayman Islands compel the appearance of S.L.C. Whicker of KPMG in his capacity as a Joint Voluntary Liquidator of the Strategy Funds, who is currently resident in the Cayman Islands, under oath in the Cayman Islands for examination by representatives of the Receiver, and to bring to the examination all books, records and documents relating to the financial affairs of the Strategy Funds as particularized in Schedule "A" hereto and to produce an affidavit attesting to the authenticity of those documents.

YOU ARE FURTHER REQUESTED, in furtherance of justice, to compel or to have the Appropriate Judicial Authority in the Cayman Islands compel the appearance of K.D. Blake of KPMG in his capacity as a Joint Voluntary Liquidator of the Strategy Funds, who is currently resident in the Cayman Islands, under oath in the Cayman Islands for examination by representatives of the Receiver, and to bring to the examination all books, records and documents relating to the financial affairs of the Strategy Funds as particularized in Schedule "A" hereto and to produce an affidavit attesting to the authenticity of those documents.

YOU ARE FURTHER REQUESTED, in furtherance of justice, to compel or to have the Appropriate Judicial Authority in the Cayman Islands compel any representatives of the Strategy Funds resident within the Cayman Islands, including David Bree, S.L.C. Whicker and K.D. Blake, in such capacities as described in the preceding paragraphs, and any officer, shareholder (or its representative in the case of a corporate shareholder), a director, and/or manager of any or all of the Strategy Funds, to produce to the Receiver all of the books

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and records relating to the financial affairs of the Strategy Funds as particularized in Schedule "A" to the Rodier Affidavit, and to produce an affidavit attesting to the authenticity of those documents.

YOU ARE FURTHER REQUESTED, in furtherance of justice, to authorize the Receiver or representatives of the Receiver in the Cayman Islands to make copies of any documents produced by any representatives of the Strategy Funds in accordance with this Letter of Request as is necessary for the purpose of permitting the Receiver to carry out its investigations respecting the matters described in the Rodier Affidavit.

YOU ARE FURTHER REQUESTED to give the parties advance notice of the time and place of the examination and permit their representatives to attend and conduct the examination.

YOU ARE FURTHER REQUESTED to permit the audiotaping and videotaping of the examinations for the purpose of having the examinations transcribed by a certified Ontario court reporter, the costs of which will be borne by the Receiver. The Receiver will reimburse you for any costs incurred in acting on this Letter of Request.

AND WHEN YOU REQUEST IT, this Court will be ready and willing to act on Letters of Request from you in a similar case when and if such is requested and required.

THIS LETTER OF REQUEST is signed and sealed by order of The Honourable Mr. Justice Campbell of this Court dated August 18th, 2006.

Respectfully requested,

The Honourable Mr. Justice Campbell
Ontario Superior Court of Justice
Commercial List

Dated: August 18, 2006

Seal of the Court:

SCHEDULE "A"

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LIST OF DOCUMENTS RQUESTED

RE:

- Univest Convertible Arbitrage Fund II Ltd.
- Univest Equity Long/Short Fund Ltd.
- Univest Equity Long/Short Fund II Ltd.
- Univest Equity Long/Short Fund IV Ltd.
- Univest Global Marco Fund Ltd.
- Univest Managed Futures Fund Ltd.
- Univest Market Neutral Fund Ltd.
- Univest Multi-Strategy Fund Ltd.

FOR THE FISCAL YEARS 2003 TO MARCH 23, 2006

1. Annual and interim financial statements
2. General Ledger
3. General journal
4. Cash Receipts journal
5. Cash disbursements journal
6. Fund activity reports, i.e., details of the subscriptions, redemptions and transfers in and out of each Fund
7. Bank statements, including cancelled cheques, deposit slips and wire transfer requests
8. Fund manager statements
9. Minutes book
10. Offering memoranda issued by each Fund

The Request asks for cross-examination of certain witnesses. However, the areas which are to be covered in that cross-examination are not stated with any particularity in the Letter of Request. The affidavit in support of the

1 Letter of Request contains the general areas that the cross-examination may
2 explore.

3

4 The ex-parte Order which was made by this Honourable Court permitted all
5 the relief sought in the Letter of Request, including videotaping of the
6 examination.

