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IN THE GRAND COURT OF THE CAYMAN ISLANDS

AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO 93 OF 1992

IN THE MATTER OF OMNI SECURITIES LTD (IN LIQUIDATION)
and

IN THE MATTER OF SECTIONS 126 AND 127 OF THE COMPANIES LAW (1995 REVISION)

For the Applicant: Mr. Alan Turner
For the Respondents: Mr. Nigel Clifford

HARRE C. J. JUDGMENT

On the 11th May 1995 this Court ordered that the resident partner or partners or other officers of Deloitte & Touche of George Town, Grand Cayman, the former auditors of Omni Securities Limited ("the Company") for the years 1988, 1989 and 1990 attend before the Court to be examined upon oath concerning the affairs, dealings, estate or effects of that company and produce all books, audit working papers, permanent files, original compilations, computations, accounts, papers, writings and

other documents in their custody or power relating to the audits of the company for those years.

The summons with which I now deal seeks a discharge of that order or, alternatively, that it be varied so as to relieve the respondents from any obligation to produce audit working papers or any other documents relating to the audits.

The Order of the 11th May was made under section 126 of the Companies Law and in support of the application for the order affidavit evidence was given by Mr. Christopher D. Johnson, the Managing partner of Coopers and Lybrand, Chartered Accountants of George Town. He is one of the Joint Liquidators. He says that Deloitte, Haskins & Sells (now Deloitte & Touche) were the auditors of the company until it was wound up and that the final audit report of Deloitte and Touche relating to the company is dated 16th August 1991, and appears to have been prepared by Deloitte & Touche A.G. of Switzerland. It is the view of Mr. Johnson that in the light of the radical change in the fortunes of the company between the end of 1989 and the end of 1990 it is incumbent upon the liquidators to analyze the financial

statements of the company, to assess its financial position at the time various loans were made to it and the information which was available to the auditors regarding the recoverability of these loans. To do this, he says, it is necessary to have the oral and documentary evidence which was sought by the summons in the interest of the orderly and efficient winding up of the company.

Affidavit evidence in reply was given by Mr. Richard Douglas, a partner of Deloitte and Touche, George Town. He describes the audit arrangements relating to the company as follows. Although it was incorporated in the Cayman Islands the overall accounting records were maintained in Switzerland and the audit work relating to the financial statements was performed by Deloitte & Touche A.G., Zurich. It was, however, the wish of the management of the company that its audit report should be signed by a Cayman Islands audit firm and, accordingly, arrangements were made between the Cayman and Zurich firms in relation to the 1988 and 1989 year ends to the effect that Deloitte & Touche, Zurich would audit the operations of the company and Deloitte and Touche Cayman would issue the audit report on its financial statements based on the work carried out in Switzerland. The

responsibilities of Deloitte and Touche, Cayman, were simply to review the local statutory records and draft audited financial statements to be provided by Deloitte and Touche, Zurich, identify suggested changes or additional disclosures and produce the final audited statements. So, in the view of Mr. Douglas, Deloitte & Touche, Cayman, was entitled to assume that Deloitte & Touche Zurich which was part of the same international network of member firms, had complied with the auditing requirements of member firms.

For the year 1990, the financial statements of the company were audited by Deloitte & Touche, Zurich, and the audit report for that year was signed by that firm.

On the basis of that evidence it is averred that it is clearly not appropriate to seek information from Deloitte and Touche, Cayman.

