

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: 843/02

In the matter between:

**PETER GRAHAM GARDENER
APPLICANT**

1ST

**RODNEY MITCHELL
APPLICANT**

2ND

and

**ROBERT JOHN WALTERS N.O.
RESPONDENT**

1ST

**GAVIN CECIL GAINSFORD N.O.
RESPONDENT**

2ND

[in their capacities as the duly appointed joint liquidators
of **LeisureNet Limited (in liquidation)**]

In re the *ex parte* application of:

ROBERT JOHN WALTERS N.O.

1ST APPLICANT

GAVIN CECIL GAINSFORD N.O.

2ND APPLICANT

JUDGMENT: 3 MAY 2002

NEL, J:

The Applicants (*'Gardener'* and *'Mitchell'*) seek an order setting aside two orders made by Louw J, at the instance of the Respondents (the *'Liquidators'*). The applications were brought *ex parte* for the issue of letters of request to the Royal Court of Jersey to recognize the appointment of Walters and Gainsford as the duly appointed liquidators of LeisureNet Limited (in liquidation) (*'LeisureNet'*) and

in that capacity to allow them to institute proceedings in Jersey for the purposes of investigation and the recovery of LeisureNet assets.

Background

LeisureNet was a public company listed on the JSE Stock Exchange and owned, *inter alia* the Health and Racquet Club business which operated 85 health clubs in South Africa. It also held 57,8% of the ordinary issued share capital in Healthland International Limited (formerly LeisureNet International Limited) (*LeisureNet International*) registered in Malta. This company was the holding company of the offshore operations of LeisureNet and had 17 subsidiaries in Europe and Australia which owned 22 operating health clubs with a further 17 under development in the U.K., Spain, Germany, Austria and Australia. Gardener and Mitchell were the joint chief executive directors of LeisureNet.

LeisureNet had committed itself to support Healthland International through direct funding and by extensive guarantees although it could not by itself fund expansion. Without adequate funding Healthland International and its subsidiaries could not operate as sustainable enterprises. It is alleged that LeisureNet's financial position had been materially misrepresented to its bankers, creditors and shareholders, particularly in relation to its 31 December 1999 annual financial statements. This false picture, it is alleged, was attributable to *inter alia*, a questionable accounting policy, the gross exaggeration of its debtors, and the non-disclosure of potential financial obligations amounting to almost R1 billion.

LeisureNet was placed under a provisional winding-up order on 7 October 2000 on the basis that it was unable to pay its debts. The order was made final on 30 November 2000. The failure of LeisureNet also meant the demise of its offshore operations. The collapse of the group is said to be the largest corporate collapse in South African history. The total value of its shares traded during 1999 was

R425,695,000.

Prior to 1 May 1999 LeisureNet International held a 50% interest in Healthland Germany Limited which in turn had a wholly owned subsidiary Healthland Germany GmbH which operated the health clubs in Germany and Austria and whose managing director was one Johan Moser (*Moser*). The other 50% shares in Healthland Germany were held by Dalmore Limited (*Dalmore*) registered in Jersey. It was generally believed that Dalmore belonged to Moser.

On 16 April 1999 Dalmore sold its 50% shareholding in Healthland Germany to LeisureNet International for the sum of DM10 million. The purchase price was paid in cash.

The application by the liquidators for the issue of the letters of request was brought after the discovery that LeisureNet funds in an amount of DM 10 million earmarked for the development of fitness clubs in Spain had been misappropriated and, on the instructions of Gardener, had been channeled through a number of overseas bank accounts for the payment of the purchase price of the shares bought by LeisureNet International. The recipient of the funds was Dalmore but from Dalmore DM 4 million of the DM 10 million was channelled to Ajax Way Investments Limited (*'Ajax Way'*) and Clockwork Limited (*'Clockwork'*) companies created for the benefit of Gardener and his family and Mitchell and his family. Both companies are registered in the British Virgin Islands and administered and controlled by the Insinger Trust registered in Jersey.

Dalmore was administered by Ernst & Young Trust Company (Jersey) Limited (now known as the Royal Bank of Canada Trust Company (International) Limited). The shareholders of Dalmore are Cacique Investments Limited, Damor Investments Limited and Paternoster Nominees Limited, all with the same registered office address as Dalmore. The shareholders of these companies are

not known. According to the evidence of Mr Joubert Rabie (*Rabie*)(since denied by him), Gardener and Mitchell were each the beneficial owners of 20% of the shares in Dalmore. Rabie is an attorney, an erstwhile director of LeisureNet, and a long time friend and business associate of Gardener, Mitchell and Moser. According to him, he is the beneficial owner of 15% of Dalmore and Moser the beneficial owner of 45%. At no stage did Gardener or Mitchell disclose their interests in Dalmore or in the sale of the shares to the LeisureNet boards.