7

8 The relevant sections for the purposes of this application of the Evidence
9 (Proceedings Other Jurisdictions) (Cayman Islands) Order 1978 are section
10 1, section 2 and section 9.1. Section 1 reads:

11 “Where an application is made to the Grand Court for an order
12 for evidence to be obtained in the Cayman Islands, and the
13 Court is satisfied –

14 (a) that the application is made in pursuance of a
15 request issued by or on behalf of a court or tribunal
16 (“the requesting court”) exercising jurisdiction in a
17 county or territory outside the Cayman Islands; and

18 (b) that the evidence to which the application relates is
19 to be obtained for purposes of civil proceedings
20 which either have been instituted before the
21 requesting court or whose institution before that
22 court is contemplated,

23 the Grand Court shall have the power conferred on it by the
24 following provisions of this Act.

25 Power of Grand Court to give effect to application for
26 assistance.

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2 2. (1) Subject to the provisions of this section, the Grand Court
3 shall have power, on any such application as is mentioned in
4 section 1 above, by order to make such provision for obtaining
5 evidence in the Cayman Islands as may appear to the court to be
6 appropriate for the purpose of giving effect to the request in
7 pursuance of which the application is made; and any such order
8 may require a person specified therein to take such steps as the
9 court may consider appropriate for that purpose.

10 (2) Without prejudice to the generality of subsection (1) above
11 but subject to the provisions of this section, an order under this
12 section may, in particular, make provision

13 (a) for the examination of witnesses, either orally or in writing;

14 (b) for the production of documents;

15 (c) for the inspection, photographing, preservation, custody or
16 detention of any property;

17 (d) for the taking of samples of any property and the carrying
18 out of any experiments on or with any property;

19 (e) for the medical examination of any person;

20 (f) without prejudice to paragraph (e) above, for the taking and
21 testing of samples of blood from any person.

22 (3) An order under this section shall not require any particular
23 steps to be taken unless they are steps which can be required to
24 be taken by way of obtaining evidence for the purposes of civil
25 proceedings in the court making the order (whether or not
26 proceedings of the same description as those to which the
27 application for the order relates); but this subsection shall not
28 preclude the making of an order requiring a person to give
29 testimony (either orally or in writing) otherwise than on oath
30 where this is asked for by the requesting court.

31 (4) an order under this section shall not require a person

1 (a) to state what documents relevant to the proceedings to
2 which the application for the order relates are or have been
3 in the possession, custody or power; or

4 (b) to produce any documents other than particular documents
5 specified in the order as being documents appearing to the
6 court making the order to be, or to be likely to be, in his
7 possession, custody or power.

8 (5) A person who, by virtue of an order under this section, is
9 required to attend at any place shall be entitled to the like
10 conduct money and payment for expenses and loss of time as
11 on attendance as a witness in civil proceedings before the court
12 making the order.

13 Privilege of witnesses.
14

15 Section 3.1 reads:

16
17 “A person shall not be compelled by virtue of an
18 order under section 2 above to give evidence
19 which he could not be compelled to give.

20
21 (a) in civil proceedings in the Cayman Islands;
22 or

23 (b) subsection (2) below, in civil proceedings in
24 the country or territory in which the
25 requesting court exercise jurisdiction.

26
27 (2) subsection (1) (b) above shall not apply unless
28 the claim of the person in question to be exempt
29 from giving the evidence is either –

30
31 (a) supported by a statement contained in the
32 request (whether it is so supported
33 unconditionally or subject to conditions that
34 are fulfilled); or

35 (b) conceded by the applicant for the order.

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2 Section 9.1 reads:

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4 "In this Act "civil proceedings", in relation to the
5 requesting court, means proceedings in any civil or
6 commercial matter."
7

8 The 1978 Order in this jurisdiction clearly contemplates that there are
9 proceedings abroad or that proceedings are to be commenced there before
10 the Cayman Court can act in aid. It is then and only then that this Court
11 could be said to have jurisdiction in this matter.