There are also issues of material non-disclosure and conflict of interest. The non-disclosure alleged is that Coopers & Lybrand have been involved in audit functions within the group of which the company forms part. In December 1989 the United Kingdom firm associated with

Deloitte Haskins & Sells joined with Coopers and Lybrand in the UK. This resulted in work being done for the Omni Group being taken on by the new Coopers and Lybrand merged firm in the UK. It was suggested that involvement in the underlying audit work by a firm or firms with which the liquidators of the company may have some relationship or connection could well give rise to a conflict of interest or at the very least be relevant to the question of whether the liquidators should be entitled to obtain the information sought, particularly in the light of related litigation in Switzerland and the Cayman Islands. In respect of the Swiss proceedings it is claimed that it appears that under Cayman Islands Law the documents sought by the summons could not properly be obtained through letters rogatory and in relation to the Cayman Islands proceedings it is claimed that the liquidators are seeking to embark upon a fishing expedition to obtain evidence from the respondents possibly to be used against them in circumstances where there may otherwise be no case.

Issue is joined in Mr. Johnson's affidavit in response to these matters with regard to the respective roles of the Cayman and Swiss auditors. His view is that Deloitte and Touche, Cayman Islands, were the primary

auditors of the company and Deloitte & Touche, Zurich, the secondary auditors. He says that it is not unusual in the Cayman Islands for the primary auditor to appoint secondary auditors as a large number of Cayman companies are subsidiaries or affiliates of overseas companies and it is often necessary to do this to assist the primary auditors with their functions. Consequently the inquiries which Deloitte & Touche, Cayman, were under a duty to make would have resulted in the partners or staff of Deloitte & Touche, Cayman, obtaining knowledge about the financial position and certain of the transactions of the company.

I do not need to go into the intricacies of auditing practice. The question is whether the liquidators are entitled to call for such evidence as Deloitte and Touche may have in their possession on the basis of the legal principles which I shall seek to analyze. Having done so I shall return in more detail to the evidence on the specific issues.

Section 126 of the Companies Law (1995 Revision) follows the wording of section 268 of the English Companies Act 1948, and the parties agree that the principles expressed in the following passages from the speech

of Lord Slynn of Hadley in British and Commonwealth Holdings plc v. Spicer & Oppenheim (1993) BCLC 168 at 176 apply

> "In my opinion, although there may be some difference in the wording of these sections, the position under s 236 of the Insolvency Act 1986 is broadly the same as that under s 268 of the Companies Act 1948 as explained by Buckley J in Re Rolls Razor Ltd [1968] 3 All ER 698 at 700, in a passage subsequently approved by the Court of Appeal in Re Esal (Commodities) Ltd [1989] BCLC 59 at page 64:
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> > 'The powers conferred by s 268 are powers directed to enabling the court to help a liquidator to discover the truth of the circumstances in connection with the affairs of the company, information of trading, dealings, and so forth, in order that the liquidator may be able, as effectively as possible and, I think, with as little expense as possible ... to complete his function as liquidator, to put the affairs of the company in order and to carry out the liquidation in all its various aspects, including, of course, the getting in of any assets of the company available in the liquidation. It is, therefore, appropriate for the liquidator, when he thinks that he may be under duty to try to recover something from some officer or employee of a company, or some other person who is, in some way, concerned with the company's affairs, to be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim.' "...
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> "As Megarry J said in Re Rolls Razor Ltd (No 2) [1969] 3 All ER 1386 at 1396-1397, [1970] Ch 576 at 591-592:
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> > 'The process under s 268 is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a

> stranger to the affairs of a company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses, and the ordinary standards of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding-up. The process, borrowed from the law of bankruptcy, can only be described as being sui generis.'

I am therefore of the opinion that the power of the Court to make an order under s 236 is not limited to documents which can be said to be needed 'to reconstitute the state of the company's knowledge' even if that may be one of the purposes most clearly justifying the making of an order.