The liquidators have also ascertained that as at the end of 1999 an amount of DM 160,000 had been paid to Dalmore by LeisureNet International as commissions. According to Rabie a further amount of £245,608-90 had been paid to Dalmore during the period April 2000 to July 2000. The payments were made into a bank account held in the name of Dalmore at the Royal Bank of Scotland, Jersey. It was paid on the specific instruction of Gardener although there was a general instruction during July 2000 to withhold payments to creditors. According to Rabie, after a deduction of DM 60,000 per transaction had been paid to a wholly owned subsidiary of Dalmore, the commissions were paid to the owners of Dalmore, in accordance with their proportionate shares.

Gardener and Mitchell contend that these payments were made as management fees as agreed upon with the boards of the LeisureNet companies. They state that they were employed by Ajax Way and Clockwork but had donated their offshore work to these companies. They were each entitled to take up 5% founders shareholding in LeisureNet International and Lnet (Australia) (Pty) Limited. The shares were taken up in the names of Ajax Way and Clockwork.

While these explanations as to the payment of the commissions might prove to be correct, no explanation is advanced for their failure to disclose their interests in Ajax Way and Clockwork to the LeisureNet boards and auditors. In fact, they had denied having any such interest.

A letter dated 18 March 1999 addressed to the auditors of LeisureNet and signed by Gardener reads as follows:

'It is recorded that certain amounts are paid by a subsidiary of LeisureNet Limited to Ajax Way Investments Limited, a company incorporated under the laws of the British Virgin Islands having registration number 275080 ("Ajax"), in terms of a management contract entered into by Ajax with such subsidiary. It is recorded further that Ajax is the holder of

shares in certain other subsidiaries of LeisureNet Limited.

This letter serves to confirm that no profit, advantage or other benefit accrues to me, my immediate family or any trust, corporate body or other entity in which I or my immediate family have an interest, in respect of any such amounts paid or benefits accruing to Ajax.'

A similar letter relating to Clockwork was signed by Mitchell.

In addition, in disclosure schedules for the use of the auditors of LeisureNet International, both Gardener and Mitchell declared that they did not have any related party relationships with Kinsman and Ajax Way and with Moreland and Clockwork.

In the replying affidavit by Gardener these allegations were not denied but were dismissed as irrelevant and vexatious.

The First Application by the Liquidators

In their first application for the issue a letter of request, the Liquidators stated as follows:

'107. It further appears from evidence led before the commission that Dalmore received very substantial payments from LeisureNet and/or its subsidiaries by way of commissions. Dalmore was not an operating company. The evidence shows that Gardener and Mitchell were also the recipients of a part of these funds in breach of their fiduciary duties as directors. I have indicated above that an amount of £245 608,90 was paid to Dalmore by way of commission.

108. The LeisureNet liquidators have been unable to investigate the full circumstances relating to transaction described above. They do not have access to the books, records and other relevant documents of Dalmore. It is also evident that Mitchell and Gardener relied on the corporate personality of Dalmore and the anonymity which it

ensured in order to conceal their unlawful activities. It is imperative that the ultimate destination of the substantial funds paid to Dalmore be ascertained. In particular, confirmation is sought of Rabie's evidence before the commission that Gardener and Mitchell were recipients of a substantial part of these funds.

113 The LeisureNet liquidators seek recognition of their appointment as joint liquidators of LeisureNet for the purpose of obtaining access to the books and records of Dalmore at its registered office or elsewhere in the Island of Jersey. These records may reflect the nature and extent of Mitchell and Gardener's interest in Dalmore. As I have stated above the corporate personality of Dalmore was used in an enterprise in which the former chief executive offices of LeisureNet, Gardener and Mitchell abstracted the amount of DM10 million from LeisureNet International and thus enriched themselves. They sought to conceal their own involvement in the transaction by utilizing Dalmore as a front company, a company in which they held a beneficial interest. These funds are recoverable from Gardener and Mitchell by the LeisureNet liquidators. It is in relation to these investigations that access to the books and record of Dalmore is sought. It appears that the secret commissions paid to Dalmore may also be recoverable.