12

13 As jurisdiction is fundamental to any application, the question of a fishing
14 expedition or oppression must inevitably be dealt with after the question of
15 jurisdiction. The question must be whether the word "proceedings" covers
16 the insolvency process itself, and whether the collection and realization of
17 assets and the distribution of assets is and can be said to constitute action
18 within civil proceedings.

19

20 Ms. Hatfield on behalf of the liquidators submits that the appointment of a
21 Receiver should not be considered proceedings and that they are not civil
22 proceedings. She submits that the request to conduct an investigation into

1 the affairs of the company is not a request for evidence to be obtained for the
2 purposes of civil proceedings which have been instituted by the requesting
3 court, instead she says, she would term it a roving inquiry. She says the very
4 wording of the Letter of Request does not specify that civil proceedings are
5 either instituted or pending before the Ontario Court. It purely states that the
6 documentation and oral examinations are being requested on the basis that it
7 appears to the Ontario Court necessary for "the purposes of justice". She
8 urges the Court to look behind the terms of the Letter of Request.

9
10 These are her submissions on jurisdiction. On the question of whether this is
11 a fishing expedition, she submits that there are a plethora of authorities and
12 well established ones that the pre-trial discovery process is not allowed
13 under the law. Therefore, she submits that the order for disclosure is not to
14 be used as a fishing expedition. She submits that "fishing" has been defined
15 by this Court as a roving inquiry which has not definitively established
16 allegations of fact, which have been raised bona fide with adequate
17 particulars, or an inquiry to obtain information which may lead to obtaining
18 evidence in general in support of allegations which have not yet been and
19 which may never be brought. She submits that in this matter they are not
20 seeking to establish specific allegations but instead it is an investigation and

1 a gathering of information. That in those circumstances it is tantamount to
2 oppression and should not be allowed.

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4 Mr. Nicholas Robinson for the Fund submits that it is only when the
5 requirements of section (1) of the Evidence Order has been satisfied that the
6 Grand Court has jurisdiction to consider a request for assistance. He agrees
7 that the requirements of (1) (a) have been met and what he says, is that the
8 principle issue for consideration in this case relates to section (1) (b) i.e.
9 whether the evidence is sought for civil proceedings before the requesting
10 court and whether civil proceedings had been instituted before the request
11 and/or whether the proceedings are contemplated. In relation to this
12 particular case, he submits, where a request for assistance is made by a
13 foreign court to assist a liquidator appointed in that foreign jurisdiction, the
14 Cayman Court would not regard the foreign winding up proceedings, as
15 relating to a justiciable issue but as for the benefit of that liquidator to enable
16 him to better carry out his administrative duties in the winding up. The
17 Receiver was appointed in this case under a Canadian statutory regulatory
18 regime and he submits that as the Grand Court would not regard this
19 receivership as relating to a justiciable issue, it would not fall within the
20 description of civil proceedings as required by 1(b) of the Evidence Order.

1 He further submits that this is an inquiry which is roving by nature and he
2 relies on the paragraphs in Mr. Rodier's affidavit which states:

3

4 "RSM Richter wishes to examine the financial
5 affairs of the Strategy Funds to determine whether
6 assets of the Strategy Funds belong to the
7 Norshield Financial Group or claims can be
8 asserted against the Strategy Funds by the
9 Norshield Financial Group."

10

11

12 The Applicants in an affidavit by Mr. Lee Freeman have in fact conceded
13 that, "the request arises as a result of ongoing investigations by the
14 Applicant with respect to receiverships commenced in Canada." Mr.
15 Robinson urges this court not to dismiss his application because section (2)
16 (4) of the Evidence Order contained in statutory form is a prohibition against
17 pre trial discovery. Finally, he submits that the disclosure order is a fishing
18 expedition and the only purpose is to uncover information which may, (as
19 the Canadian Receiver's hope), permit them to explain what they term "an
20 unaccounted for discrepancy" between assets and liabilities while carrying
21 out their administrative duties. He submits that the disclosure order will not
22 necessarily yield evidence for use in existing civil proceedings and further
23 that there is in fact no evidence before this Court, other than a mere
24 assertion, that proceedings are genuinely contemplated. Mr. Robinson alone

1 makes this point that on the ex parte application, the court was not informed
2 of the law and he submits, this is particularly alarming as there are such
3 specific prior legal requirements to the making of an order such as this and
4 the Court was not addressed on this aspect of the law at the ex parte stage.

