29/6/10

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION
Hon Mr Justice Andrew J. Jones QC
28th May 2010 in Chambers

CAUSE NOS. FSD 83 and 84 2010 (AJJ)

RESERVE MANAGEMENT COMPANY, INC — Plaintiff (FSD 83 & 84 of 2010)
and
BRANCH BANKING AND TRUIST COMPANY — Defendant (FSD 83 of 2010)
and
SOCIETÉ GENERALE — Defendant in (FSD 84 of 2010)
and
DAVID WALKER and NICHOLAS CARTER
(Official Liquidators of Reserve International Liquidity Fund Limited)
Interpleader Claimants (FSD 83 & 84 of 2010)

Appearances : Mr Kenneth Farrow QC of Mourant du Feu & Jeune for SocGen
Mr Anthony Akiwumi of Stuarts Walker Hersant for the Investment Manager
Mr Shaun Folpp of Ogier for the Official Liquidators

GRAND COURT - CAYMAN ISLANDS

REASONS FOR JUDGMENT

INTRODUCTION

1 On Monday 13 April 2010 I ordered, inter alia, that Branch Banking and Trust Company ("BB&T) and Societé Generale ("SocGen") each pay the sum of US$10 million plus interest then due and owing to Reserve International Liquidity Fund Ltd (in Liquidation) ("the Fund") on the instructions of Messrs Walker and Carter in their capacity as its official liquidators ("the Order"). The Order

was perfected (signed, sealed and filed) on the same day that it was made, but my written reasons for that order were not issued until Monday 19 April. In the meantime, on Friday 16 April SocGen's attorneys wrote a letter addressed to me, with copies to the parties, for the purpose of informing the Court and the parties that a statement contained in an affidavit sworn on behalf of SocGen by Mr Governor Tipton, its Managing Director and General Counsel for the Americas Region, may have been inaccurate.

2 In his first affidavit (filed in the related proceeding FSD #70 of 2010), Mr Tipton said (in paragraph 2) that "*SocGen's Cayman Islands Branch holds a Suspense Account No.3617600A90 ("the Account") in the name of the [Fund]. As at 23 March 2010 the balance in the Account stands at US$10,000,022.22.*" The letter said that this statement may be inaccurate in that the funds may no longer have been held on the books of the Cayman Islands Branch at the time he swore the affidavit. It went on to say that it would take Mr Tipton a few more days to complete his investigation, whereupon it was intended that he would swear a further affidavit. The penultimate paragraph of the attorney's letter said *"We believe that in light of this development Your Lordship may wish to have the parties attend before you today in order that you may give procedural directions in respect of all the causes regarding the filing of additional evidence and to provide the parties, if deemed necessary, an opportunity to make additional submissions to Your Lordship."* In the light of this statement, I convened a case management conference which took place by means of a telephone conference call on Monday 19 April. I made the observation that the Order had been perfected and that if any party sought to set it aside or vary it, the remedy was to appeal to the Court of Appeal. I asked if any party wished to make any application and was told that they did not. I concluded that case management conference by informing counsel that my reasons for the Order, which had already been written, would be issued later in the day.

3 Having completed his investigation, Mr Lipton swore a second affidavit which was filed in respect of Causes FSD #70, #84 and #96 of 2010 on 22 April 2010. In summary, this affidavit says that on 11 February 2010 an overnight deposit of US$10 million was placed with SocGen's Cayman Islands Branch in the name of the Fund. This deposit was duly recorded in the books of the Cayman Islands Branch. On the same day SocGen was informed that a winding up order had been made in respect of the Fund on 18 January 2010; that Messrs Walker and Carter had been appointed official liquidators; and that the Official Liquidators were requesting SocGen to "freeze" the deposit. SocGen responded by transferring the funds to a "suspense account". Mr Lipton's evidence is that the suspense account is identified by reference to a different account number (#000119900848) and is an account maintained on the books of the New York Branch. Mr Lipton

had not appreciated that the deposit had been transferred to a suspense account on the books of the New York branch until he received a copy of my Order on 15 April, whereupon he realised that the statement contained in his first affidavit appeared to have been inaccurate. The decision to transfer the deposit to a suspense account, whether on the books of the Cayman Islands branch or any other branch, was made unilaterally by SocGen in its own interest and has no bearing upon the legal rights and obligations as between the bank and its customer.