114. The LeisureNet liquidators also wish to ascertain whether Dalmore is in possession of the funds transferred to it by LeisureNet International being the pound sterling equivalent of DM10 million, If so, they will seek to recover these funds for the benefit of LeisureNet's creditors.

115. The LeisureNet liquidators also require access to the books, bank records and bank statements of the Royal Bank of Scotland in Jersey for purposes of further investigation into possible payments to Mitchell and Gardener in relation to commissions paid to Dalmore by LeisureNet.

116. *In the circumstances, the LeisureNet liquidators seek an order for the issue of letters of request requesting the Samedi Division of the Royal Court of Jersey or any other court of competent jurisdiction to act in the aid of the High Court of South Africa for the purpose of recognizing the appointment of the applicants as the duly appointed joint liquidators of LeisureNet.*

The order was sought in the following terms:

- 1) *That letters of request be issued requesting the Royal Court of Jersey to act in aid of the High Court of South Africa (Cape of Good Hope Provincial Division) for the purposes of recognizing the appointment of the applicants as the duly appointed joint liquidators of LeisureNet Limited (in liquidation) ("LeisureNet").*
- 2) *That the applicants are authorized to institute and proceed to the final determination thereof, such proceedings as may be required to be instituted in any Court of competent jurisdiction in Jersey to obtain recognition of the appointment of the applicants as the joint liquidators of LeisureNet.*
- 3) *That the applicants are authorized to institute and proceed to the final determination thereof, such proceedings as may be necessary in the Royal Court of Jersey for the recovery of all movable property situated in Jersey which belongs to LeisureNet.*
- 4) *That the applicants are authorized to institute and proceed to the final determination thereof, such proceedings as may be necessary in the Royal Court of Jersey or any other Court of competent jurisdiction in Jersey in achieving the proper and effective winding-up of LeisureNet.*

The order was granted in chambers on the 8th February 2002 and a Letter of Request addressed to the Royal Court of Jersey was issued by the Registrar. It reads as follows:

TO: THE ROYAL COURT OF JERSEY

Dear Sir

LETTER OF REQUEST – LEISURENET LIMITED (IN LIQUIDATION)

In my capacity as the Registrar of the High Court of South Africa (Cape of Good Hope Provincial Division) I am directed to write this letter to you as a "letter of request" under and pursuant to an Order of the High Court of South Africa (Cape of Good Hope Provincial Division), made by the Honourable Mr Justice W J Louw on Friday, 8 February 2002, the signed original copy whereof I annex as "A".

I confirm and record that pursuant to the said Order of Court, the certificate of appointment issued by the Master of the High Court of South Africa at Cape Town dated 23 March 2001 has been produced to me in terms of which certificate Robert John Walters and Gavin Cecil Gainsford were appointed joint liquidators of LeisureNet Limited (in liquidation) ("LeisureNet") (Master's Reference No. C1033/2000) from which I am satisfied that the said Robert John Walters and Gavin Cecil Gainsford have been appointed joint liquidators of LeisureNet. I annex as "B" a true copy of their certificate of appointment.

It is incumbent upon me to act in terms of the annexed Order of Court (annexed as "A") and I accordingly request the Royal Court of Jersey to act in aid of and to assist the High Court of South Africa:

- 1) By recognizing the winding-up of LeisureNet and the appointment of Robert John Walters and Gavin Cecil Gainsford as the joint liquidators of LeisureNet;*
- 2) By recognizing the rights, powers and title of the joint liquidators of LeisureNet to institute such legal proceedings in the Royal Court of Jersey as may be necessary;*
- 3) By making such order as the Royal Court of Jersey considers just and appropriate in assisting the High Court of South Africa in achieving the most effective administration of LeisureNet's winding-up for the benefit of his creditors.*

The Second Application by the Liquidators

On the 21st February 2002 Mr Leonard Katz, the liquidators' attorney filed a further affidavit which reads as follows:

(6) I have
been in
discussion with
Mr Jonathan

Speck, a practicing advocate in Jersey. He has been engaged by the applicants to seek the relief set out in the applicant's founding affidavit. He has advised me (and I verily believe his advices to be true) that the Royal Court of Jersey will in all probability grant the relief sought by the applicants and to which reference is made in their founding affidavit. However, after discussions with officials of the Royal Court of Jersey he is of the view that

the letter of request should be amplified to include more specifically the relief sought.

