2.11.95

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 446/94

BETWEEN:	MARADA GLOBAL CORPORATION	PLAINTIFF
AND:	MARADA CORPORATION LTD ET AL	DEFENDANTS

For the first defendant: Mrs. S. Corbett
For the plaintiff: Mr. A. McLaughlin

BEFORE HARRE CJ

JUDGMENT

This is an application by the first defendant ("Marada Corporation") to strike out the claim of the plaintiff ("Marada Global") as an abuse of the process of the court and, subject to any counterclaim, to dismiss the action.

On 16th November 1994 a United States District Court ordered the appointment of a receiver to manage the assets of Marada Global and others on the application of the Securities and Exchange Commission ("SEC"). Among the powers of the receiver was power, on obtaining the permission of the court, to institute any action deemed necessary and appropriate.

A further order was made by the US District Judge on 21st December

1994. It authorised the receiver to intervene in an interpleader summons relating to funds held by a Cayman Bank in which the competing parties were Marada Corporation and the SEC and to file an independent action here to obtain an injunction preventing dissipation of those funds.

Cayman proceedings were filed on 21st December 1994. They claim money had and received by Marada Corporation to the use of Marada Global or alternatively money payable on demand for money lent.

These proceedings are attacked on the following grounds -

1. the receiver was not authorised by the United States Court to commence this action at the time when he did so.

2. the receiver has not made an application in Cayman for recognition and would not succeed if he did so, as the proceedings are designed to give extraterritorial effect to the penal law of a foreign jurisdiction.

Evidence has been filed for Marada Global in the form of an affidavit by its American attorney, Mr. Wiggins. He traces the involvement of the SEC in this matter in support of the argument that the receiver is acting at its instigation and for its interest and that the SEC abandoned its claim in the interpleader proceedings before this court because the receiver appointed in Florida at its request was seeking indirectly in the present proceedings what the SEC had originally sought directly, namely "disgorgement" or repatriation of moneys in

the Marada Global account.

At this point I can refer to the following principles quite briefly. They are well established here and are not in dispute.

(i) this court has the same jurisdiction to recognise the Receiver appointed by a foreign court as is exercised by English courts (see Canadian Arab Finance Corporation and Kilderkin Investments Ltd v. Player 1984 CILR 63;

(ii) even if the Court is satisfied that there is a sufficient connection between the company over whose assets the Receiver has been appointed and the Court of the foreign jurisdiction, the Receiver will not be recognised if the effect of his recognition would be to give effect to penal laws of the jurisdiction concerned (see Stutts v. Premier Benefit Trust 1992 -3 CILR 605.

(iii) whether the foreign law concerned regards the law to be enforced as penal is irrelevant; that is a matter for the Court which is being asked to enforce the law (see Huntingdon & Attrill (1893) A.C. 150);

My task is to apply these principles to the facts of this case, and I consider first the nature of the Florida proceedings. They are described in an affidavit by Mr. Wiggins, in his capacity as the attorney for the defendants in those proceedings. Among those

defendants is Marada Global, the present plaintiff.

The complaint by the SEC in the Florida proceedings alleges violations of the United States Securities Act 1933 and the United States Securities Exchange Act 1934 and claims, among other things, disgorgement of the profits of the alleged fraudulent activities of the Florida defendants.

The terms in which relief was requested by the SEC satisfies me that those were proceedings of a kind which would not provide a basis for the recognition of a receiver in the Cayman Islands: See Stutts v. Premier Benefit Trust 1992-93 CILR 605. There is a request for a declaration that violations of federal securities laws were committed, for various restraints against further violations, an accounting and disgorgement "to effect the remedial purposes of the federal securities laws" an order for payment of civil fines and penalties and a freezing of assets "except that such freeze of assets not be applicable to any receiver appointed by the court."