4 On 12 May 2010 the Fund's Official Liquidators issued a summons (in FSD #84 of 2010) for a 'supplemental order'. On the basis of the information contained in Mr Lipton's second affidavit, the Official Liquidators contended that the original Order contained a factual error and, in order to give effect to the manifest intention of the Court, a supplemental order should be made to the effect that SocGen do pay US$10 million plus interest to the Fund. On 24 May the Official Liquidators' summons was amended to seek an order that the Order be varied by deleting the words (in paragraph 1.2) *"standing to the credit of the Fund in account number 3617600A90 operated by Societé Generale"* and replacing them with the words *"owed to the Fund having been credited to the account of the Fund in the books of the Cayman Islands branch of Societé Generale on 11 February 2010".* As amended, the Official Liquidators' summons sought a variation of the Order as an alternative to the supplemental order.

5 The Official Liquidators' summons came on for hearing on 28 May 2010 when I made an order that paragraphs 1.1 and 1.2 of the Order be amended by deleting the phrases "for payment of the sum of US$10,000,000.00 standing to the credit of the Fund in account number 414500121410 operated by BB&T" and "for payment of the sum of US$10,000,000.00 standing to the credit of the Fund in account number 3617600A90 operated by SocGen" and substituting the phrases "for payment of the sum of US$10,000,000.00 plus interest due and owing to the Fund by BB&T" and "for payment of the sum of US$10,000,000.00 plus interest due and owing to the Fund by SocGen" respectively. The amendment of paragraph 1.2 was made on the Official Liquidators' summons. To be consistent, I made exactly the same amendment to paragraph 1.1 of my own motion. I now give my reasons for amending the Order in this way.

THE COURT'S JURISDICTION TO AMEND OR RECTIFY PERFECTED ORDERS

6 It is not in dispute that the Court has jurisdiction to amend a perfected order which by accident or error does not reflect the actual decision of the judge. The Court has the power contained in GCR Order 20, rule 11 which provides that "*Clerical mistakes in judgments or orders, or errors*

arising therein from any accidental slip or omission, may at any time be corrected by the Court on motion or summons without an appeal". In addition, the Court has a wider inherent jurisdiction to correct an order which, for whatever reason, does not accurately reflect the Court's intention. The argument turned upon the scope of these powers and their application in the particular circumstances of this case.

7 The language of GCR Order 20, rule 11 is derived from the Rules of the Supreme Court in England. It is reproduced from RSC Order 20, rule 11 (enacted in 1962) which was itself reproduced from RSC Order XXVIII, rule 11 (enacted in 1883). Whilst this legislative history enables us to have regard to the way in which the English courts have interpreted the equivalent rule, it must not be forgotten that the Grand Court Rules were first enacted in 1995 and must be interpreted in the light of the other applicable rules and circumstances prevailing in our jurisdiction today. The practice and procedure for drawing up and perfecting court orders is contained in GCR Order 42, which is *not* based upon RSC Order 42. During the course of a hearing, at least in the Financial Services Division, the Court is normally presented with a draft order prepared by the plaintiff or applicant and it may be presented with competing drafts prepared by other parties. When the Judge decides to make "an order in terms of the draft", he may be able to sign it at the end of the hearing. Whenever the Judge is not in a position to sign an order at the end of the hearing, the attorney for the successful party is required by O.42, r.5(5) to draw up the order and circulate his draft amongst the attorneys for the other parties for their approval. If and when they are agreed upon a draft which properly reflects what they believe to be the Judge's intention, they are each required to sign the draft to the effect that it is "approved as to form and content". It is then sent to the Courts office (together with a cheque for any applicable filing fee) and presented to the Judge for signature. If the Judge is satisfied with the form and content of the draft order as prepared and approved by the parties, he will sign it. If not, he may annotate the draft with his amendments and send it back to the relevant attorney for it to be re-typed. Alternatively, if there is a disagreement amongst the attorneys about the appropriate form or content or the Judge is dissatisfied with what they have agreed, it will be necessary to convene a hearing for the purpose of settling the order.