- (7) I annex as “**LCK3**” a draft order which includes the matters which in his view ought to be included in the letter of request. I point out that Moreland Overseas Limited, Kinsman Consultancy Limited, Clockwork Limited, Ajax Way Investments Limited and the Insinger Trust are entitled with which either Peter Graham Gardener or Rodney

Mitchell, the former chief executive officers of LeisureNet, are associated.

(8) In the circumstances the applicants seek an order amending the order granted on 7 February 2002 in accordance with the draft annexed as “**LCK3**”.

(9) I respectfully submit that this application is urgent. The lawyers in Jersey are already seized of the matter and have made arrangements to move the application next week. Moreover, the

applicants are concerned that any delay might result in either Gardener or Mitchell coming to learn of the application and that if this happens, they may attempt to frustrate the execution of any order granted in favour of the applicants.

(10) In the circumstances I respectfully ask that an amended order be granted in the terms set out in “**LCK3**”. I draw to the attention of this Honourable Court that reference is made in Walters’ founding

*affidavit to
Ernst & Young
Trust
Company. The
name of the
aforesaid
entities has
been changed
to Royal Bank
of Canada
Trust Company
(International)
Limited.
Furthermore, a
reference is
made in
Walters'
affidavit to
Royal Bank of
Scotland. The
correct name is
Royal Bank of
Scotland
International
Limited.*

On 22 February 2002 Louw J, issued the Second Order with an additional paragraph 5 which reads as follows:

5. *That the applicants, without limiting the generality of the foregoing, are authorized to institute and proceed to the final determination thereof in the Royal Court of Jersey or any other Court of competent jurisdiction in Jersey:*
- 5.1 *Proceedings for injunctive or interdictory relief against any party, including but not limited to, the Royal Bank of Scotland International*

Limited and the Royal Bank of Canada Trust Company (International) Limited and/or Ernst & Young Trust Company (Jersey) Limited and Standard Chartered Bank Limited;

5.2 *Proceedings for an order that any party, including but not limited to, the Royal Bank of Scotland International Limited and the Royal Bank of Canada Trust Company (International) Limited and/or Ernst & Young Trust Company (Jersey) Limited and Standard chartered Bank Limited produce to the applicants all documents, papers or other records relating to or having any connection with Dalmore Limited or its subsidiary or subsidiaries.*

5.3 *Proceedings for an order that any party, including but not limited to, the Royal Bank of Scotland International Limited and the Royal Bank of Canada Trust Company (International) Limited and/or Ernst & Young Trust Company (Jersey) Limited and Standard Chartered Bank Limited produce to the applicants all documents, papers or other records relating to or having any connection with Cacique Investment Limited, Damore Investments Limited and Paternoster Nominees Limited;*

5.4 *Proceedings for an order that any party, including but not limited to, the Royal Bank of Scotland International Limited and the Royal Bank of Canada Trust Company (International) Limited and/or Ernst & Young Trust Company (Jersey) Limited and Standard Chartered Bank Limited produce to the applicants all documents, papers or other records relating to or having any connection with Peter Graham Gardener, Rodney Mitchell, Joubert Rabie and Johan Eduard Moster;*

5.5 *Proceedings for an order that any party, including but not limited to, the Royal Bank of Scotland International Limited and the Royal Bank of Canada Trust Company (International) Limited and/or Ernst & Young Trust Company (Jersey) Limited and Standard Chartered Bank Limited produce to the applicants all documents, papers or other records relating*

to or having any connection with Moreland Overseas Limited, Kinsman Consultancy Limited, Clockwork Limited, Ajax Way Investments Limited and the Insinger Trust;

5.6 Proceedings against any party, including but not limited to, the Royal Bank of Scotland International Limited and the Royal Bank of Canada Trust Company (International) Limited and/or Ernst & Young Trust Company (Jersey) Limited and Standard Chartered Bank Limited restraining them from making any payments or transferring out of any account in the name of Dalmore Limited, Peter Graham Gardener, Rodney Mitchell, Joubert Rabie, Hans Eduard Moser and any person or entity associated with them;

5.7 Proceedings for an order for the examination of any party, including but not limited to representatives of the Royal Bank of Scotland International Limited and the Royal Bank of Canada Trust Company (International) Limited and/or Ernst & Young Trust Company (Jersey) Limited and Standard Chartered Bank Limited, before the Master or any other officer of the Royal Court of Jersey;

5.8 Proceedings for restraining the disclosure of any order granted by a competent Court in Jersey and any evidence pursuant thereto.

