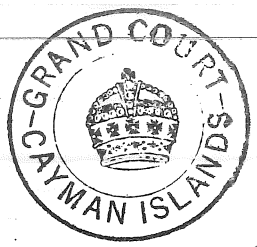
IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE 154 OF 2002



27-03-02

IN THE MATTER OF SHEIKH FAHAD MOHAMMED AL SABAH, A BANKRUPT

AND IN THE MATTER OF SECTION 156 OF THE BANKRUPTCY LAW (1997 Revision)

AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE COURT

Appearances:
Mr. Graham Ritchie and Mrs. Rosie Whittaker-Myles for the Trustee in bankruptcy appointed by the Bahamian Court.

Before: Hon. Chief Justice Anthony Smellie

Date: 15.03.2002, 27.03.2002.

JUDGMENT

Shiek Fahad Al Sabah is domiciled in the Commonwealth of the Bahamas. He has been adjudged a bankrupt by the Supreme Court of that country which has certified the appointment of Mr. G. Clifford Culmer as his trustee-in-bankruptcy ("the trustee"). The petitioner in bankruptcy was Gruppo Torras S.A. ("G.T"), an entity owned by the Kuwaiti Government through which it held overseas investments. Sheikh Fahad, a member of the Kuwaiti Royal Family, was once the person in charge of the Kuwaiti Investment Authority based in London, England, and in that capacity directed the affairs of G.T. on behalf of the Kuwaiti Government.

In abuse if that important position of trust, Sheikh Fahad became personally involved in a number of fraudulent schemes from on or about May 1988, by which G.T. was defrauded of hundreds of millions of dollars.

In recovery actions in a number of jurisdictions around the world, G.T. has sought to restrain, trace and recover its assets primarily as against bank accounts, trusts and other property alleged or already proven to be under the control of Sheikh Fahad.

In the central action brought in England, G.T. has obtained against Sheikh Fahad, a final judgment in its favour in the amount of USD 716,846,263. This judgment debt accrues interest at the amount of some USD 147,713 per day.

It is the judgment debt which grounded the petition in bankruptcy before the Bahamian Court.

Sheikh Fahad is known to have interests in certain Cayman Islands trusts which are believed to have assets of substantial value. It has already been established in other proceedings before this Court, that he is the settlor and primary beneficiary of at least one of these trusts.

It is against that background that the trustee has moved the Bahamian Court to seek the aid of this Court in the recognition and enforcement here of his appointment, with the attendant powers to recover the assets of the bankrupt within this jurisdiction.

The present application is in furtherance of that objective.

It is brought ex parte by originating summons in two alternative ways. First, pursuant to a Letter of Request to this Court from the Bahamian Court, seeking Orders of this Court in aid of and auxiliary to the orders of the Bahamian Court by which that Court certified the appointment of the trustee and empowered him to act. This basis of the application is

said to rest upon section 156 of the Caymans Islands Bankruptcy Law 1964. ("the local Law").

The second basis depends upon the inherent jurisdiction of this court, pursuant to which the trustee applies in his own right for orders recognising and enforcing his appointment and so enabling him to act as trustee within this jurisdiction.

The first basis, which primarily Mr. Ritchie relies upon and urges me to follow, gives rise to issues of construction and jurisdiction which have not arisen in this Court before .

Section 156 of the local Law provides:

> "All the Courts in bankruptcy and the officers of such Courts shall act in aid of and shall be auxiliary to each other in all matters of bankruptcy, and any order of any one Court in a proceeding in bankruptcy may, on application to another Court, be made an order of such other Court and be carried into effect accordingly. An order of any Court in bankruptcy seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court that made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions".

There are two fundamental issues of construction which go to the jurisdiction of this Court and to the kind and extent of the powers vested.

Jurisdiction

Put in context, this first and fundamental issue is whether section 156 of the local Law enables this Court to act in aid of and be auxiliary to the Bahamian Court in bankruptcy. This depends on how the phrase "All the Courts in bankruptcy" is to be construed. By section 1 of the local law "Court" means "The Chief Court in Bankruptcy" which, by section 3 (1), is defined as this, the Grand Court.

Thus, the only Court exercising original jurisdiction in bankruptcy under the local Law is this Court.

