

SUPREME CT.

IN RE WARDOUR TRADING

[2007–09 Gib LR 293]

IN THE MATTER OF WARDOUR TRADING LIMITED

SUPREME COURT (Pitto, Ag. J.): February 12th, 2009

Companies—compulsory winding up—examination of company officers by court—assistance from foreign court—no need to issue letter of request seeking assistance from foreign court under Hague Convention 1960 in examining company officers if summons validly issued in Gibraltar and properly served on company officer resident in Convention country

Companies—compulsory winding up—examination of company officers by court—summons for examination of non-resident director validly made under Companies Act, s.262—nationality and residence immaterial if Gibraltar company—summons validly served out of jurisdiction under English Rules of Supreme Court, O.11, r.8A in absence of direct provision in Companies (Winding-up) Rules 1929—may contain penal provision (backed by threat of arrest) in event of non-compliance

The liquidator of a Gibraltar company obtained an order for the examination by the court of the sole director of the company.

The sole director of the company, Mr. Schwab, was a Swiss resident. The company was placed in compulsory liquidation in Gibraltar as it had failed to satisfy a large arbitration award. The liquidator obtained an order for the examination of Mr. Schwab by the court as to the affairs of the company. The order was served to him in Switzerland a month before he

was due to be examined. He then applied unsuccessfully to have it set aside and further attempts to summon him before the court were unsuccessful. By order dated December 12th, 2007, the most recent examination was set down for January 30th, 2008. Since Mr. Schwab had repeatedly failed to appear, on February 6th, 2008 the Registrar ordered a warrant for his arrest, the validity of which Mr. Schwab challenged.

He submitted that (a) the court could not issue a summons against him as a non-Gibraltar resident, as it had no power to compel his appearance and the order should therefore be set aside; (b) as a non-resident, he was not subject to the Gibraltar legislation which, unless otherwise stated or implied, was only applicable to British subjects or resident foreigners and even if it were applicable, there was no provision for service to be effected abroad; (c) the penal notice in the summons, which threatened arrest in the event of non-compliance, was invalid and unenforceable; and (d) the liquidator should instead have asked the court to seek the assistance of the Swiss court under common law or by letter of request under the Hague Convention 1960.

The liquidator submitted in reply that (a) the court could issue a summons against Mr. Schwab as the director of a Gibraltar company as he and the company were subject to Gibraltar law and the court had the power under s.262 of the Companies Act to order his examination as to the affairs of the company; (b) the English Companies (Winding-up) Rules, applicable in Gibraltar by virtue of the Supreme Court Rules 2000, rr. 6 and 7, allowed the English rules to be followed in the absence of appropriate provisions in the Gibraltar legislation—service of a summons was therefore permitted on a company officer to be examined out of the jurisdiction under the English Rules of the Supreme Court, O.11, r.8A; (c) consequently, the penal notice in the summons was valid as also was the warrant of arrest, which was not extraterritorial but limited the arrest to within the jurisdiction; and (d) there was therefore no need to seek the assistance of the Swiss court.

Held, dismissing the application:

(1) The order for the examination of Mr. Schwab under s.262 of the Companies Act had validly been made and served on him in Switzerland. Although there was no provision in the Companies (Winding-up) Rules 1929 for service of such an order out of the jurisdiction, the Supreme Court Rules 2000, r.6 applied the English Rules of the Supreme Court to cases in which the local law was silent. It was therefore within the powers of the Registrar by R.S.C., O.11, r. 8A to effect service of process out of the jurisdiction including “any Summons, Order or Notice in any proceedings.” There was therefore no need to seek the assistance of the Swiss court (paras. 8–11).

(2) Mr. Schwab could not use his Swiss nationality or non-residence in Gibraltar as grounds for not responding to the valid summons. He was the director of a Gibraltar company subject to Gibraltar law, a valid order for

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his examination had been made and served on him and, in default of compliance, he remained liable to arrest in Gibraltar (para. 11; para. 13).