The Liquidators sought an order in these terms in the Royal Court of Jersey. The judgment of the Court (Case no 2002/46) reads as follows:

IN THE MATTER OF LEISURENET LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE REPRESENTATION OF ROBERT JOHN WALTERS

AND GAVIN CHECH GAINSFORD

Representation by Joint liquidators seeking the assistance of Royal Court in relation to the liquidation and winding up of LeisureNet.

Advocate J. Speck for the Representors

JUDGMENT

THE DEPUTY BAILIFF:

1. *Robert John Walters and Gavin Cecil Gainsford are the joint liquidators of LeisureNet Limited ("LeisureNet"), a public company which was listed on the Johannesburg Securities Exchange in South Africa. LeisureNet was ordered to be wound up on 30th November, 2000, by the High Court of South Africa on the grounds that it was insolvent. It is estimated that its liabilities exceed its assets by some R681 million (£42 million at current exchange rates).*
2. *The joint liquidators now seek the assistance of this Court in relation to the liquidation and winding up of LeisureNet in the following circumstances. On 30th November 2000 the High Court in South Africa appointed a Commissioner pursuant to Section 417 and 418 of the Companies Act of South Africa in order to enquire into the trade, dealings, affairs and property of LeisureNet. We have received evidence on affidavit concerning the evidence which emerged from the hearings before the Commissioner.*
3. *The story is a complicated one but, for our purposes, can be reduced to the following: LeisureNet, through subsidiaries, was the owner of 50% of Healthland Germany Limited ("Healthland Germany"), a United Kingdom company, which in turn owned Healthland Germany GmbH, a company incorporated and carrying on business in Germany. The other 50% of Healthland Germany was owned by Dalmore Limited ("Dalmore") a company incorporated in Jersey and administered by Royal Bank of Canada Trust Company (International) Limited. It was said before the Commissioner that the joint chief executive officers of LeisureNet, namely Peter Gardener and Rodney Mitchell, each beneficially owned 20% of Dalmore.*
4. *On 16th April 1999 LeisureNet – through a subsidiary called LeisureNet International Limited – purchased Dalmore's 50% interest in Healthland Germany for DM10million. It is said that this was a fraudulent transaction in a number of respects:-*

i. The price was grossly inflated. At the time Healthland Germany was technically insolvent and worth almost nothing.

ii. The beneficial interest of Mr Gardener and Mr Mitchell in Dalmore was unknown to the remaining members of the board of directors of

LeisureNet when they agreed to the transaction.

iii. The board of LeisureNet understood that the purchase price was to be funded by the issue of shares in LeisureNet but, in fact, the price was paid by way of a cash payment.

5. *It is also alleged, on the basis of evidence given before the Commissioner, that unjustified commissions of some £245,000 were paid to Dalmore and other sums were paid to four companies incorporated in the British Virgin Islands but administered in Jersey.*
6. *In short, it is alleged that the two chief executive officers have improperly extracted company funds for their own benefit and the joint liquidators wish, if appropriate, to trace and recover these monies. They have obtained a letter of request from the High Court of South Africa seeking the Court's assistance.*
7. *Article 48 of the Bankruptcy (Desastre) (Jersey) Law 1990 contains statutory provisions governing requests by foreign courts; but that is of no assistance in this case. The article is applicable only to designated countries and territories and South Africa has not been so designated as yet.*
8. *It is however clear that the Court has an inherent jurisdiction to make orders in aid on the basis of comity and reciprocity (e.g. Re First International Bank of Grenada Limited (Jersey Unreported) 23rd January 2002).*
9. *It is clear from the very detailed memorandum before us from South African counsel to the liquidators that the High Court of South Africa would offer reciprocal assistance in such circumstances*
10. *In essence the joint liquidators ask for the following relief:-*
 1. *That their authority and status be recognized and enforced by this Court.*
 2. *That certain banks and the company administrators of Dalmore and the BVI companies disclose information concerning the matters in question.*
 3. *That the same institutions disclose documents concerning the matters in question:*
11. *That injunctive relief freezing the appropriate assets be granted for a limited*

period pending consideration whether, following production of the information and documents, substantive proceedings for recovery of funds should be instituted.