At the same time it is plain that this is an extraordinary power and that the discretion must be exercised after a careful balancing of the factors involved: On the one hand the reasonable requirements of the administrator to carry out his task, on the other the need to avoid making an order which is wholly unreasonable, unnecessary of 'oppressive' to the person concerned. The latter was stressed by Bowen LJ in *Re North Australian Territory Co* (1890) 45 Ch D 87 at 93:

> 'That is an inquisitorial power, which may work with great severity against third persons, and it seems to me to be obvious that such a section ought to be used with the greatest care, so as not unnecessarily to put in motion the machinery of justice when it is not wanted, or to put it in motion at a stage when it is not clear that it is wanted, and certainly not to put it in motion if unnecessary mischief is going to be done or hardship inflicted upon the third person who is called upon to appear and give information.'
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> ... the applicant must satisfy the Court that, after balancing all the relevant factors, there is a proper case for such an order to be made. The proper case is one where the administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements. An application is not necessarily unreasonable because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee of or a contractor with the company in administration, but all these will be relevant factors, together no doubt with many others..".

Among these factors are the following, which were referred to by Ralph Gibson LJ in the Court of Appeal in the British and Commonwealth Holdings case (see (1992) BCC 172 at 184.) -

> "(a) The case for making an order against an officer or former officer of the company will usually be stronger than it would against a third party because officers owe a fiduciary duty to the company and they are under a statutory duty (s. 235 of the 1986 Act) to assist the office holder.

(b) If, by giving the information sought, a third party risks exposing himself to liability, that involves an element of oppression: per Sir Nicolas Browne-Wilkinson V-C in *Cloverbay* at p. 420F.

(C) If someone is suspected of wrongdoing, and in particular fraud, it is oppressive to require him to prove the case against himself on oath before any proceedings are brought: per Sir Nicolas Browne-Wilkinson V-C in *Cloverbay* at p. 421.".

I now deal with each of the issues presented in support of the application to set aside or vary the order -

1. Should the application have been made ex -parte ?

In Re Maxwell Communications Corporation plc Homan v Vogel (1994) BCC 741 Vinelott J made the following observations about an ex parte application under S. 236 of the Insolvency Act 1986 -

"In many if not in most cases where application is made under s 236, the circumstances do justify the making of the application ex parte and without notice to the person against whom the order is sought. It is not infrequently the case that it is apparent when the application is made that documents which fall clearly within s. 236 will not be produced voluntarily and there may be good reasons for insisting on the confidentiality of the statement by the office-holder in support of the application. It is not infrequently the case that the production of documents is urgently required and that the delay in obtaining an inter partes hearing or in giving notice to the person affected would unduly hamper the office-holder's task. There are cases, though less frequent, where notice in advance of the service of the order might lead to the disappearance of the documents which the office-holder wishes to inspect.

However, an application under s 236 must not be seen as an all embracing exception from the general rule

> that a person is entitled to be heard before an order of the court is made against him, more particularly if it is a mandatory order requiring the production of documents. Some good reason must be shown justifying an application ex parte.".

There was not such an issue of urgency or confidentiality as to justify the ex parte application here. It is clear from the correspondence between the parties and their advisers between October 1994 and February 1995 that what the liquidators sought was known, and that disclosure would be resisted. The summons was filed on 21st April and came on for hearing on 11th May. There was no question of the documents in the hands of Deloitte & Touche disappearing.

I think, nevertheless, that the liquidators had some basis for a reasonable belief that an ex parte application was the correct course. There are numerous examples to be found in comparable cases where it has been adopted. It is a matter to be considered in any argument about costs.

2. Material non-disclosure and conflict of interest.

I need to refer at some length to the affidavit evidence of Mr. Johnson. The Mr. Cuttler to whom he makes reference was described in the affidavit of Mr. Douglas as being a partner in Deloitte Haskins and Sells who had

formerly done work relating to the Omni group in Switzerland. Mr.