8 All orders are of course produced using printers and computerised word processors. In my judgment the first limb of O.20, r.11, which refers to *"clerical mistakes in judgments or orders"*, enables the Court to correct both input errors made by the secretary or lawyer who typed up the document and processing errors made as a result of equipment failure. In other words, it covers mistakes arising from both human error and equipment failure. For example, as a result of

equipment failure a printed document may omit or duplicate a whole line of text which appears on the electronic document and if such a defective print is signed by the Judge, it may be corrected under the first limb of O.20, r.11. Clearly, the inclusion of the wrong account number in paragraph 1.2 of the Order was not a mistake caused by human error in this sense, because the secretary who typed it and the lawyers who approved its form and content and I, as the Judge who signed it, had no means of knowing that the information contained in Mr Lipton's first affidavit was inaccurate.

9 The second limb of O.20, r.11 is much wider. It allows the Court to amend an order if, as a result of some error or accidental omission, it does not properly reflect the Judge's actual decision. The word "error", as used in the second limb of the rule, has never been limited to typographical or word processing errors. In *Regina v. Cripps, Ex parte Muldoon* [1984] 1 QB 686 the English Court of Appeal considered an appeal against the variation of an order for costs made by a commissioner in connection with an election petition. After the order for costs had been drawn up and perfected, the unsuccessful party made an application in which he sought 'clarification' of the order in a way which would reduce the amount of his liability. In reliance upon RSC O.20, r.11 the commissioner made a direction which was set aside on the basis that it amounted to a substantive variation of the order. Sir John Donaldson M.R. analysed the rule in the following way (at page 695) –

> "It is surprisingly wide in its scope. Its primary purpose is akin to rectification, namely to allow the court to amend a formal order which by accident or error does not reflect the actual decision of the judge: *Preston Banking Co v. William Allsup & Sons* [1895] 1 Ch. 141. But it also authorises the court to make an order which it failed to make as a result of the accidental omission of counsel to ask for: *In Re Earl of Inchcape* [1942] Ch. 394, approved by the Judicial Committee of the Privy Council in *Tak Ming Co v. Yee Sang Metal Supplies Co* [1973] 1 WLR 300, 304. It even authorises the court to vary an order which accurately reflects the oral decision of the court, if it is clear that the court inadvertently failed to express the decision which it intended: *Adam & Harvey Ltd v. International Marine Supplies Co Ltd* [1967] 1 WLR 445. However, it cannot be over-emphasised that the slip rule power can never entitle the trial judge or court to reconsider a final and regular decision once it has been perfected, even if it has been obtained by fraud: per Lord Halsbury in *Preston Banking Co v. William Allsup & Sons* ".

10 This analysis was adopted by the Chief Justice in *Kirkconnell v. Cook-Bodden* [1996] CILR 326 as the correct interpretation of GCR O.20, r.11. In my judgment it leads to the conclusion that any error or ambiguity reflected on the face of the an order can be corrected pursuant to the second limb of the rule. The power is not limited to errors which can be characterised as typographical or word processing errors. If I am wrong in my interpretation of GCR O.20, r.11, there can be no doubt that the Court does have an inherent jurisdiction to rectify a perfected order which has