5
6 Mr. Crawford who acts on behalf of Mr. David Bree (a director) supports the
7 application made by Mr. Robinson and Ms. Hatfield and endorses the
8 submissions made by Mr. Robinson. He refers me to section 426 of the
9 Insolvency Act in the UK and paragraph 70/6/2 of the Supreme Court Rules.

10 He submits that far from being a simple application this is a complex one in
11 that the question of jurisdiction is fundamental to this application. He says
12 in normal civil proceedings there is always a plaintiff and a defendant but
13 that in this case he doesn't know who the defendant is and that there is no
14 evidence that proceedings are contemplated for purposes of the Act, which
15 governs jurisdiction. He reminds the Court that the jurisdiction of the
16 Cayman Courts to order persons within its jurisdiction to provide oral or
17 documentary evidence in aid of proceedings in foreign Courts has always
18 been exclusively statutory. He submits further that it is not possible to recast
19 the Letter of Request at this stage and that in fact this request is a fishing
20 expedition. He doesn't have too much complaint about the specificity of the

1 documents listed in Schedule A, but certainly complains about the request
2 for oral examination. He submits that it is not for him to go through the
3 various affidavits filed and ascertain what areas will be covered in the oral
4 examination but in fact that the applicant should have set out the areas in
5 question with some specificity in order that the court and the persons being
6 questioned will be in a position to determine the following:

7

8 (1) Whether they should make a section 4 application
9 on the basis of confidentiality

10 (2) Object to the questions

11 (3) Make inquiry in order to be more useful and helpful
12 to the Court in providing the requested information.

13

14 For all these reasons, he submits that the order should be set aside.

15

16 Mr. Broadhurst, on the other hand, on behalf of the applicants submits that
17 the court has jurisdiction, as this is a civil proceeding. It was started, he
18 submits, in the Ontario Superior Court of Justice in pursuance of an exercise
19 of a right under the Securities Act (Ontario). The Cayman Court, he submits
20 has jurisdiction to make the order as it would classify the appointment of a

1 Receiver as a step in a civil proceeding. He relies on the case of Re
2 Ansbacher (Cayman) Limited [2001] CILR 214, where the Court found that
3 a liquidator exercising its functions would in fact be a proceeding before the
4 Cayman Court.

5
6 In opposition Mr. Robinson and Mr. Crawford submit that that particular
7 case is irrelevant as it has to do with a section 4 application. Finally, Mr.
8 Broadhurst on this particular point submits that the applicant is a court
9 appointed officer who has a mandate to collect and preserve the assets of the
10 Norshield Financial Group and to determine what claims need to be brought
11 on behalf of the Norshield Financial Group. He says presently claims are
12 being contemplated and the guidance of the Ontario Supreme Court will be
13 sought. Apart from claims being contemplated, he submits, decisions with
14 respect to the allocations of the funds collected and the creditor and
15 contributories respective rights will all need to be determined in due course.
16 It is accordingly submitted these are justiciable issues before the Ontario
17 Supreme Court of Justice.

18
19 He says that it is not a fishing expedition and that according to Lord
20 Diplock's dicta in Rio Tinto Zinc and others v Westinghouse Electric

