ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.4 OF 2003

IN THE MATTER of Globe-X Canadiana Limited (In Liquidation) and Globe-X Management Limited (In Liquidation).

AND IN THE MATTER of Winding Up Orders of the Supreme Coourt of the Commonwealth of the Bahamas dated 5th September 2002 appointing Clifford A Johnson and Wayne Aranha as Joint Liquidators of Globe-X Canadiana and Globe-X Management Limited.

AND IN THE MATTER of a Request from the Supreme Court of the Commonwealth of the Bahamas dated 4th April 2003 for the recognition of the Winding Up Orders made on the 5th September 2002

AND IN THE MATTER of a Request from the Supreme Court of the Commonwealth of the Bahamas dated 4th April 2003 for assistance to be granted to Clifford A. Johnson and Wayne J Aranha, the Official Liquidators of Globe-X Canadiana Limited and Globe-X Management Limited

BETWEEN:

GLOBE-X MANAGEMENT LIMITED
GLOBE-X CANADIANA LIMITED

First Appellants

SILICON ISLE LIMITED

Second Appellant

and

CLIFFORD JOHNSON
WAYNE ARANHA

Respondents

Before:

The Hon. Mr. Brian Alleyne, S.C — Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, Q.C. — Justice of Appeal
The Hon. Mr. Denys Barrow, S.C. — Justice of Appeal [Ag.]

Appearances:

Mr. Kenneth Porter with Ms. Merlene Barrette for the First Appellants
Mr. Patrick Patterson with Ms. Eustelle Fontaine for the Second Appellant
Mr. Robert Hildyard Q.C. with Mr. James Hilsdon for the Respondents

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2005: April 12;
May 23.

JUDGMENT

[1] GORDON J.A.: This appeal arose out of judgment of the High Court on an application made by the Respondents that the winding-up, and their appointment as joint liquidators, of the first Appellants (hereafter "the Globe-x companies") be recognized and given full effect in the jurisdiction of Anguilla together with a number of other Orders ancillary to the principal request.

[2] The Globe-X companies were incorporated in the Bahamas some time in the early 1990s and carried on business as investment managers trading in commodity future contracts and government securities globally. On the 12th July 2002 two Petitions for winding up were filed in the Supreme Court of the Commonwealth of the Bahamas. The Petitioner was a company called Cinar Corporation. Also on the 12th July 2002 the Globe-X companies were re-domiciled in Anguilla as International Business Companies. The learned trial Judge found as a fact that the Certificate of Continuation was issued by the Registrar of Companies in Anguilla at about 4.00 pm. Crucially, the learned trial Judge found that the petitions for winding-up had been presented in the Bahamas before that hour. In other words, as between the petitions and the Certificate of Continuation, the petitions were first in time.

[3] Silicon Isle Limited, the second Appellant (hereafter "Silicon") is a company incorporated in Anguilla. On or about 14th May 2002, (some two months before the re-domiciliation of the Globe-X companies to Anguilla) Silicon became the sole shareholder of the Globe-X companies having purchased the shares from the previous shareholder. On that date, Silicon alleges, it also became a creditor of the Globe-X companies in the sum of some US$29 million.

[4] The learned trial Judge on May 12, 2003 granted an Order that the Winding-up of the Globe-x companies by the Bahamian Court and the appointment of the liquidators, the Respondents, be recognized and given full effect in the jurisdiction of Anguilla together with a number of ancillary orders as sought by the Respondents. The liquidators were armed with a 'letter of request' from the Bahamian Court seeking the Anguillan Court's assistance in the interests of justice and good international relations. Written reasons for the decision were delivered shortly after.

[5] The Globe-x companies appealed on three grounds, namely, (i) that the learned trial Judge misdirected herself as to the law applicable to insolvency proceedings in Anguilla having regard to the specific language in the International Business Companies Act; (ii) that the learned trial Judge erred in law in holding that the Bahamian Court had jurisdiction to make the winding-up orders at all; and, (iii) that the trial Judge was wrong in law in holding that the foreign liquidation in the Bahamas fell within the established bases of recognition at Common Law and that equity, convenience and comity demand that a foreign liquidation should be recognized by this Court. Silicon also appealed against the trial Judge's Order on the same three grounds.