Johnson says this -

> "Concerning the allegations of conflict of interest in Mr. Douglas's affidavit, I spoke to Mr. Hansjorg Sonderreger who is a partner of Coopers & Lybrand and is based in the offices of Coopers & Lybrand in Basel, Switzerland. He has advised me and I verily believe that Michael Cuttler presently works for Coopers & Lybrand, London (formerly Coopers & Lybrand, Deloitte). He has also advised me that certain companies in which Werner K. Rey had an interest were audited by the firm of Coopers & Lybrand, Deloitte for the year ending 31st December, 1989. However, I can advise this honourable court as follows:-
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> (a) That the Company has never been audited by Coopers & Lybrand or Coopers & Lybrand, Deloitte. The relevant audits of the Company were performed by D & T Cayman Islands or its agent D & T Zurich.
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> (b) As far as Mr. Dinan and I are aware none of the companies in the Werner K. Rey group which were audited by Coopers & Lybrand, Deloitte were involved in any transactions involving the Company.
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> In view of the above facts Mr. Dinan and I do not feel in any way constrained from continuing to act as joint liquidators of the Company and I would advise this honourable court that our objectivity in winding up the affairs of the Company will be in no way affected by the fact that Coopers & Lybrand, Deloitte audited other companies in which Werner K. Rey had an interest. I can also advise this honourable court that if during the course of the liquidation of the Company genuine conflict of interest arises which would prevent Mr. Dinan and I carrying out our functions impartially this will immediately be brought by us to the attention of this honourable court. I should also advise this honourable court that until I read Mr. Douglas affidavit I had no knowledge of Mr. Cuttler's involvement in the audits of other companies in which Werner K. Rey had an interest.
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> Mr. Douglas suggests in paragraph 4 of his affidavit that I should have advised this honourable court of the criminal proceedings in Switzerland against Werner K. Rey and the threat of civil proceedings

> in Switzerland against D& T Zurich. I would respectfully submit to this honourable court that it is wrong to suggest that my failure to mention the Swiss criminal proceedings or the alleged intentions of the liquidators of Omni Holding A.G. concerning D&T Zurich constitutes a material non-disclosure. I know very little about the criminal proceedings against Mr. Rey beyond the fact that such proceedings have been commenced. I also know little about the intentions of the liquidators of Omni Holding A.G. in Switzerland concerning D&T Zurich. In any event these proceedings or intended proceedings are of no relevance to the present application as the present application is not intended to obtain information which could be used in Swiss proceedings against D&T Zurich. The reasons for the present application are clearly stated in my affidavit of 21st April, 1995. The sole concern of myself and Mr. Dinan is to investigate the affairs of the Company and we are not concerned with any proceedings which may or may not be raised in Switzerland against D&T Zurich. We are certainly not involved in any "scheme" as alleged by Mr. Douglas to obtain documents for the purposes of proceedings in Switzerland."

Mr. Johnson goes on to deny that he and his fellow liquidators are engaged in a "fishing expedition" in relation to Cayman proceedings against the respondent and to aver that their application is necessary because -

> "there are many transactions of the Company which are difficult to understand merely from the records of the Company. Also, the collapse of the Company raises many serious questions about certain of its investments which will require full investigation. It is hoped that the audit working papers held by D&T Cayman Islands and the evidence of D& T Cayman Islands will throw some light on certain transactions of the Company which Mr. Dinan and I based on the information we have available presently have difficulty fully understanding."

The liquidators are officers of the Court. They have duties to the creditors and shareholders and to the Court to make themselves acquainted with the company's affairs and to ascertain the exact truth with regard to them.

This is a liquidation which constitutes a part of a complex web of interrelated companies. It is a major affair with a place quite high in the league of international financial disasters. Firms of accountants who deal with audits, and liquidators in relation to these matters, are an exclusive band who also operate within a web of interlocking entities. Potential for conflict of interest is high. Liquidators in this class of business must be relied on to apply for the guidance of the court where a serious conflict arises. That is precisely what Mr. Johnson undertakes that they will do, and I accept that undertaking from the liquidators as Officers of the Court.

In my view Mr. Johnson has in his evidence sufficiently answered the objections to the order which was obtained ex-parte and I decline to discharge or vary it.

I will hear any submissions as to costs of this application at a convenient time.

6th May 1997

G. E. Harre
Chief Justice