1 Corporation etc (contra RTZ Services Ltd. and others [1978] 1 AER 434,
2 any limitation with respect to the use of this purpose for fishing discovery is
3 to be found in section 2 of the Evidence (Proceedings in other jurisdiction)
4 (Cayman Islands) Order 1978 (supra). He says that in this case, the
5 questions put have been specific in both the need for oral examination and
6 the documents to be provided. He says this is not a pre-trial discovery
7 because the evidence requested is relevant to the matters before the Ontario
8 Court and has been requested by the Ontario Court to assist in bringing
9 proceedings against a number of the individuals and entities involved with
10 the Norshield Financial Group. He submits that the evidence is not
11 oppressive and should be allowed. He says that the opposition's arguments
12 that the JVL's have only recently been appointed and accordingly cannot be
13 expected to have knowledge is irrelevant. That the applicants are only
14 seeking to find out what the JVL's plainly would have knowledge of relating
15 to the financial arrangements of the Strategy Fund. It is their duty, he says,
16 to enquire into these matters and satisfy themselves prior to distributing any
17 assets. He submits that the second objection that they are giving evidence
18 against themselves is not a valid objection and that there is no suggestion
19 that there would be claims brought against the JVL in connection with the
20 liquidation of these companies. Accordingly, they are not being asked to

1 give evidence against their own interests. He submits with respect to the
2 third objection, that this is essentially one of relevance, that the scope of the
3 inquiry is not too wide, and that the scope and extent of the evidence order is
4 sufficiently confined to avoid irrelevant matters. Finally, he submits that
5 this is a very serious issue, as there are two reports before the court and the
6 court should not lightly vary an order especially as comity is of utmost
7 importance in these cross boarder insolvency matters.

8
9 There is undoubtedly a need for judicial co-operation in cross border
10 insolvency cases and there is of course an ongoing effort to have extensive
11 and successful judicial co-operation between the necessary countries.
12 However, this court must bear in mind that the permissibility of this court to
13 grant such orders are governed by a statute and there are certain pre
14 conditions to the powers that can be exercised by the Cayman Courts. In the
15 United Kingdom assistance is available under four parallel systems:

- 16
17 (1) At common law to foreign representatives from any jurisdiction
18 (subject of course to certain conditions being fulfilled);
19 (2) Under section 426 of the Insolvency Act 1986 where a select
20 group of counties mainly commonwealth countries co-operate;

- 1 (3) Under the EU Insolvency regulations for the other twenty four
2 member states of the EU; and
3 (4) Under the model law which had recently been adopted in Great
4 Britain for all countries.

5

6 These four parallel systems however, are not available in our jurisdiction
7 and we are governed by the Evidence (Proceedings in Other Jurisdictions)
8 (Cayman Islands) Order 1978. In support of the objection, the parties place
9 heavy reliance on In the Matter of D (in liquidation) 1985 CILR at page 296.

10 My Lord Chief Justice Summerfield in that case held:

11

12 “That the court was not entitled to exercise its
13 power and grant assistance to a foreign
14 jurisdiction, or make a request of a foreign
15 jurisdiction, as the information would not be
16 required for the trial of a justiciable issue.”

17

18 This was an application by the liquidators of a company in winding up for an
19 order that a letter of request for international juridical assistance issued to
20 the proper judicial authority in Switzerland for the examination of two
21 witnesses in Switzerland and for the production by them of documents
22 prepared by the auditors in Switzerland.

23

1 In that case Summerfield, C.J. adopted the reasoning in Re International
2 Power Indus. NV. BCLC [1985] at page 128, where Lord Woolf held - “that
3 the order of the Master be set aside. The object of the Evidence (Proceedings
4 in Other Jurisdictions) Act [1975] he said, “with the assistance in providing
5 evidence for the purpose of civil litigation and it could not be invoked in
6 connection with proceedings such as pre-trial discovery as distinct from the
7 obtaining of evidence for trial.”

8
9 As Mr. Crawford quite rightly pointed out it would be doing injustice to the
10 word “trial” if I were to hold that the appointing of a receiver could
11 constitute a trial and that it could be interpreted as proceedings. With due
12 respect to Mr. Broadhurst submissions, I disagree with him and agree with
13 Mr. Crawford.