12. *We consider it appropriate to grant the assistance requested by the letter of request and articulated in the terms of the prayer of the representation. The prayer is granted subject to the following points:-*

i. *Paragraphs (d) to (g), which require disclosure of information and documents, are granted subject to receipt of an undertaking that the joint liquidators will pay the reasonable costs of the named institutions in complying with the orders.*

ii. *The freezing injunctions contained at paragraphs (h) to (k) inclusive will be limited to a period of two months. This is intended to give time for substantive proceedings to be instituted which could then seek injunctive relief if appropriate. There will be liberty to apply so that the joint liquidators will be able to apply for an extension of these injunctions should this become necessary.*

iii. *Paragraph (k) will be extended to cover the four BVI companies. The application for paragraph (l), which was a gagging order, was withdrawn by Mr Speck during the course of the hearing.*

iv. *We are not willing to grant paragraph (m) which allows the joint liquidators to summon an officer of the relevant institutions before the Viscount for examination in relation to these matters. The request is too general. Should the exercise of this power become necessary, the joint liquidators may apply to this Court for a specific order setting out the grounds upon which it is required.*

v. *As to paragraph (n) we confirm that the joint liquidators may make use of the copy documents and information disclosed for the purpose of tracing actions elsewhere and for the purposes of reporting to the Commissioner and for the purposes of any proceedings before the High Court of South Africa but not for any other purpose. If they do require to use the documents for any other purpose, they will need to make specific application to this Court*

The application by Gardener and Mitchell

Initially Gardener and Mitchell sought to set aside both orders made by Louw J on the grounds that:

- the orders had been granted ex parte and despite the fact that serious allegations of fraud had been made against them and that the orders could partially at least, affect their interests, they had not been granted the opportunity to be heard;
- the liquidators had failed to place all relevant information before the Court, more particularly the contention that the value of the Healthland shares was in fact substantial and not minimal;
- the contention of the liquidators that payment for the Healthland shares should have been by way of LeisureNet shares issued to Dalmore and not in cash was misconceived;
- the order of the Jersey Court would affect their privacy.

However, during the course of the argument on their behalf, it was conceded that

no grounds exist for setting aside the first order as that order only relates to the recognition of the Liquidators as the duly appointed liquidators of LeisureNet, their authorization to institute proceedings in Jersey to recover moveable property belonging to LeisureNet and to the proper and effective winding-up of LeisureNet.

The application to set aside the order dated 8 February 2002 must therefore be dismissed.

Similarly it was conceded that no grounds exist to set aside Paragraphs 1-4 of the Second Order (a mere duplication of the First Order). Gardener and Mitchell having disavowed any interest in Dalmore, it was further conceded that no grounds exist to set aside paragraphs 5.1, 5.2, 5.3 and 5.7 of the Second Order as these paragraphs only relate to the Royal Bank of Scotland International Limited, the Royal Bank of Canada Trust Company (Jersey) Limited, Dalmore Limited, its subsidiaries and its shareholders Cacique Investments Limited, Damore Investments Limited and Paternoster Nominees Limited.

The remaining paragraphs in the Second Order read as follows:

5. *That the applicants, without limiting the generality of the foregoing, are authorized to institute and proceed to the final termination thereof in the Royal Court of Jersey or any other Court of competent jurisdiction in Jersey:*
.....

"5.4 *Proceedings for an order that any party, including not limited to, the Royal Bank of Scotland International Limited and the Royal Bank of Canada Trust Company (International) Limited and/or Ernst & Young Trust Company (Jersey) Limited and Standard Chartered Bank Limited produce to the applicants all documents, papers or other records relating to or having any connection with Peter Graham Gardener, Rodney Mitchell, Joubert Rabie and Johan Eduard Moster;*

5.5 *Proceedings for an order that any party, including but not limited to, the Royal Bank of Scotland International Limited and the Royal Bank of Canada Trust Company (International) Limited and/or Ernst & Young Trust Company (Jersey) Limited and Standard chartered Bank Limited produce to the applicants all*

documents, papers or other records relating to or having any connection with Moreland Overseas Limited, Kinsman Consultancy Limited, Clockwork Limited, Ajax Way Investments Limited and the Insinger Trust;

- 5.6 *Proceedings against any party, including but not limited to, the Royal Bank of Scotland International Limited and the Royal Bank of Canada Trust Company (International) Limited and/or Ernst & Young Trust Company (Jersey) Limited and Standard Chartered Bank Limited restraining them from making any payments or transferring out of any account in the name of Dalmore Limited, Peter Graham Gardener, Rodney Mitchell, Joubert Rabie, Hans Eduard Moser and any person or entity associated with them."*

It is clear from the papers that there might be a *bona fide* dispute about the value of the Healthland shares. It is equally clear, what ever the impression of the LeisureNet board might have been, that the purchase price of the shares was probably payable in cash, and not by the issuing of LeisureNet shares to Dalmore.

