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article

Grants Ad Colligenda Bona – Securing estate assets at risk pending administration

When the assets of an estate are endangered by delay in its administration, the court has a general power to make a limited grant of administration in order to preserve assets of the deceased within the jurisdiction without waiting until those entitled to a grant have applied. These emergency grants are known as *ad colligenda* grants and are becoming a common feature in the battle for control of British Virgin Islands assets, including companies. They are particularly useful when a person entitled to a full grant is abroad or is temporarily incapacitated and where some urgent step needs to be taken, for example in order to keep the deceased person's business running or for any other urgent purpose. These grants are also commonly allowed where there is a need for urgent administration but where the full facts or details to allow a full grant to be issued cannot be immediately ascertained. It has been recently confirmed that such a grant is available under the common law in the British Virgin Islands (see the *Estate of Liao* BVIHC 2011/0222 (unreported)).

Generally, the application for the order for the *grant ad colligenda* is made without notice on affidavit. However, it is not a requirement for the grant to be made without notice, and it is only appropriate for the application to be made without notice in uncontroversial cases. When it is clear that the circumstances are highly contentious, the court has held that the grant may be revoked if the application was made without notice, as clearly demonstrated in the obiter of *Ghafoor and others v Cliff and others* [2006] EWHC 825 (Ch).

Background

Ghafoor died leaving a sizeable estate with assets in England and Wales, Jersey and Pakistan. He made a will by which he left his entire estate to his four children in equal shares and appointed them to be his executors. The validity of the will was not challenged. The claimants were his sons by his first marriage (the "Sons"). The third defendant, was his daughter (the "Daughter").

The relationship between the Sons and the Daughter deteriorated shortly after their father's death. In early March 2005, Daughter engaged solicitors, namely the first defendant filed a caveat on Daughter's behalf so that the grant of probate would not be made without her knowledge. However, at the same time on 16 March 2005 a petition for a succession certificate was also issued in the civil court in Lahore. Five parties were named as heirs, each one

of the Sons entitled to one quarter share and Daughter and their mother each shown as entitled to one eighth share.

After learning from a family friend that a succession certificate proceeding had been commenced in Pakistan and that she would be receiving a reduced share, Daughter turned to the first defendant Mr. Cliff for assistance. Daughter was of the opinion that the succession certificate proceedings were an attempt by her brothers to reduce her share in the estate and filed a petition for an order for a grant *ad colligenda*. The evidence stated that documents "suggest that the sons have dishonestly provided information to the Pakistani Court with a view to defeating the position regarding the English will."

The steps taken by Mr. Cliff as administrator were as follows: a) he wrote to HSBC in Jersey requesting account balances, b) he dealt with correspondence from liquidators making inquiries, c) he responded to solicitors acting for a potential claimant to the estate. The claimants of the application and of the grant were intentionality not informed of the grant *ad colligenda.*

Notice

Mr. Justice David Richards held that the grant of letters of administration in this case should not have been made without notice to the claimants. The reason is that it was clear that this was a highly contentious matter. Secondly, Mr. Cliff was making very serious allegations of dishonesty and misappropriation. Thirdly, the claimants were three out of the four executors. If the grant was made, it would interfere with any steps taken by them to deal with the estate. Fourthly, it was not a case where a notice would frustrate the application, for example, if the application was for a freezing or search order. Fifthly, the Court found that the urgency was not such as to preclude notice. Mr. Cliff received a copy of the Pakistani petition, but did not make an application to the Court until a month later, even if the time had been short and informal notice had been given.

It was noted that in the English Non Contentious Probate Rules ("NCPR"), rule 27(4) provides that a grant of administration "may be made to any person entitled thereto without notice to other persons entitled in the same degree". The power of appointment without notice is discretionary and in the case of a known dispute, there will be a determination *inter partes* (27(6) and (8)).

Similarly, NCPR 26(1) of the BVI provides that where administration is applied for by one or some of the next of kin only, there being another next of kin equally entitled thereto, the Registrar may require proof by affidavit that notice of such application has been given to such other next of kin. Although the BVI NCPR are not identical to the English NCPR, it seems likely that the BVI courts will apply the same stance that has been adopted in the English courts.

In a recent judgment in the British Virgin Islands High Court dated 29 November 2011, Justice Olivetti held that:

"[A]n application for a *grant ad colligenda bona* is usually made *ex parte* to the Registrar in the first place who may refer it to a judge. (See Tristram and Cootes para. 25.175.) CPR 2000 authorizes a judge to hear urgent matters ex parte. And in *Ghraffoor v Cliff* it was held that where allegations of dishonesty are being made it may be a factor such that those parties should be given an opportunity to refute the allegations at an *inter partes* hearing. The Court thus had jurisdiction to entertain an *ex parte* application…

[However,] Ghafoor also held that, 'if an applicant decides that it is proper to apply without notice, he is subject to the usual duty to make full and frank disclosure. This is the usual duty imposed by the court on a litigant who moves the court without notice to his or her opponent. It means that such a litigant has a duty to make full and fair disclosure of all material facts. The material facts are those which it is material for the judge to know in dealing with the application as made. Materiality is to be decided by the Court and not by the applicant or his or her legal adviser. The duty also requires the applicant to draw to the Court's attention any possible defences by opposing parties who have not been given notice of the hearing."

In the majority of cases, applications to the registry, including those for a grant of administration *ad colligenda bona* are not contentious and are properly and sensibly made without notice. However, the particular circumstances of each case should be considered. Failing to give notice of the order or grant to other claimants will undoubtedly open applicants to criticism in court. The absence of any express requirement in the rules is no longer an adequate reason.

In *Ghafoor*, since the claimants were also executors of the will, they should have been informed as soon as possible, particularly since they may have taken steps in relation to the estate. They were in any event the obvious source of information on assets in the estate, which is the administrators' duty to safe guard. Merely wishing for an opportunity to deal with the matter amicably did not provide good grounds for not bringing the grant to the immediate notice of the claimants either.

Ultimately, it was held in *Ghafoor* that the application should have been made on notice. If urgency required it, a judge could abridge time for notice. If the urgency were so great that not even informal notice could be given, any order would be subject to a further hearing on notice within a short time. The applicant would be required to give immediate notice of the order to the executors and to supply copies of all material relied on to obtain that order and a note of any hearing. This is the general approach in litigation in the High Court. Where there is already a significant level of dispute and the order will be controversial, there is no reason why the same approach should not be adopted in applications to probate registries.

Conclusion

This case sheds some light on how to revoke grants of letters of administration *ad colligenda bona*. Use of such grants to usurp control over companies at the BVI level is becoming more prevalent; clients should be aware of proper procedures in order to set aside or avoid grants being set aside.

Further Information

The foregoing is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.

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