However, the receiver was not appointed on those applications. That was done pursuant to a subsequent motion of the SEC on 16th November 1994. The SEC requested that the court appoint the receiver to manage the defendant's assets and to prevent their dissipation. Contempt of previous orders was alleged and it was submitted that the appointment was needed to act in the investors' best interests, with specific reference to the funds in the Cayman bank account. The Court gave its reasons for acceding to the request for a receiver. They were these -

"It is well settled that the Securities and Exchange Commission can seek the appointment of a receiver in an injunctive action. See e.g. Securities and Exchange Commission v. First Financial Group of Texas 645 F. 201 (429, 438 (5 Cir 1981); Securities and Exchange Commission v. Florida Bank Fund Inc. 1978 WL 1131 (M.D. Fla. 1978) A court has discretion to make such an appointment. First Financial Group 645 F. 2d at 438. Courts have considered various factors in determining when the appointment of a receiver is appropriate. A court may appoint a receiver when the interests of public investors are in substantial jeopardy or when the appointment is necessary to prevent a diversion or waste of assets. Securities and Exchange Commission v. R.J. Allen & Associates Inc. 386 F. Supp. 866, 878, (S.D. Fla. 1974). A court may also appoint a receiver to preserve the status quo or to make assessment of various transactions undertaken by the party that will be placed in receivership. Securities and Exchange Commission v. Manor Nursing Centres Inc. 458 F. 2d 1082, 1104 (2d Cir. 1972); see also Commodity Futures Trading Commission v. American Metals Exchange Corp., 991 F. 2d 71 (3d. Cir. 1993); Florida Bank Fund Inc. 1978 WL 1131. The court hereby adopts and incorporates by reference its findings of fact and conclusions of law set forth in the preliminary injunction order entered herein on October 18, 1994 (Dkt. #75). Based on these findings and upon the representations of the parties at the October 25, 1994 hearing on the motion for appointment of receiver, it appears that the funds of investors in the Marada entities are in jeopardy. Various principals of the Marada entities have committed numerous

securities law violations, and a receiver is necessary to ensure that funds of investors remain protected. It further appears that Defendants have made attempts to withdraw investor funds from bank accounts in which the funds are deposited, in violation of the Court's Temporary Restraining Order. Additionally, the record herein does not clearly set forth the amount of funds collected from investors and the locations of all the funds. The appointment of a receiver is necessary to assure the securing of an accurate accounting of the funds."

This analysis lends some support to the argument on behalf of Marada Global that notwithstanding the origins of the Florida proceedings with the SEC the present proceedings are severable and not within the rule prohibiting a court from executing the penal judgments of a foreign court. See Raulin v. Fischer (1911) 2 KB 93. Moreover, I have already mentioned the position of the SEC in the Cayman interpleader proceedings, Cause No. 353 of 1994. An order by this Court in that matter was made on 22nd December 1994 pursuant to which the issues between Marada Global Corporation and numerous investors who were defendants in Cause no. 353 are to be decided in Cause No. 446 of 1994. On that basis the SEC did not seek to pursue its claim in the interpleader proceedings.

In relation to those matters, the case of Marada Corporation in the present application is succinctly put in the affidavit of Mr. Wiggins. It is this -

> "These events give rise to the clear and inescapable inference that the SEC abandoned its claim to the money in the Marada-Cayman account before this court because the Receiver appointed in Florida at its request was seeking recovery of the money in the present proceedings, thereby achieving indirectly what the SEC had initially sought directly, namely "disgorgement" or repatriation of the monies in the Marada-Cayman account to Florida.... [the] proceedings are in reality an attempt by the SEC through its Receiver to achieve repatriation of the money formerly held in the Marada [Corporation] account. Although brought in the name of Marada Global as a claim for money had and received and/or repayment of a loan, the action has been initiated by the Receiver (who was appointed on the application of the SEC) as simply another means of attempting to claim the money formerly held in the Butterfield account of Marada [Corporation] to compensate allegedly defrauded investors in the United States. This, in essence, is an attempt at enforcement of U.S. Securities Laws in this jurisdiction. I, therefore, respectfully ask that this action be struck out as an abuse of the process of the court."