For the purposes of this application, I am prepared to accept that if Louw J had been fully informed of the Rabie valuation of the shares in Healthland Germany, and if his attention had been more pertinently drawn to the interpretation of the payment clause as contended for by Gardener and Mitchell, he might have come to a different conclusion. However I doubt that he would have. In my view, as indicated hereinafter, it was not necessary for the liquidators to establish a *prima facie* case or to show a reasonable prospect of success. In any event, the uncontradicted allegations of the liquidators do show the necessity for enquiries in Jersey.

These allegations are that while Gardener and Mitchell were the joint chief executives of LeisureNet:-

- The financial position of LeisureNet had been

materially misrepresented to its bankers, creditors and shareholders particularly in relation to its 31 December 1999 annual financial statements;

- That DM10 million specifically earmarked for expansion in Spain had, on the instructions of Gardener, been diverted to Dalmore;
- That DM4 million of the DM10 million had been channeled from Dalmore to Ajax Way and Clockwork for the benefit of Gardener and Mitchell or their families
- That millions of Rand had been paid to Dalmore as 'commissions' even at a time when other creditors were kept waiting;
- That Gardener and Mitchell had never disclosed their interests in Dalmore, Ajax Way and Clockwork to the boards of LeisureNet and had in fact denied having such interest.
- That three versions had been advanced why DM4 million had been channeled to Gardener and Mitchell, namely
 - i) Gardener and Mitchell beneficially own 40% of the shareholding of Dalmore (Rabie's

evidence before the Commission);

(ii) Gardener and Mitchell beneficially owned 20% of the shareholding in Healthland

Germany, the shareholding having been held by Dalmore on their behalf (a later version of Rabie's);

(iii) Gardener and Mitchell did not own any shares in Dalmore or Healthland

Germany. The DM4 million was paid to them by Moser. No details of the agreement or the background thereto are provided (the version of Gardener and Mitchell in this application).

In these circumstances where millions of LeisureNet funds have disappeared into pockets created by Gardener and Mitchell in offshore havens, a proper and thorough investigation is not only warranted but essential for the proper winding up of LeisureNet. On reconsideration of the matter I will certainly not set aside the orders.

The contention that the orders should not have been granted because the information sought by the liquidators is private and confidential borders on the grotesque. It is illustrative of the attitude of so many managers of companies who seem to believe that they should be allowed to walk away scot-free from financial disasters which they have created.

The remaining questions are whether the applications should have been brought *ex parte* and the orders granted without notice to Gardener and Mitchell and whether they have the necessary *locus standi* to intervene.

The Issue of Letters of Request

In the United Kingdom the issue of letters of request to act in aid of a Court was also known in the Ecclesiastical Courts. *Phillimore* "Ecclesiastical Law" at page 1278. This procedure, which seems to have become peculiar to insolvency proceedings, and is also known as 'process in aid' or 'orders in aid' was formally introduced into bankruptcy by the Bankruptcy Court Act 1869.

Section 74 of the Bankruptcy Act of 1869 read as follows:

'British Courts and their officers shall severally act in aid of, and be auxiliary to, each other in all matters of Bankruptcy; and an order of the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to matters directed by such order, the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.'

Since that date numerous applications for the issue of letters of request or for the recognition of foreign trustees have been brought in the Courts of the old South African colonies and later in the Courts of the Union of South Africa. In 'The Judicial Practice, of South Africa' by *C.H. van Zyl*, 2 e.d. the following appears at p285-286.

"Our Supreme Court in February, 1884 (not reported), acting on this request, gave an order, not only to recognize the English order, but even cancelled the Colonial sequestration of the estate, including the appointment of the Trustees thereunder, and vested all the movable assets of the estate in the English Trustees, By virtue of the same section again, our Supreme Court and the Griqualand West Court, in November, 1886, granted similar orders seeking the aid of the English Bankruptcy Courts and requesting them to recognize, as Trustees in England, the appointment of Colonial Trustees is the insolvent estate of Christopher Firbank, and of the estate of Firbank, Pauling & Co. (neither of which is reported).

