



Court sets aside order granting leave to serve summons outside jurisdiction



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In a recent decision, the Supreme Court of the Commonwealth of the Bahamas held that an order granting a liquidator leave to serve a summons outside the jurisdiction on a company incorporated in Bermuda, which sought the recovery of a payment as a fraudulent preference, should be set aside. The liquidator sought a declaration that a payment made to the foreign company before the commencement of the company's liquidation amounted to a fraudulent preference payment and was invalid. The ruling held that under existing Bahamian international business companies legislation and the Rules of the Supreme Court, there was no jurisdiction for the court to order service outside of the Bahamas in relation to a claw-back claim. The court traced the history of the relevant legislation in the Bahamas and supported the ruling by reference to legislative changes in the United Kingdom which have not yet occurred in the Bahamas to overcome the present obstacle. No doubt, provided the decision is not overruled on appeal, an amendment to the legislation will need to be considered.

Moreover, the liquidator failed to satisfy the court that it disclosed a good and arguable cause of action to satisfy the test that there was a dominant motive or intent to prefer the foreign company over other creditors. In such circumstances, the court found that even if there was jurisdiction, leave should not have been granted in any event to serve a summons outside of the jurisdiction on persons who are not named as parties to the action. The foreign company served did not submit to the jurisdiction and had entered a conditional appearance to the Bahamian proceedings solely for the purpose of seeking to have the order granting the liquidator leave to serve outside the jurisdiction set aside.

The court held that, even if the application was being served in the jurisdiction, service of the summons was impermissible because the summons was not an original process for the purposes of the winding-up proceedings already underway in the Bahamas. Further, the court found that the declaration sought by the liquidator was not the type of application to be heard by summons in chambers in liquidation proceedings and followed the House of Lords decision in *Masri Consolidated Contractors International Co* (SAC 2009 UKHL 43), which held that leave would be obtained only to serve a summons where it could have obtained leave in the original action to serve the originating process out of the jurisdiction. The originating process in this case was the winding up of a company incorporated in the Bahamas which was commenced by petition. Bahamian insolvency legislation makes no provision for service outside of the jurisdiction and common law principles apply in such instances.

This case also raised issues of agency as a defence to a fraudulent preference claim in circumstances when a payment is made to a creditor of the company which is not the ultimate beneficiary of the payment.

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