There is a right of appeal by section 9 (1) to the Court of Appeal and by section 9 (2); the right of final appeal to the Privy Council is recognised.

What then is to be made of the pluralistic phrase "All the Courts in Bankruptcy" within this statutory context in the Cayman Islands?

I consider that the answer is historical, going back to Jamaican legislation of 1871 in which the local Law has its provenance and, before that, to the Imperial Act of Bankruptcy of 1869 of the British Parliament (32 + 33 Vict. C.71).

By section 74 of the 1869 Act it was enacted that:

> "The London Bankruptcy Court, the local Bankruptcy Court, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of such Courts respectively, shall severally act in aid of and be auxillary to each other in all matters of bankruptcy, and an order of the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court which made the request, as well the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions".

The 1869 Act by necessary implication, arising from the wording and intent of section 74 (and from other provisions which it contained); was clearly Imperial legislation. It applied to all Courts in bankruptcy throughout the British Empire. That was affirmed by the judgment of the Privy Council in Callender, Sykes & Co v Colonial Secretary of Lagos and Davies [1891] A.C. 460.

Provisions in practically identical terms to section 74 were re-enacted in the Bankruptcy Acts of 1883 and 1914, which successively repealed and replaced the 1869 Act, each having effect in turn as Imperial legislation. See further: New Zealand Loan and

Mercantile Agency Co. v Morrison [1898] A.C. 349, 357 – 358, per Lord Davey in the Privy Council; where there is further authoritative pronouncement on the Imperial application of the Bankruptcy Acts.

Section 122 of the Bankruptcy Act of 1914 is, ultimately, the provision primarily relied upon by the Bahamian Court for this request and which, for reasons which follow, I regard as a primary and proper basis for granting the request.

The historical link to the Cayman Islands runs through the Jamaican legislation of 1871 and that link with the Imperial legislation is fundamental.

Section 64 of the Jamaican Bankruptcy Law of 1871 contained identical wording to section 156 of the local Law, which was originally passed in the Cayman Islands in 1964.

The relevant history began in 1863 when the Imperial Parliament enacted the Act for the Government of the Cayman Islands (26 &27 Vict; C.31).

An important function of the Act of 1863 was expressed in section 2 which granted to the Jamaica Legislature, the power to make laws for the "peace, order and good government" of the Cayman Islands. This was so even while the local Cayman Islands Assembly of Justices and Vestry was also conferred limited power to make regulations and later, by retrospective validation, the Jamaica Legislature validated all Laws and Acts which the local Assembly had purported to pass between 1863 and 1893. This was necessary because the local Assembly had been granted no legislative power. See the Cayman Islands Government Law enacted by the Jamaica Legislature in 1893, Section 2.

Thus the Cayman Islands Act of 1863 of the Imperial Parliament formalised the constitutional theory - if not the political reality - of the Cayman Islands being regarded as and administered as part of the colony of Jamaica.

The significance for present purposes is that the Bankruptcy Law of 1871 of the Jamaica Legislature, by virtue of the Act of 1863, applied also to the Cayman Islands.

The legislative and governmental responsibility of the Jamaica legislature for the Cayman Islands continued until Jamaica opted to become a part of the ill-fated and short-lived Federation of the West Indies. At that time, the Cayman Islands and the Turks and Caicos Islands (also constitutionally governed as a dependency of Jamaica) choose to remain colonies of Britain; even while being a part of the Federation which was established under the British Caribbean Federation Act of 1956 of the Imperial Parliament.

Then followed yet another Act of the Imperial Parliament: the Cayman Islands and Turks and Caicos Islands Act 1958. Section 2 of the 1958 Act brought the operation of the 1863 Act to an end and vested power in Her Majesty by Order-in-Council to provide for the government of the Islands.

This yielded the first "constitutional" Order-in-Council for the Cayman Islands, which, among other things, provided for the first representative legislature in the Islands.

Only shortly thereafter, the Federation of the West Indies was dissolved by the last Act of the Imperial Parliament of relevance to this matter - the West Indies Act of 1962. By virtue of the Act of 1962, the Cayman Islands (along with the Turks and Caicos Islands) formally seceded from the Federation and by section 5, expressed powers were conferred on Her Majesty again to provide for the Government of the Islands, by Orders-in-Council. Such an Order-in-Council in respect of the Cayman Islands was made in 1962, providing again for a representative legislature.