14
15 In Re International Power Industries N.V. (supra), Lord Woolf went on and
16 held that, “the Act was not to be used as fact-finding machinery in
17 connection with an investigation of the affairs of a company which was
18 being reorganised in the United States and where no proceedings were
19 contemplated. The letters rogatory should not be given effect to and the
20 appeal should be allowed.” That case referred to Rio Tinto Zinc Corp v

1 Westinghouse Electric Corp [1978] AC 547 and the Norwich Equitable Fire
2 Assurance Co, Re (1884) 24 Ch. D.

3

4 Re International Power Industies N.V. is still binding and persuasive
5 authority that bankruptcy proceedings are not considered by the courts to be
6 civil proceedings and it is my view that there is no inherent jurisdiction of
7 this Court to exercise its discretion, outside the statutory requirements. A
8 further issue that has to be answered is whether the Request can be said to be
9 in pursuance of assistance to a foreign court in obtaining evidence for the
10 purpose of a justiciable issue as recognized by the Hague Convention.

11

12 The evidence that has been sought is to enable the Receiver to carry out his
13 administrative functions and to ascertain (this is accepted by the applicants)
14 whether, in fact, the inquiries would lead to persons being charged and if so,
15 the evidence that is required to support such a charge. In the Matter of a
16 Request for International Judicial Assistance from a Tribunal of Inquiry
17 (Dunne's Payments) 1997 CLR 330, Justice Patterson (AG) held that, if the
18 tribunal that was requesting the foreign court in that matter were a court of
19 law, the inquiry before it would constitute "civil proceedings both under the
20 Irish law, and—since all proceedings other than criminal proceedings were

1 “proceedings in any civil or commercial matter” as described in section 9(1)
2 –under Cayman law.” I draw a distinction between that and the case at
3 hand. In this case, the requesting court has not said that there is a justiciable
4 issue before it. What that Court has said is that it requires the information in
5 the interest of justice. There is no evidence of any proceedings before it.
6 There is an appointment of a receiver, an officer of the court with power to
7 conduct an inquiry under a particular law. I also have to remind myself that
8 the second condition precedent to the jurisdiction of the Grand Court to
9 grant a request as set out in section (1) (b) of the Schedule to the 1978 Order
10 is:

11

12 “That the evidence to which the application relates
13 is to be obtained for the purposes of civil
14 proceedings which either have been instituted
15 before the requesting court or whose institution
16 before that court is contemplated.”
17

18 It is, I think, a matter of fact although Mr. Broadhurst submits otherwise that
19 no proceeds have been instituted. What has been instituted is the
20 appointment of a receiver. There is no justiciable issue at the moment
21 before the court and there is no evidence before me that a proceeding before
22 that requesting court is contemplated in the immediate future. Indeed on the
23 applicant’s own evidence and submissions what is being undertaken is an

1 inquiry as to whether the parties have sufficient evidence to commence
2 proceedings. When the law requires contemplation of proceedings, it must
3 mean that the proceedings must be immediate and not in the future only if
4 evidence is found. Even, if I am wrong that the appointment of a Receiver
5 can be considered civil proceedings there must be some evidence that the
6 proceedings have been instituted before the requesting court or that
7 institution before that court is contemplated. Again if I am wrong on the
8 issue of jurisdiction, I then have to consider whether this is a fishing
9 expedition for pre-trial discovery. The fact that such a request cannot ever
10 be a pretrial discovery has been agreed by all parties.

11

12 Mr. Broadhurst in his submission relies on the case of Voluntary Purchasing
13 Group Incorporated v Insurco International Limited, 1994 to 1995 CILR at
14 page 84. With respect, there is a distinction to be drawn in that case, the
15 civil proceedings identified were post-trial and the question was whether at
16 the judgment stage it was still considered a trial. A statement that was made
17 in that case is of relevance in this one. At page 90, it is said:

18

19 “ A further statement of general application is that
20 the foreign request must be examined to ensure its
21 compliance with the 1978 Order, in particular as to
22 documents requested.”