[6] I will deal with the second ground of appeal first, to wit that the learned trial Judge erred in law in holding that the Bahamian Court had jurisdiction to make the winding-up orders at all. It will be recalled that the learned trial Judge found as a fact that the winding-up petition had been presented in the Bahamian Courts prior

in time to the re-domiciliation of the Globe-x companies in Anguilla. Learned Council for the Globe-x companies conceded in response to a question by the Court that in Anguilla a winding-up order related back to the filing of the petition. However, it was his position that whilst this might be so in Anguilla, the Court would be unable to state that this was so in Bahamas in the absence of expert evidence on Bahamian law.

[7] In Dicey & Morris, The Conflict of Laws[1] the learned authors state the following as Rule 18:

> "(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.
> "(2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case"

In Ertel Bieber and Co v Rio Tinto Co Ltd[2] Lord Dunedin said the following:

> "…I am clear that it is for those who say that the German law is different to the English to aver it as a fact and to prove it. This they have not done, and that being so the German law must be presumed to be the same as the English."

[8] In the circumstances of this case where there was no expert evidence, I have no difficulty in holding that Bahamian law is the same as Anguillan law. In other words, once the petition to wind up was granted and an Order made by the Bahamian Court, that Order related back to the time of filing of the petition. It will be recalled that the learned trial Judge found as a fact that the winding-up petition had been filed before the re-domiciliation was effected. Thus at the time of the winding-up order, the Globe-x companies were domiciled in the Bahamas.

[9] I will deal with grounds of appeal one and three together. Learned Counsel for the Globe-x companies argued that the learned trial Judge erred in applying the English Insolvency Act 1985 and the English Insolvency Rules 1986 in the context of the existence of the International Business Companies Act and the Companies Act, both of which address the issue of liquidation. The trial Judge based her

[1] 13th Edition at paragraph 9-001

reasoning in this regard upon Section 10 of the East Caribbean Supreme Court Act (the ECSC Act) which reads as follows:

> "Any judge of the High Court in accordance with the rules of court, or so far as such rules shall not provide, in accordance with the practice and procedure which shall for the time being be in force in the High Court of Justice in England, exercise, in Court or in Chambers, all or any of the jurisdiction vested in the High Court"

She found that Section 10 had an ambulatory effect and that in the absence of local rules regarding the winding-up of companies it was appropriate to apply the English Insolvency Act 1985 and the 1986 Insolvency Rules.

[10] The subject matter of this appeal is the recognition of a foreign winding-up order. Neither the International Business Companies Act nor the Companies Act speak specifically to this subject. It therefore appears to me that assistance must be sought from either English statute law, English Common Law or from the inherent jurisdiction of the court. Section 5 of the ECSC Act reads as follows:

> "5 The High Court shall have and exercise within Anguilla all such jurisdiction (save and except the jurisdiction in Admiralty) and the same powers and authorities incidental to such jurisdiction as on the 1st day of January, 1940 were vested in the High Court of Justice in England."

[11] In Re African Farm Ltd[3] a company registered in England with limited liability but carrying on business in the Transvaal and owning property there was placed in liquidation in accordance with the English law. The company could not be placed in liquidation under Transvaal law as at no time in its history had it ever had more than 25 shareholders, a requirement for it to fall within the definition of 'company' under the applicable law permitting the winding-up of companies. The liquidator, appointed by a creditors' resolution in England, sought recognition of his appointment in the Transvaal. Innes C.J. said the following:, at page 381:

> "The true test appears to me to be not whether we have this power to order a similar liquidation here, but whether our recognizing the foreign liquidation is actually prohibited by any local rules; whether it is against the policy of our laws, or whether its consequences would be unfair to local creditors, or on other grounds undesirable."

[2] [1918] AC 260 at page 295
[3] (1906) TS 373

In short, the court in the Transvaal used its inherent jurisdiction to achieve its ends.