This was the legislature which passed the local Law in 1964 and which, as we have seen, carried over in s. 156, the identical provisions of section 64 of the Jamaican Bankruptcy Law of 1871.

Given the relative importance of Jamaica as a colony, it must have been the case that in 1871, the Jamaica Legislature was aware of the provisions of the Imperial Act of Bankruptcy enacted two years earlier in 1869. The similarity of wording between section 71 and 74 of the Imperial Act of 1869, leaves room for no other inference.

In the Jamaican context, the pluralistic reference in the 1871 Law to "All the Courts in bankruptcy" may well have had immediate local applicability where there were a number of Courts exercising limited jurisdiction in bankruptcy and which could therefore have been mandated to act in aid of and auxillary to each other. See for instance In re the Bankruptcy of Charles Lee [1933] J.L.R. 10.

No such immediate practicability would have been possible in the post-Federation Cayman Islands. Mr. Ritchie therefore submitted before me that the pluralistic reference in the local Law makes sense after 1964, only if construed as a reference to all courts in bankruptcy wherever they might be. Or, at least, to all *British* Courts in bankruptcy wherever they might be.

I have concluded from a review of the constitutional and legislative history that his latter submission is correct.

Whatever the practical effect in Jamaica of the Bankruptcy Law 1871, the Jamaica Legislature might not be taken as having intended to limit the effect of the Courts' mandate as applying only as amongst the Courts of Jamaica. Purporting so to do would have involved impeding the effect of the Imperial Act of 1869 in its mandate which

required that assistance be given by all British Courts to all other British Courts in Bankruptcy, wherever they might be.

By virtue of section 2 of the Colonial Laws Validity Act 1865, any such purported delimitation created by a colonial legislature would have been void for repugnancy to the Imperial Act. See Nadan v R [1926] A.C. 482.

And while there was no rule of law that territorial limits defined the competence of a colonial legislature, its law-making powers were given for "the peace order and grand government" of the colony (the express wider powers – including that to repeal Imperial legislation and to legislate extra-territorially - given to "Dominion" parliaments by the Statute of Westminster 1931 not being relevant here). See Wallace v Commissioner of Income Tax Bombay (1948) 75 I.A. 86 and Commonwealth and Colonial Law; by Sir Kenneth Roberts-Wray, Stevens & Sons London, 1966; at p359 and following. See also for a helpful discussion on the legislative and constitutional issues: Re Clunis-Ross Cause 263 of 1981 in the Federal Court of Bankruptcy State of Western Australia, judgment delivered on 26th August 1988; and In the Matter of Hugh Reilly, a bankrupt [1942] 1.R. 416.

As a matter of arriving at the proper construction of the Jamaica legislative intent, it would therefore be inappropriate to regard Section 71 as having general worldwide effect.

Rather, I am persuaded to the more obvious and permissible construction: That Section 71 was intended to mandate and enjoin all Jamaican courts in bankruptcy to act in aid of and auxillary to each other and to all other British courts in bankruptcy. Thus, it would follow, expressly in furtherance of the mandate of the Imperial Act of 1869 and as the

local equivalent and correspondent provisions to those of the Imperial Act. I am fortified in this construction by a similar view taken by the Irish Supreme Court of similar provisions enacted by the Irish legislature; vis-à-vis the Imperial Act. See In re Reilly, a Bankrupt [1942] I.R. 416, at 446-447.

The third possible construction - that the 1871 Law was intended to apply only within the territorial limits of the Jamaica legislature, leaving the Imperial Act of 1869 to govern entirely the manner in which the Jamaican courts related to other British Courts in bankruptcy, is equally permissible. That construction would have brought the same results as the second which I prefer, so long as the Imperial Act governed.

The effect would be that the local Courts in bankruptcy since 1871 would have had the power to act in aid of and auxillary to each other and similarly in relation to all other British courts in bankruptcy.

This statutory scheme was carried over into the last Imperial Bankruptcy Act of 1914 Section 122, which ultimately came to apply, on the foregoing construction, to the Cayman Islands.