1

2 I do not think that that case is of particular help in interpreting the factual
3 basis of this case. Mr. Broadhurst also places reliance on Rio Tinto Zinc v
4 Westinghouse [1978] 1 All ER at page 434, the House of Lords examined in
5 detail the United Kingdom's corresponding Act, upon which the Cayman
6 law is based. Lord Diplock at page 461 said:

7

8 "…My lord I would not be inclined to place any
9 narrow interpretation on the phrase 'evidence to be
10 obtained for the purposes of civil proceedings'.
11 The 1975 Act applies to civil proceedings pending
12 or contemplated in courts and tribunals of all
13 countries in the world. It is not confined to the
14 countries that are parties to the Hague Convention
15 of the 18th Mach 1970, nor is it limited to the
16 courts of law. It extends to tribunals..."
17

18 He then states:

19

20 "In my view, 'civil proceedings' includes all
21 procedural steps taken in the course of the
22 proceedings from their institution up to and
23 including their completion and, if the procedural
24 system of the requesting courts provide for the
25 examination of witnesses or the production of
26 documents for the purpose of enabling a party to
27 ascertain whether there exists admissible evidence
28 to support his own case or to contradict that of his
29 opponent, the High Court has jurisdiction to make
30 an order under the 1975 Act. Any limitation on

1 the use of this procedure for the purpose for
2 'fishing' discovery is, in my view, to be found in s.
3 2."
4

5 The words 'for the examination of witness or the productions of documents
6 for the purpose of enabling a party to ascertain whether there exist
7 admissible evidence to support his own case or to contradict that of this
8 opponent' presupposes that there is a plaintiff and a defendant. In this case
9 there is no opponent, the receiver is purely making inquires as to whether
10 there could be a defendant and whether there in fact has been or is any cause
11 of action to commence proceedings. In those circumstances, I do not
12 believe that Lord Diplocks comments are particularly useful to Mr.
13 Broadhurst's case.

14

15 As was said by Lord Goff in Re State of Norway's Application (No.2)
16 [1989] 2 WLR at page 458:

17

18 "That there must not be a narrow distinction drawn
19 between civil proceedings and commercial
20 proceedings and that the words in section 9(1)
21 should be given their ordinary meaning so that
22 proceedings in any civil matter include all
23 proceedings other than criminal proceedings."
24

1 But that, in my view, is the very problem that the Receiver (Canadian) faces
2 in this case. It is my view, that there are no proceedings at all in this case
3 and that the evidence being sought is a fishing expedition with a view to
4 commencing proceedings and help in ascertaining a defendant.

5

6 It is my opinion, the 1975 Act and indeed the Hague Convention to which
7 this Act gives effect, is to assist in the determination of actions of a civil
8 nature between one body and another. At page 137 B, Woolf J said in Re
9 International Power Industries NV (1985) BCLC at page 128:

10

11 “If, where there is to be a trial, it is not appropriate
12 to use the 1975 Act for the purposes of pre-trial
13 discovery, does it become any more appropriate to
14 use that Act when the whole exercise upon which
15 the foreign court is engaged is an exercise in
16 discovery which may result in subsequent
17 proceedings but where no proceedings which will
18 result in a trial are then even contemplated?
19 Having regard to the approach which was adopted
20 by House of Lords in the Rio Tinto Zinc’s case, I
21 am bound to answer that question in the negative.”
22

23 This is a roving inquiry to enable the Receivers to investigate companies and
24 subsequently issue proceedings against named defendants or a defendant yet
25 to identified depending on the evidence found. Whether it is under the
26 bankruptcy act or any other act matters not if the test is that it is fact-finding

1 machinery to enable them to undertake this matter in that way. I agree with
2 learned counsel's submissions that there has to be a cause of action between
3 main parties which will eventually lead to a judgment. In view of my
4 findings that there are no civil proceedings in this matter, I need not examine
5 the issue of oppression or fishing. However, even if I am wrong as I said
6 previously about the meaning of the word "proceedings", I believe this must
7 be a fishing expedition as proceedings have not been commenced, nor is
8 there a trial in which this evidence can be used. In the circumstances, I set
9 aside the order that was granted ex parte with costs to the opposing parties;
10 that is Mr. Bree, the joint voluntary liquidators, and the Uninvest Diversified
11 Fund II Limited, such costs to be taxed or agreed.

12

13 Dated this 13th day of October 2006

14



15

16 Judge of the Grand Court