It is not asserted that there is, on the face of the pleaded claim, no cause of action. The real issue is whether the action has been brought on proper authority of the plaintiff company. The assumption has been made that the attorneys for the company are acting on the instructions of the receiver. They have declined to reveal by whom they are instructed but say simply that they are satisfied that they are properly instructed. The receiver has not applied for recognition here. The key to the decision which I shall make lies, in my view in the terms of the further order of the US District Court dated 16th February 1995 which is exhibited to the affidavit of the receiver dated 17th February. That order authorises an action in the name of Marada Global in the following terms -

"A receiver appointed by a court upon request of the SEC serves as an officer of the court and the court sets forth powers which the receivers may exercise. See Securities and Exchange Commission v. Elliot 953 F 2d 1560 (11th Cir. 1992). Ordinarily, a receiver which is granted the power to manage a corporation in receivership, stands in the shoes of management and can direct litigation of the corporation. Securities & Exchange Commission v. Spence & Green 61 F. 2d 896, 903 (5th Cir. 1980). In the instant case, the court, in its November 16, 1994 Order appointing the Receiver, predicated the Receiver's right to pursue litigation upon receipt of the Court's permission. Pursuant to the Receiver's "Emergency Motion for Authorisation and for Directions" (Dkt. 112), the Court entered its December 321, 1994 Order granting the Receiver permission to maintain its action in the Cayman Islands. The Court finds, therefore, that the Receiver can maintain the Cayman Islands action against Marada Corporation Ltd, to recover debts which Marada Corporation, Ltd. allegedly owes to Marada.

The Court further finds its appropriate to provide clarification of its December 21, 1994 Order in accordance with the Receiver's Motion for Clarification. The Receiver, in its Emergency Motion for authorisation, requested that the Court allow the Receiver to pursue the Cayman Islands action on behalf of Marada, its creditors and its investors, to "prevent the release or dissipation of the funds to anyone other than the Receiver." The Court granted that relief in its December 21, 1994 Order. Accordingly, the Court clarifies that pursuant to that Order, the Receiver is authorised to maintain the Cayman Islands action in the name of Marada to recover debts owed to Marada and that such action is for the protection and benefit of Marada, its investors and its creditors.

The Court further notes that the Receiver, in its Emergency Motion for Authorisation asked that the Court permit it to pursue recovery of funds only for the benefit of Marada and its investors and creditors. Therefore, by granting the Receiver's Motion, the Court provided no authorisation for the Receiver to recover funds for distribution to the SEC."

The power to stand in the shoes of management and direct litigation of a corporation goes beyond which I understand to be the position of a receiver and manager in Cayman. However, in neither case does the receiver sue in his own name. The suit is brought in the name of the person having the title to recover.

In US v. Inkley (1989) Q.B. 255 the Court of Appeal set out, on the basis of consideration of earlier cases which were cited to me, and others, the following propositions -

> "(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."

This case is a case brought by a corporate plaintiff seeking legal

remedies well recognised by the laws of the Cayman Islands. The United States receiver has been given power by a court there to "stand in the shoes of management" to maintain an action in the name of the plaintiff company and for the protection and benefit of the company and its investors and creditors. These would be the purposes of any private corporate plaintiff.

Although the disgorgement provisions of the United States Securities Act 1933 and Securities Exchange Act 1934 have been found by this Court to be penal in nature - see Stutts v. Premier Benefit Trust 1992-3 CILR 605, and the SEC is the regulatory agency charged with the primary responsibilities of enforcing those Acts and was the instigator of the proceedings which led to the appointment of the receiver this is now a claim by a corporation asserting a good arguable case in respect of rights which are available to any private litigant. It is not the enforcement of a sanction or power at the instance of the state in its sovereign capacity. It is noteworthy too that the undertaking was given by the receiver in Stutts v. Premier Benefit Trust that assets recovered in the Cayman action would be applied in the disgorgement proceedings to compensate investors. In the present proceedings the application of funds recovered is a matter with which the US Court itself has dealt as part of the terms of the receivership. That, in my judgment, is an important distinction.

For these reasons, and applying the criteria set out in the passage from the US v. Inkley to which I have referred, and in particular points (3) and (4) I conclude that the application of the first

defendant that the plaintiff's claim be struck out on the ground that it is an abuse of process of the Court and that the action be dismissed, fails.

Costs will follow the event.

Dated 2nd November 1995

G.E. Harre

Chief Justice

GRAND COURT CAYMAN ISLANDS

Doc# 513