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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 83/94

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

AND

IN THE MATTER OF ORDER 70 OF THE RULES OF THE SUPREME COURT

AND

IN THE MATTER OF A CIVIL ACTION NOW PROCEEDING BEFORE THE ONTARIO SECURITIES COMMISSION, TORONTO, CANADA

Mr. Huw Moses (with him Mr. Thomas Lockwood Q.C. and Mr. Shaun Devlin counsel for the Ontario Securities commission, present)

Mr. Andrew Jones for the applicants Terrence Edward Robinson and Peter Jeffery Robinsion

BEFORE SMELLIE J

RULING

The applicants, who are parties to the Ontario proceedings, seek the discharge of the Order made by this court on the 14th April, 1994, in furtherance of a letter of request sent to this court by the Ontario Securities Commission. (the "OSC")

Should they succeed in so doing, further directions to the OSC would be necessary for the return and preservation of the evidence already obtained and sent pursuant to a commission rogatory held in furtherance of the Order of 14.4.94, and pending any further request from the OSC which may be made for that evidence.

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Two main arguments have been advanced on behalf of the applicants seeking to discharge the Order.

The first is that the letter of request did not emanate from a foreign court as is required by the Evidence (Proceedings in other jurisdictions) (Cayman Islands) Order 1978 and that therefore this court had no jurisdiction to make the order of the 14th April 1994.

The second is that the OSC, on seeking the ex parte order of the 14th April 1994, failed to make full and frank disclosure of relevant facts at the time of the application and that the Court was misled as to the true facts, operated on a misapprehension of the facts and that their failure in that regard is sufficient reason to set aside the order so obtained.

The first argument depends on what view is taken of all the evidence now before this court in respect of the genesis of the letter of request within the offices of the OSC.

Mr. Shaun Devlin, counsel on the staff of the OSC, gave oral evidence upon the present application, further to affidavits which he had sworn and which had been filed on behalf of the OSC generally in these proceedings.

The Court is indebted to Mr. Devlin for the full and frank evidence which he gave on oath.

Because of that evidence, the genesis of the letter of request within the OSC and the manner in which it came to purport to emanate as a letter of request from the OSC acting in its quasi-judicial capacity, has now been more fully explained.

The letter of request is signed by Mr. Edward Waitzer, the Chairman of the OSC.

It recites, among other things, that the hearing being conducted into

the alleged regulatory breaches were "currently ongoing before the Commission".

In granting the order of 14th April, 1994, this court was of the impression, gleaned in part from the letter rogatory itself and in part from representations in affidavit evidence and from Counsel, that the OSC was itself constituted as the tribunal for the purposes of that hearing. And from all that, the further impression was left that the Chairman of the OSC Mr. Waitzer, presided, qua chairman, as a member of the tribunal so constituted.

From the earlier evidence it had been explained that the OSC exercised various statutory functions, including regulatory, quasi-judicial and investigatory functions. But that explanation did not serve to correct the impression of the OSC itself constituting the tribunal.

It is now explained that the tribunal is constituted, not in that manner, but instead by a panel of two or more (in this case three) members of the OSC appointed to hear the particular matter.

Moreover, the three Commissioners on this panel do not include the Chairman of the OSC, Mr. Waitzer.

Instead, it is now clear that Mr. Waitzer, in signing and issuing the letter of request, did so entirely in an administrative manner and capacity.

This is now clarified by the evidence of Mr. Devlin, in which he explained that he attended before Mr. Waitzer, on behalf of the staff of the Commission, to obtain the issuance of the letter of request.

In his experience, this was to be the first application of its kind made on behalf of the staff.

He elected to apply to the Chairman of the Commission and not to the panel convened to hear the matter, for two reasons.

The first was his concern that an application to the panel would have involved disclosing to the panel his belief, and the reasons for it, that one or other of the parties before it (the applicants on the present summons) had an interest in certain Cayman companies which were to be the subject of the commission rogatory in these Islands.

That disclosure, he was concerned, might have given rise to a complaint that the panel had been prejudiced by his application.

His second main reason was the view taken by the staff that the Chairman, (who was vested with statutory powers to issue summons and to do so administratively as a procedural facility to the functions of the OSC) was, by analogy, the proper authority to issue the letter of request, in any event.

From that background one can well understand how Mr. Devlin, as counsel on the staff of the OSC, would have been persuaded to the view he took, as a matter of OSC internal practice.

This is especially so as it seems he had no statutory provision or procedural precedent directly on point to guide him.

As a matter of Cayman Law however, this court has no jurisdiction to act in furtherance of a foreign letter of request unless it emanates from the foreign Court itself. That is, to adapt the words of section 9 (1) of the 1978 Evidence Order, unless it is made "by or on behalf of" the foreign court.

Here, the commission panel which constituted the tribunal were not aware that the request was being issued by Mr. Waitzer and, indeed, entirely unaware of the proceedings it triggered in these Islands. This was so until evidence, garnered by the commission rogatory appointed by this Court, was placed before it, seeking admission in Toronto.

Mr. Devlin explained that he had simply attended on Mr. Waitzer at the latter's office at the OSC and where he explained to him the Staff's veiws, that the Cayman evidence would be important to the Staff's case being then presented before the commission panel.