[12] Section 19 (2) of the English Supreme Court Act 1981 is similar in intent and terms to Section 5 of the ECSC. This section, according to both logic and the learning in the White Book Service 2002, Vol. 2 at page 1539, subsumes and incorporates "the inherent jurisdiction of the court." Such jurisdiction has been exercisable by the superior courts from the earliest days. "The court may execute its inherent jurisdiction even in respect of matters which are regulated by statute or by rules of court. In Stewart Chartering Ltd v C & O Managements S.A. et al "The Venus Destiny[4] the plaintiff filed a writ indorsed with a Mareva injunction. The plaintiff filed an ex parte application for judgment in default of appearance in an action for a liquidated sum. In the ordinary course, the plaintiff could have entered judgment in default without leave of the court. However, because the writ was indorsed with a claim for an injunction it was not possible for the plaintiff simply to enter judgment in default of appearance. Goff J, as he then was said the following:

> "The solution to this problem lies, in my judgment, in the inherent jurisdiction of the court to control its own process, and in particular to prevent any possible abuse of that process"

The learned Judge then went on to order judgment in default of appearance, notwithstanding Order 13 rule 6. I am therefore of the clear view that the High Court of Anguilla is the repository of all the powers referred to as "the inherent jurisdiction" possessed by the common law courts of England.

[13] In Smart's "Cross Border Insolvency" at Chapter 6, a large number of examples are given of the practice of courts, both common law and non-common law, recognizing the effect of a winding-up order made in the country of domicile of the company being wound-up. As learned Queen's Counsel for the Respondent put it in his argument, it is a necessary concomitant of the recognition accorded to a

[4] [1980] 1 All ER 718

body corporate established under a foreign legal system. I am therefore satisfied that the High Court of Anguilla has the necessary jurisdiction to recognize the Winding-up Order made by the Bahamian court.

[14] As I understood the argument of Counsel for the Globe-x companies, he did not dispute that the Anguilla court had an inherent jurisdiction which encompassed the recognition of foreign winding-up orders. His complaint rather was that the learned trial Judge in accepting that the English Insolvency Act and Insolvency Rules applied, used the wrong criteria in the exercise of her discretion. I confess to a certain confusion in following the argument of learned Counsel. The learned trial Judge listed some 16 considerations which she took into consideration in the exercise of her discretion to recognize the Bahamian Order. Whether she exercised that discretion mistakenly believing that she was acting pursuant to the Insolvency Act and the Insolvency Rules of England, or more properly exercised it in the exercise of the inherent jurisdiction makes no difference, in my view, to the outcome. I can find no error in her exercise of discretion.

[15] Much has been made of the 'letter of request' issued by the Court in the Bahamas. There is no magic in a 'letter of request'. In Panayiotou v Sony Music Entertainment (UK) Ltd[5] Sir Donald Nicholls V-C said the following at page 761:

> "In my view the courts' power to issue a letter of request stems from the jurisdiction inherent in the court. Inherent in the court is power to do those acts which the court needs must have to maintain its character as a court of justice…It is important to keep in mind that when a letter of request is issued, the English court is doing no more than make a request to a foreign court for assistance. It is not making an order."

Admittedly, the Vice chancellor was there speaking of a letter of request to a New York Court seeking the production of certain documents, but the principle is the same. A 'letter of request' is exactly what its name implies. The Anguillan Court is in no way obliged to conform to the request. It retains its discretion, a discretion exercised with comity as a part of the decision.

[5] [1994] 1 All ER 755

[16] In the circumstances, I would dismiss the appeal and confirm the order of the learned trial Judge and award the costs of this appeal to the Respondents

[17] Prior to the hearing of this appeal the Respondents applied for security for costs and prayed that the security be provided by some sufficient person other than the Globe-x companies on the grounds that in the event that the Globe-x companies lost the appeal their assets would be diminished to the prejudice of the creditors of Globe-x to meet the costs. The Court ordered that security for costs be provided from sources other than the assets of the Globe-x companies. For the avoidance of doubt, the costs awarded at paragraph 16 above are to be paid from a source or sources other than from the assets of the Globe-x companies.

Michael Gordon, QC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal [Ag.]