Cases cited:

- (1) *Sawers, In re*, [1874–80] All E.R. Rep. 708; (1879), 12 Ch. D. 522; 28 W.R. 334; 41 L.T. 46; 7 T.L.R. 177, referred to.
 (2) *Tucker, In re*, [1987] 1 W.L.R. 928; [1987] 2 All E.R. 23, referred to.

Legislation construed:

Companies Act (L.N. 1930/07), s.262: The relevant terms of this section are set out at para. 3.

Supreme Court Rules (L.N. 2000/031), r.6: The relevant terms of this rule are set out at para. 8.

r.7: The relevant terms of this rule are set out at para. 9.

Rules of the Supreme Court, O.11, r.8A: The relevant terms of this rule are set out at para. 10.

E. Phillips and *K. Drago* for the applicant;

N. Howard for the liquidator.

1 **PITTO, Ag. J.:** This is an application seeking to set aside the order made by the Registrar on February 6th, 2008. The order in so far as relevant provides:

“It is ordered that a warrant for the arrest of Mr. Daniel Ivan Schwab be issued forthwith by this court so that he may be apprehended when in this jurisdiction and brought before this court for examination, such order to be backed for bail.”

Background

2 On October 10th, 2005, Wardour Trading Ltd. was placed in compulsory liquidation by this court. Mr. Kenneth Robinson was subsequently appointed liquidator by this court. Wardour had failed to satisfy an arbitration award made in Russia in favour of Chernogorneft Joint Stock Co., in the sum of US\$13,727,195.23. On July 7th, 1998, this court granted Chernogorneft liberty to enforce the Russian arbitration award in the same manner as a judgment of this court. An application to set aside the order of July 7th, 1998 was dismissed in November 2003.

3 Mr. Daniel Schwab, who resides in Switzerland, has been the sole director since 1997. On September 6th, 2007, Mr. Robinson obtained an order under s.262 of the Companies Act for Mr. Schwab to be examined in the chambers of the Registrar of the Supreme Court as to the affairs of Wardour Trading. Section 262 provides:

“(1) The court may at any time after the appointment of a provisional liquidator or the making of a winding-up order, summon before it any officer of the company . . . or any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company.

(2) The court may examine him on oath concerning the matters aforesaid, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them . . .

(3) If any person so summoned after being tendered a reasonable sum for his expenses, refuses to come before the court at the time appointed, not having a lawful impediment (made known to the court at the time of its sitting, and allowed by it), the court may cause him to be apprehended and brought before the court for examination.”

4 It is not disputed that the order was served on him in Switzerland on October 19th, 2007, a month before he was to be examined. Mr. Schwab applied unsuccessfully to have this order set aside or varied. Thereafter all attempts to have Mr. Schwab examined before the court have failed. There have been several adjournments and much court time has been wasted. Mr. Robinson has offered to pay Mr. Schwab’s expenses in coming to Gibraltar to be examined. But so far he has not come. By order dated December 12th, 2007, the examination was set down for January 30th, 2008. Mr. Schwab failed to appear and the Registrar made the order of February 6th, 2008.

5 Mr. Schwab’s counsel, Elliott Phillips, contends:

(a) that the court has no power to issue a summons against an individual who is not resident within the jurisdiction as it has no power to compel his appearance;

(b) that the applicant, Mr. Schwab, takes particular issue with the penal notice contained in the summons which the applicant says is invalid and unenforceable;

(c) that the order ought to be set aside because the court has no power to compel the applicant’s attendance; and

(d) that the liquidator should ask the court to seek the assistance of the foreign court under common law or by letter of request under the Hague Convention (CPR, r.34). The applicant has expressed his willingness to cooperate with the liquidator should either of these courses be adopted.