That "application" lasted some five or so minutes. No record was made of it.

It is plain that acting as he then did, Mr. Waitzer exercised no judicial or quasi-judicial authority and, not being a member of the commission panel, he was, as a matter of fact, not then purportedly acting on its behalf.

In reality, the letter of request, as it emanated from Mr. Waitzer's office and pen, was entirely a request being made on behalf of the staff of the OSC acting in its investigatory capacity and as one only of the parties before the commission panel.

The jurisdictional difficulties raised in this Court, by that manner of the genesis of the letter of request, has been brought to the attention of the commission panel.

This is apparent from a letter dated 17th June, 1994, signed by the Secretary to the OSC and written on behalf of the commission panel. It is plain from the terms of that letter that it was intended to be brought to the attention of this Court.

Paragraphs (iii) and (iv) are of particular significance in the context of the present application and para (iii) is specifically relied upon by Counsel for the OSC in his submissions to this Court in opposition to the present application.

Paragraphs (iii) and iv) read as follows:

> "(iii) While it does not express an opinion with respect to Cayman Law, the Commission Panel is of the view that it was not necessary

for staff of the Commission to have the Request for International Judicial Assistance to take Depositions signed by the Commission Panel in the Robinson hearing".

" (iv) On the assumption that the Grand Court of the Cayman Islands will hear and decide the application by certain of the respondents for an order vacating the previous order of the Grand Court prior to the resumption of the Robinson hearing, the Commission Panel proposes to await the decision of the Grand Court before deciding on whether to admit the relevant transcript and documents. If it appears that the issues before the Grand Court will not be resolved before the Robinson hearing resumes, the Commission Panel will reconsider the timing of its decision".

Paragraph (iv) is clearly written and must be accepted in recognition of the highest traditions of judicial comity and signals the full understanding of the Commission Panel of the jurisdictional issues arising from the present applicaton before this Court.

This Court accepts the reassurance it offers that any directions for the recall of the evidence, necessitated by a finding that this Court had no jurisdiction to make the order of 14th April, 1994, will be honoured.

As to paragraph (iii) of the letter, Counsel for the OSC invites a certain construction of it in order to arrive at the conclusion, ex post facto, that Mr. Waitzer, in signing and issuing the letter of request, did so" on behalf of" the Commission Panel.

The construction which he seeks to advance is that the commission

panel, as a matter of Canadian law, is now content to regard the letter of request as its own, as having been sent on its behalf and for those purposes to treat it as being, retrospectively, a valid letter of request.

That construction could only be taken, with some liberty, from what is written. Even if it fairly arises by implication, I must also decide, as a matter of Cayman law, whether this Court should accept the premise it presents as a proper one on which to base a finding, at this stage, that jurisdiction was properly vested on the 14th April, 1994 when the order was made.

Mr. Moses has also urged that I refer back to the commission panel to clarify any remaining doubt as to the construction of paragraph (iii). I accept that in an appropriate case this Court has the power and should do so as a matter of comity to afford the requesting Court the opportunity to explain any aspect of the request which is in doubt. (See **American Express Warehousing Ltd. and Doe** [1967] 1 Lloyds **Pgs. 222** and the notes to Order 70 rule 1-6/2 of the Rules of the Supreme Court).

However, in light of the conclusions to which I have come, that reference back would not be appropriate in this case. For even if the commission panel confirms the construction being advanced, that, to my mind, would not provide an acceptable premise on which to found the jurisdiction of this Court.

That jurisdiction was a prerequisite to the making of the order of the 14th April, 1994. It might not be vested retrospectively and certainly not by virtue of the view now being taken by the commission panel of what occurred, without its knowledge or consent, upon the issuance of the letter of request by the Chairman of the OSC.

I have already noted that this court has no jurisdiction to make an order in furtherance of a letter of request unless that request is made by or on behalf of a foreign court or tribunal.

The incontrovertible fact, now made plain from Mr. Devlin's evidence, is that the request, issued by the Chairman, was not such a request.

The willingness and duty of this court to assist the commission panel, are subject to there being jurisdiction to do so.

As the matter stands, the order of 14th April, 1994 was procured irregularly. Although I accept that this was without a full understanding of what, by Cayman law, was required to found jurisdiction in this Court, there can be no snatching at jurisdiction.

Either it existed or it did not and, on the present facts, it plainly did not.

The order must be discharged and consequential orders for the repatriation of the evidence within the custody of this Court, to be dealt with in accordance with the further directions of this Court,

must also be made.

As to the terms of those orders, I will hear the further submissions of counsel.

The further submissions made on behalf of the applicants, in particular to the effect that the OSC has been guilty of material non-disclosures in procuring the order of the 14th April, 1994, no longer fall for decision in light of the foregoing conclusion on the jurisdictional issues.

Nonetheless, I feel obliged to note my satisfaction that any material non-disclosures were not deliberately intended to mislead this Court and that I have implicity accepted the explanations offered in the testimony of Mr. Devlin.

Dated 7th July 1994

A. Smellie, QC

Judge