been 'approved as to form and content' by the parties' attorneys and signed by the Judge if it can be shown that, for whatever reason, its terms do not give effect properly and adequately to the decision which the Court actually made. Counsel referred me to a series of English decisions which support this proposition. In *Lawrie v. Lees (1881) 7 App. Cas. 19*, a decision of the House of Lords, Lord Penzance said (at page 34-5) "every Court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the Court – to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful, to make it plain." In *Re Swire* (1885) 30 Ch D 239, a decision of the Court of Appeal, Lindley LJ said (at page 246) "This case has raised a discussion of some importance, because it was contended that when once the order of the Court was passed and entered it could not be put right, even although as drawn it did not express the order as intended to be made. I protest against any such notion. There is no such magic in passing and entering an order to deprive the Court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal". Nor is there any magic in the fact that an order bears the attorneys' endorsement that it has been 'approved as to form and content'.

11 In *Thynne v. Thynne* [1955] P 272, a decision of the Court of Appeal in a divorce case, Singleton LJ said (at page 301) " I am satisfied that the court has power to amend the petition and decrees nisi and absolute in the way sought in this case. It arises under the inherent jurisdiction of the court to do what is necessary and proper to correct an order so that the position under it shall be clear and free from ambiguity". Having illustrated the nature and extent of the court's inherent jurisdiction by reference to a long list examples (at pages 313-314), Morris LJ summarised the law in this way – "Where a court has decided an issue and the decision of the court is truly embodied in some judgment or order that has been made effective, then the court cannot reopen the matter and cannot substitute a different decision in place of the one which has been recorded. Those who seek to alter must in those circumstances invoke such appellate jurisdiction as may apply. But if a case arises where in the interests of accuracy it seems desirable to amend some part of a judgment, other than its operative and substantive part, it would seem to be regrettable if the inherent powers of the court were limited or confined. The powers extend, in my judgment, to enable a court so to amend a judgment so that it carries out the intention of the court." This decision and in particular the dictum of Morris LJ was followed and approved by the Cayman Islands Court of Appeal in *Francis v. Woods* [1988-89] CILR 298.

THE REASONS FOR AMENDING THE ORDER MADE ON 13 APRIL

12 In my judgment it is now apparent with the benefit of hindsight that the Order which I signed on 13 April 2010 did not properly reflect my intention in that the references (in paragraphs 1.1 and 1.2) to sums standing to the credit of specific accounts were unnecessary to my decision and in one case has unfortunately given rise to ambiguity and argument. I do not know why the draftsman included the phrases "standing to the credit of the Fund in account number 41500121410 operated by BB&T" and ".....3617600A90 operated by SocGen" in paragraphs 1.1 and 1.2 of the Order. Nor do I know what, if any, discussion took place amongst the attorneys who approved the inclusion of these phrases in the Order. For my part, I have to say that I signed the Order without paying any particular attention to these phrases and it was only with the benefit of hindsight that the significance of the error became apparent.

13 I had decided the principal issue, namely whether the Official Liquidators or the Investment Manager should be recognised as the person entitled to act on behalf of the Fund, on 1 April 2010. In the absence of any appeal, my declaration that the Official Liquidators are the only persons recognised in this jurisdiction as having authority to act on behalf of the Fund for all purposes, including giving instructions to its bankers, ought to have brought this litigation to a close. In the event the Investment Manager insisted upon pursuing actions against BB&T and SocGen, both in this jurisdiction and in New York, for repayment of the sums of US$10 million plus interest which were admittedly due and owing, when it has no authority to do so. For the reasons stated in writing on 19 April 2010, I made an anti suit injunction (in FSD #96 and #97 of 2010) and also gave summary judgment on the Banks' interpleader summonses by directing them to pay the amounts claimed in the actions (FSD #83 and #84 of 2010) on the instructions of the Official Liquidators. The Banks' identifying account numbers were of no relevance to this decision. The placement of the deposits created a debtor/creditor relationship which is clearly and unequivocally pleaded in each of the writs issued against BB&T and SocGen on 29 March 2010. The account numbers are not pleaded, quite rightly so because they are of no relevance to the causes of action. The Court can exercise personal jurisdiction over the Banks because they have both established branches in this country which are duly registered under Part IX of the Companies Law; they are both duly licenced pursuant to the Banks and Trust Companies Law to carry on banking business here; and the writs were duly served on them at their local registered offices. The cause of action pleaded against them is non payment of the debts admittedly due and owing. The writs do not assert proprietary tracing claims. Jurisdiction did not depend upon the identification and situs of specific funds to which the Fund was asserting proprietary claims.