The application here is by petition to the Court by the Trustees, setting forth the circumstances why they wished to be recognized as such in England; and concluding with a prayer:-

- 1. To act in aid.*
- 2. To declare the property (in England) vested in the Colonial Trustees.*
- 3. To order that the administration be proceeded with by the Trustees, or by their lawfully appointed agents; and*
- 4. For general relief, &c.*

The Supreme Court has confirmed the appointment of a trustee elected in Griqualand West, and appointed by the High Court there, for the purpose of enabling him to dispose of landed property in this Colony beyond the jurisdiction of the said High Court."

See also the numerous cases cited and summarized by *Bisset and Smith* in 'The Digest of South African Case Law' Vol III p.411-417.

A similar procedure but without the intervention of Courts, is the recognition of a foreign executor by the Master of the High Court in South Africa or by the Registrar of the Chancery Division of the High Court in the U.K for the purposes of administering deceased estates.

The issuing of letters of request is also known and recognized in International law and is based on the 'universality' of sequestration, reciprocity and the comity of nations. See generally *Story* 'Commentaries on the Conflict of Laws' 6 ed. par. 26-38 a, *Bar* 'The Theory and Practice of Private International Law' 2 ed. par. 476-477 and *Fletcher* 'The Law of Insolvency' p. 609-611 as follows:-

"As already explained above, the fundamental principle long accepted by English law is that the law of the company's domicile is primarily competent to control all questions concerning the company's initial formation, and subsequent existence, as a legal person. As was also explained above, the domicile of a company is for this purpose treated as being, possibly immutably, located in the country under the laws of which the company originally underwent formal incorporation and registration so as to attain a legal identity and status. From this fundamental principle it follows that English private international law will accord recognition to a foreign dissolution of a company which has taken place under the law of the company's domicile, as understood by English law: if the true construction of the effect of the winding up according to the foreign legal system is to bring to an end the company's legal existence, that consequence will be accepted and recognized at English law.

From the general principles stated in the previous subsection it follows that a liquidator appointed under the law of the company's place of incorporation will be recognized at English law as having authority to wind up the company, and to represent it in legal proceedings brought either against or on behalf of the company, provided that such representative authority is conferred upon him by the law governing his appointment"

See also, *Ex parte B.Z. Stegmann* 1902 TS 40 at 48-55.

Reference was made to a *dictum* from the judgment in *Ex Parte Wessels and Venter NNO*: In re *Pyke-Nott's Insolvent Estate* 1996(2) SA 677 (O) at 681 that letters of request ought to be granted by the Court only –

'if the applicants have made out a prima facie case or have shown reasonable prospects of success that an examination of witnesses and documents in England may lead to the

discovery of further assets in the insolvent estate.'

I do not agree. A Court is approached to issue a letter of request to a Court in a foreign country to recognize the liquidator and is not asked to approve or to sanction the actions of the liquidator. If the Master or creditors are of the view that the liquidators are acting irresponsibly or are wasting money they have other avenues to explore. In my view, all that has to be stated is that the liquidator believes that proceedings should be initiated in the foreign country. Whether this belief is based on impeccable information or is merely based on unsupported hearsay, is irrelevant. If a liquidator is *bona fide* of the view that proceedings should be taken in another country, it should be his decision, and his alone.

As indicated above the effect of the issue of the letters of request following upon the orders of Louw J amounted to nothing more than a request to the Court of Jersey to allow the liquidators to perform the functions conferred upon them by the South African Companies Act. No order was sought against Gardener and Mitchell, no order was granted against them and no rights or interests of either are affected by the orders. Subsequent proceedings which might affect them are governed by the laws and procedure of the Island of Jersey.

Accordingly, in my view it was not necessary to notify Gardener and Mitchell of the intention to apply for the issue of the letters of request, and they do not have the necessary *locus standi* to intervene. See *United Watch and Diamond Company v Disa Hotels* 1972 (4) SA 409 (C).

It follows that the application by Gardener and Mitchell to set aside the Second Order should be also be dismissed.

Gardener and Mitchell applied to strike out a number of paragraphs in the affidavit of Walters on the grounds of irrelevance or vexatiousness. Some of the passages are certainly irrelevant but as prejudice was not shown, the application must be dismissed.

In the result

- (a) The application to set aside the orders granted by Louw J on the 8th February and the 22 February 2002, is dismissed, with costs, including the costs attendant on the employment of two counsel;
- (b) The application to strike out is dismissed with costs.

H C NEL