Case No: *[not known]*

Neutral Citation Number: [2011] EWHC 1544 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 3 June 2011

BEFORE:

MR JUSTICE MORGAN

BETWEEN:

SUNWING VACATION INC & Ors

Applicant/Claimant

- and -

E-CLEAR (UK) PLC & Ors

Respondent/Defendant

MR M COLLINGS QC (instructed by Howard Kennedy LLP) appeared on behalf of the Claimant

MR K JARVIS (of Field Fisher Waterhouse LLP) appeared on behalf of the Defendant

---

Approved Judgment

Digital Transcript of Wordwave International, a Merrill Communications Company
101 Finsbury Pavement London EC2A 1ER
Tel No: 020 7422 6131 Fax No: 020 7422 6134
Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com
(Official Shorthand Writers to the Court)

No of words: 2,020
No of folios: 28

1. MR JUSTICE MORGAN: This is an application by Sunwing Vacations Inc and Vacances Sunwing Inc against E-Clear (UK) PLC, a company in voluntary liquidation, and its liquidators, Mr Cohen and Mr Nygate. Mr Collings QC appears on behalf of the applicants and Mr Jarvis who is a solicitor with Field Fisher Waterhouse appears on behalf of the respondents.

2. The applicants seek the order which I will describe in a moment and Mr Collings has put forward sustained submissions why it is the proper order for the court to make. Mr Jarvis has maintained a neutral stance on behalf of the respondents. He has explained very clearly that the order which is sought is not an order to which the respondents can consent by reason of constraints upon their behaviour which I do not think I need to particularise. He has also very helpfully identified a number of matters of concern to the liquidators of the company.

3. However, those matters of concern, when fully balanced up by the liquidators, have not persuaded the liquidators to depart from their stance of neutrality. Further, Mr Jarvis does not ask the court to substitute its own view as to how the liquidators should behave for the view of the liquidators; in other words he does not ask me to assess the points of concern and come to the view that it is really very harmful to the liquidators for this order to be made so that they ought not to be neutral, they ought to be hostile. So I will proceed on the basis that the liquidators are, at the end of the day, neutral.

4. In those circumstances I do not believe that I need to go through the points of concern which the liquidators have expressed to me. I understand them. I see what is said about them but the overall conclusion is that the liquidators do not oppose the making of the order.

5. Therefore, the court's task is to consider the application, to look at the statutory jurisdiction, to decide whether this is an appropriate order to make in all the circumstances relevant to this case.

6. The order which is sought is pursuant to sections 112 and 155 of the Insolvency Act 1986. In very brief summary, it is an order that the company, through its liquidators, do give disclosure and permit inspection of specified classes of documents. The principal reason that the applicants wish to have these documents is that the applicants are engaged in an arbitration in Germany where there are two respondents to the arbitration. The first is Deutsche Bank AG. The second is Pago eTransaction Services GmbH. The first of those has been referred to as Deutsche Bank, the second as Pago. That, in very brief summary, is what the applicants want and that is the primary reason why the applicants want that material.

7. The statutory provisions are well known. Section 112(1) allows a creditor of a company in liquidation to apply to the court for the court to exercise in relation to any relevant matter a power which the court might exercise if the company were being wound up by the court. That applies to this company which is not being wound up by the court but is subject to section 112.

8. The relevant power which might be exercised in a case of a winding up by the court is the power conferred by section 155(1) . That provides that the court may at any time after making a winding up order:

> "Make such order for inspection of the company's books and papers by, for example, creditors … as the court thinks just."

9. The subsection then provides that the books and papers in the company's possession may be inspected by creditors and contributories accordingly but not further or otherwise. There is no difficulty in this case about the books and papers in question being in the possession of this company.

10. I have been taken to a number of authorities which discuss section 155(1) or its predecessor. Mr Collings accepts that those authorities mean that the unqualified statutory wording is, in fact, qualified by a purpose requirement so that the power which the court can exercise under section 155(1) must be for the purpose of the winding up. A useful statement of that qualification appears in the judgment of Millett J in Re DPR Futures Limited [1989] 1 WLR 778, pages 788 to 789. If the court is exercising the power for the purpose of the winding up, then 155(1) provides the court with a discretion and the court will make the order which it thinks just.

11. The matters which need attention do not stop there because section 112(2) provides that the court may accede to the application if the court is satisfied that the determination of the question or the required exercise of the power will be "just and beneficial."