Section 122 of the Bankruptcy Act of 1914 (in terms practically identical to section 74 of the 1869 Act) was the provision invoked and relied upon by the Bahamian Court in sending its request to this Court. In so doing, that Court held that it is a "British Court". See written ruling given on 12th March 2002 in Cause No. 511 of 2001, In the matter of Sheikh Fahad Mohammed Al Sabah, a bankrupt; Supreme Court of the Bahamas, per Lyons J. at page 7.

That finding was a necessary prerequisite to the granting of the request from that Court, having regard to the construction set out above arising from the statutory basis upon which this Court might so act.

Dicey and Morris in The Conflict of Laws 9th edition at page 668 to 669) considered the principles:

> "Under section 122, [(of the Act of 1914)] the courts having jurisdiction in bankruptcy in England, Scotland and Ireland and every British court elsewhere having jurisdiction in bankruptcy or insolvency must act in aid of and be auxillary to each other in all bankruptcy matters. But two factors reduce the efficacy of this enactment as an aid to the English trustee in obtaining possession of the bankrupt's property situated in the Commonwealth oversea. First, all courts (and the English courts are no exception) whose aid is sought under this or a corresponding section reserve to themselves a discretion and decide for themselves what form of aid to give. Thus, the Irish High Court refused to aid a receiver appointed by the English court in bankruptcy in proceedings initiated in England by the Commissioner of Inland Revenue to recover United Kingdom taxes. [(Citing Re Gibbons Ex p Walker (1960) 26 Irish Jurist 60 - a similar position to which this Court would likely adhere)]. Secondly, the Commonwealth Court whose aid is enlisted may not admit that it is a "British" court within the meaning of the section. So far as English law is concerned, the expression "British court" has been widely construed. Thus, during the mandate, it was held that a bankruptcy court in Palestine was a British court. In general, it may be assumed that, so far as English law is concerned, all bankruptcy courts throughout the Commonwealth are "British courts", though there may be some exceptions. This is true even though some of the independent countries have assumed republican forms of government; for it is commonly provided that the existing law of the United Kingdom shall continue to apply in relation to them as if they had not become republics. But it is of course of no avail for the English court to seek the aid of a bankruptcy court in the Commonwealth oversea if that court does not admit that it is British".

When the position is vice versa the same concerns hold true .

I accepted the Bahamian Court's holding of itself to be a British Court for the purposes of section 122 of the Act of 1914. That Imperial Act was found to have been saved in its

application to that country - its independence from Britain notwithstanding - by specific Bahamian legislation and by the operation of savings provisions in the Constitutional Order-in-Council of that country.

In my opinion, it is sufficient to have regard to the constitutional lineage both of the Bahamian Court and of this Court, to be satisfied that both can be regarded and treated as British Courts for the purposes of section 122 of the Bankruptcy Act of 1914.

In the interest of completeness, it is to be noted that the Act of 1914 has been repealed in Britain by the Insolvency Acts of 1985 and 1986. This repeal appears to have swept away section 122 of the Imperial Act of 1914, notwithstanding momentary savings of that section by section 235 (3) and Schedule 10 of the Insolvency Act 1985. See section 438 of the Insolvency Act 1986.

The mandate for universal assistance between Courts in bankruptcy (or insolvency) is preserved in the Insolvency Act 1986 by its section 426. This is subject to the need for Orders of the Secretary of State designating the relevant courts of foreign countries. That new regime however has no general applicability in or in relation to the Cayman Islands. This is notwithstanding that by one such designation Order – Statutory Instrument 2123 of 1986 (Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 - provision was made for assistance to be given by United Kingdom Courts to the Courts of the designated countries, including the Courts of the Bahamas and the Cayman Islands.

The lack of general applicability of the modern United Kingdom regime under the Insolvency Acts does not mean that this Court, which by virtue of the Imperial operation of the Act of 1914 (section 122) was empowered and enjoined to assist other British

Courts, is hampered in its ability to do so. On the preferred interpretation of the statutory provisions as taken above, the Bankruptcy Act of 1914 would continue to apply, either directly in its own right or through the equivalent and corresponding section 156 of the local Law.