6 The applicant relies on *In re Sawers* (1) as authority for the proposition that English legislation, unless the opposite is expressly stated or is

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plainly to be implied, is only applicable to English subjects or foreigners in England. He relies on *In re Tucker* (2) for the proposition that even British subjects who are not resident in England cannot be summoned. He submits that other procedures can and should be used in cases where the information is sought from English subjects who are not resident in England or from foreigners who do not owe temporary allegiance. The alternative methods of seeking evidence from foreigners or Englishmen resident abroad is in this case, by means of a letter of request under the Hague Convention.

7 The applicant also argues that there is no provision in the winding-up rules for service to be affected abroad, and therefore s.15 of the Supreme Court Act can be relied on by the liquidator. The section provides:

“The jurisdiction vested in the court shall be exercised (as far as practice and procedure) in a manner provided by this or any other Act or by such rules as may be made pursuant to this Act or any other Act and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.”

He submits that the CPR, r.34.13 provides a mechanism by which the Supreme Court can issue a letter of request asking that the applicant's evidence be taken in Switzerland.

8 The Supreme Court Rules 2000, r. 6 provides:

“(1) Where no other provision is made by these rules or by any Act, rule or regulation in force in Gibraltar, and subject to the express provisions of these rules, the rules of court that apply for the time being in England in the High Court shall apply to all original civil proceedings in the court.

(2) The following rules, formerly in force in England, shall apply in the court, to the exclusion of any rules, which in England replace them—

(a) the Companies (Winding-up) Rules, 1929 . . .”

9 Rule 7 provides:

“Subject to the provisions of rule 3(5), English practice and procedure shall be followed—

(a) in the winding-up of companies as it was on the 5th day of August, 1947 . . .”

The pre-1947 procedure in England, for the examination of the director of an insolvent company was an *ex parte* application to the court, by way of summons (see (V) *The Encyclopedia of Court Forms & Precedents*, (1939)).

10 The Rules of the Supreme Court in force at that time allowed service to be effected, subject to the court's leave, outside the jurisdiction. Order 11, r.8A provided that this includes: "Any Summons, Order or Notice in any proceedings duly instituted whether by Writ of Summons or other such originating process as aforesaid."

11 The Registrar was therefore acting within her powers when she gave leave for service to be effected abroad. Mr. Schwab having failed to appear, she went on to make the order of February 6th, 2008. This order is only effective within Gibraltar. Mr. Schwab will not be arrested in Switzerland but in Gibraltar.

12 Compellability and the right to summons are two distinct matters. The applicant's argument that the director of a company based in Gibraltar is not subject to the jurisdiction of this court is neither attractive nor correct. The company is subject to Gibraltar's laws. It benefits from its ability to operate in Gibraltar. It benefits from Gibraltar's legal and financial framework. The court is entitled, in appropriate circumstances, to hold a company to account through its officers, and to order disclosure of information. Section 262 of the Companies Act provides such a power.

13 In *Sawers* (1), the English Court of Bankruptcy issued bankruptcy proceedings against the members of a trading firm with offices in Chile as well as Liverpool. The Chilean members of the firm had never been to England before the proceedings against them were commenced. Mr. Schwab, on the other hand, is a director of one and possibly two Gibraltar-based companies. The action in *Sawers* was against the members of the firm personally. In this case the action is against the company, which is clearly subject to the laws of Gibraltar. There is no action against him personally. Mr. Schwab can scarcely repeat the words which James, L.J. puts in the mouths of the Chilean traders ([1874–80] All E.R. Rep. at 710): "I am a Chilean subject, and I wish to be a Chilean. I never did make myself subject to English legislation or English tribunals. I do not choose to come here to be made a bankrupt."

14 Mr. Schwab seeks the protection of his Swiss nationality and residence only when he is asked to answer questions in Gibraltar about a company out of which he, it must be presumed, benefited or hoped to benefit. In other respects he was happy (and may still be happy) to enjoy the protection of Gibraltar's laws but not be subject to the jurisdiction of its courts.

15 The Registrar's order of February 6th, 2008 was validly made. The application is therefore dismissed.

Application dismissed.