12. Finally, there is of course a discretion as to not only whether there should be an order but also as to the form of the order.

13. So the questions I have to direct myself to are whether the exercise of the power under section 155(1) is for the purpose of the winding up, whether making the order sought, exercising the power, would be just and beneficial, whether I should make the order and whether I am satisfied with the terms that are proposed.

14. The principal difficulty considered in the course of argument has been whether it can be said that making the order in this case is for the purpose of the winding up. The authorities to which I have been referred, which deal specifically with section 155, are generally cases where the order has been refused, not where it has been granted.

15. However, Mr Collings draws my attention to the decision of Harman J in Re a Company (No 005374 of 1993) [1993] BCC 734. That is not a case under section 155; it was a case where administrative receivers wished to disclose material to a third party to enable the third party to advance a claim against certain persons.

16. The interest which the company and the receivers had in that claim was that if the third party succeeded in its claim, then that would reduce the claim which the third party in turn would make as a creditor of the company. So, disclosure of the material appeared to Harman J to be something which the receivers could do for the purposes of their office.

17. In the present case, there is something analogous in that if the applicants receive these documents in the way they wish, they will use them to advance a claim against

Deutsche Bank and Pago, and Mr Collings, on behalf of his clients, has stated a number of times in open court that if there is a recovery by the applicants against Deutsche Bank and/or Pago, credit will be given for the amount of that recovery against the applicant's claim against the company. Accordingly, if these documents turn out to be helpful to the applicants, the result will be of benefit to the company and the creditors generally by reason of the credit which the applicants will give.

18. That seems to me to fall within the qualification or the requirement that the order is made for the purposes of the winding up. I also, before leaving this point, mention what is said in Sealy & Milman, in the Guide to the Insolvency Legislation, as a note to section 155. Sealy & Milman refer to the case of a guarantor or an insurance company. It seems to me that at least part of the reason, not perhaps expanded but implicit in the note, is that if the documents are made available by the liquidators to the applicant for the documents, that will result in the applicant for the documents making less of a claim against the company in liquidation. That is a parallel with what is being sought here.

19. Of course there are many imponderables and I am not able to predict the future as to how this matter may develop. However, it does seem to me that the prospect of these documents being of use and resulting in a beneficial outturn for first the applicants and secondly and indirectly the company means that the disclosure of the documents is sufficiently for the purposes of the liquidation.

20. I turn then to the other requirement I need to address in 112(2): "is the exercise of this power just and beneficial?" That seems to me to admit considerations of a wider nature. I am not restricted to whether something is just and beneficial for the purposes of the liquidation. I am able to take into account other beneficial consequences.

21. First of all, it does seem to me that it is potentially beneficial for the purposes of the winding up for a credit to be obtained by the applicants against the claim they are making against the company. Secondly, and this does weigh with me, there is at present being heard in Germany a German arbitration brought by associated companies of the applicants against Deutsche Bank and Pago. If these documents are admissible and relevant and persuasive in that German arbitration, I regard it as being in the interests of justice and beneficial that the German arbitration result takes into account relevant and helpful material rather than excludes it. So I am satisfied that the exercise of the power will be just and beneficial.

22. That really carries the day as to whether I think the making of the order is just and whether, in the exercise of my discretion, I should make the order. If I am satisfied that the exercise of the power is just and beneficial, I am also satisfied on those matters. As to the terms of the order, they have been discussed in detail between those advising the applicants and those advising the respondents. I do not see any difficulty, from my own standpoint, in the terms and I will make the order.

23. I have anxiously considered whether I should impose a term that immediately following the making of the order, the existence of the order should be communicated to the respondents in the German arbitration and whether I should, in terms, provide for the respondents in the German arbitration to be able to apply to this court to vary or discharge the order which has been made. By a fairly narrow margin, I have decided

not to take that course. There does not appear to be any established precedent for that course being taken. The position of the German respondents is really a matter for those dealing with and adjudicating upon the German claim and that is the arbitrator or arbitrators in that arbitration. If documents are produced pursuant to my order, if those documents are used in the German arbitration, if the German respondents have legitimate points to make, then I am content that those points be put forward, if they can be, in the German arbitration. I do not see the need myself to bring the German dispute into this court and have a further argument when the German respondents are present as to whether I have acted appropriately or not.

24. So, for those reasons briefly expressed, I will make the order in the revised form which I have referred to.