There is a further and separate basis for concluding that the Act of 1914 still applies in these Islands. The repeal of section 122 in the United Kingdom notwithstanding, that section must be regarded as continuing to apply here by virtue of section 57 (1) of the Cayman Islands Constitution (which replaced similar provisions in the earlier Constitutions of 1962 and 1965) made by Order-in-Council pursuant to the powers delegated to Her Majesty under the West Indies Act of 1962:

> "57 (1) All Acts, ordinances, rules, regulations, orders and other instruments made under or having effect by virtue of the Order of 1965 and having effect as part of the law of the Islands immediately before the appointed day [(of this Constitutional Order; ie: 22 August 1972] shall on and after the appointed day have effect as if they had been made under or by virtue of this Constitution".

Thus, Acts of the British Parliament having effect as part of the law of the Islands before 22 August 1972 (as did the Act of 1914) shall continue to have effect by virtue of this Constitutional provision.

By reliance on subsection 122 of the Act of 1914 as Imperial legislation still applicable in the Cayman Islands; or by reliance on section 156 of the local law I determined to accede to the request of the Bahamian Court as coming from a British Court in bankruptcy.

The exercise of the powers

This Court is enjoined by section 122 of the Act of 1914 and section 156 of the local Law, to exercise "the like jurisdiction" in respect of the order of the Bahamian Court, as

it or the Bahamian Court could exercise in regard to similar matters within their respective jurisdictions.

This Court has not been requested by the Bahamian Court to exercise any of the powers which that Court itself exercises. My Order will therefore not purport to operate so as to subject the whole matter of the administration of the bankrupt's estate such as might exist in these Islands as being directly under the control of the Bahamian Court. This is not surprising, particularly because the assets in this jurisdiction are likely to be held within trusts which are governed by Cayman Islands law. Such matters in controversy as might arise in relation to those trusts can obviously only be decided in this country. The request is in more general terms, that the trustee be vested with such powers as are allowed under Cayman Islands law in the discretion of this Court.

Accordingly, I decided in the exercise of the vested powers and discretion, that the provisions of the Cayman Islands bankruptcy law will govern the conduct of the trustee in this jurisdiction and in particular, the Clerk of Courts who is our official Trustee-in-Bankruptcy will act as the auxiliary officer of the trustee. To that end paragraph 2 of my order provides that:

> "(The trustee) be granted all general law powers and the statutory powers accorded to a trustee in bankruptcy in this jurisdiction and, in particular, that he be granted the powers under section 107 of the Bankruptcy Law (1997 Revision)".

The inherent jurisdiction

Quite apart from the statutory scheme, this Court has inherent common law powers to recognise and enforce the appointment of a foreign trustee-in-bankruptcy for the purposes of bringing into the estate, the assets of a bankrupt which may exist in this jurisdiction.

These are powers which have been acknowledged and invoked by this Court in the past in analogous circumstances. See Blum v Bruce Campbell & Co. 1992 -93 CILR 591 and Gray v Royal Bank of Canada 1997 CILR note 10 (and written judgment in Cause 109/97 Grand Court; 28 March 1992).

Those cases recognised the principles of Didishiem's case [1900] 2 Ch. 15; in which Lindley M.R. at page 51 stated the principle as based upon the doctrines of obligation and comity as between the Courts of friendly States:

> "On general principles of private international law, the courts of this country are bound to recognise the authority conferred on (the foreign appointee) unless (equivalent) proceedings in this country prevent them from doing so".

See also Kilderkin v Player 1984 CILR 63 for the analogous treatment of the subject of recognition of a foreign receiver, at common law; page 81 - 83, 99 103, line 15.

The common law principles require me to be satisfied that the bankrupt was subject to the jurisdiction of the Bahamian Court and that that Court would be prepared reciprocally to recognise and enforce similar orders of this Court. Both of those matters are satisfactorily addressed in the written judgment and Order of Lyons J. of the Bahamian Court (above).

The Orders I make in recognition and enforcement of the Orders of the Bahamian Court appointing the trustee are made, in reliance also upon this inherent jurisdiction of the Court.

Anthony Smellie
Chief Justice
Dated the 27th March 2002

GRAND COURT CAYMAN ISLANDS