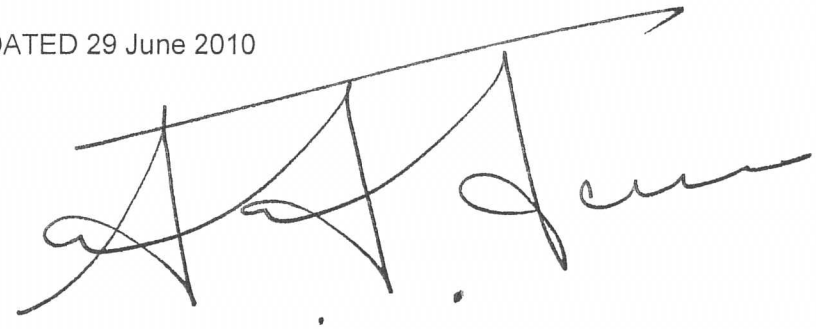
The Banks responded by taking out interpleader summonses because they were faced with conflicting instructions received from the Official Liquidators and the Investment Manager who both claimed to be entitled to act on behalf of their mutual customer.

14 The purpose and intent of the of the orders which I made on 13 April 2010 was twofold. First, I made an anti-suit injunction (in FSD #96 and #97 of 2010) restraining the Investment Manager from pursuing actions against the Banks in the Supreme Court of the State of New York. Second, I made a summary order on the interpleader summonses (in FSD #83 and #84 of 2010) that the writ actions were not to be pursued and each Bank was to pay the principal sum of US$10 million plus interest then due and owing to Fund on the instructions of the Official Liquidators. The key point of this order was that the Banks were to pay on the instructions of the Official Liquidators and not on the instructions of the Investment Manager.

15 At the time I made the Order it was obvious that both Banks must have taken appropriate administrative steps in the ordinary course of business to ensure that the deposits would not be repaid inadvertently. There are no doubt various different methods by which this result can be achieved. Transferring the disputed funds to a suspense account is not the only method, but it is the one adopted by SocGen in this case. The fact that SocGen had taken this step, unilaterally and in its own self-interest, clearly had no bearing upon its contractual obligation to repay the Fund on demand and was irrelevant to the issue raised before me. Whether the suspense account to which the deposit was transferred was maintained on the books of the Cayman Islands branch or its head office or some other branch was equally irrelevant, as was the number given to that account. For these reasons, the inclusion of the phrases "standing to the credit of the Fund in account number 3617600A90 operated by SocGen" and "standing to the credit of the Fund in account number 41450012410 operated by BB&T" were irrelevant and unnecessary to my actual decision and it can therefore be said that they were included in the Order erroneously. In the case of case of paragraph 1.1 relating to BB&T, my error was harmless. In the case of SocGen my error has unfortunately given rise to ambiguity and difficulty, resulting in the need for an application to rectify the Order. For this reason I concluded that I should exercise my power, under GCR O.20, r.11 and/or the Court's inherent jurisdiction, to amend the Order so that it clearly and unambiguously reflects the Court's actual intention.

16 Having decided to amend the Order in this way, it is unnecessary for me to address the alternative application for a supplementary order.

DATED 29 June 2010



Hon. Mr Justice Andrew J. Jones QC