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OFFSHORE CASE DIGEST

JANUARY 2013

CAYMAN ISLANDS

GRAND COURT

Irving H Picard (as Trustee for the Liquidation of the Business of Bernard L. Madoff Investment Securities LLC) (In Securities Investor Protector Act Liquidation) and Bernard L. Madoff Investment Securities LL (In Securities Investor Protection Act Liquidation) -v- Primeo Fund (In Official Liquidation)
(Cause No. FSD 275 of 2010), Jones, J., 14 January 2013

CROSS-BORDER INSOLVENCY LAW - JURISDICTION TO DETERMINE CLAW-BACK CLAIMS - FOREIGN TRUSTEE GRANTED RECOGNITION IN THE CAYMAN ISLANDS - ABILITY OF THE CAYMAN ISLANDS COURTS TO ASSIST IN AID OF FOREIGN BANKRUPTCY PROCEEDINGS

This case concerned the latest Cayman chapter of the Madoff litigation. Bernard L. Madoff Investment Securities LLC's ("BLMIS") only connection with the Cayman Islands is that several Cayman domiciled investment funds, including Primeo Fund ("Primeo"), placed funds with it for investment. Primeo's success was highly dependent on BLMIS' investment performance, and as such the fund suspended the calculation of its net asset value and suspended subscriptions and redemptions the very day after the arrest of Bernard Madoff for fraud. Primeo entered voluntary winding up very shortly thereafter and joint official liquidators were appointed.

BLMIS was not registered as a foreign company in the Cayman Islands. It was not licensed to carry on investment business in the Cayman Islands, nor did it hold any property in the jurisdiction. There was no action in the Cayman Islands for a winding up of BLMIS. However, in 2010, the Cayman Islands Courts made a declaration under Section 241(1)(a) of the Cayman Islands Companies Law recognising the Trustee as the only person entitled to act on behalf of BLMIS in this jurisdiction. Having gained recognition, the Trustee brought an action to claw-back certain payments that were made to Primeo before the commencement of the foreign liquidation proceedings. The claw-back claims, based on the law of unlawful avoidance/preference, were brought with reliance upon certain provisions of US bankruptcy legislation, as well as Cayman Islands legislation and Cayman Islands common law.

In the trial of a preliminary issue, the Court was concerned primarily with the question of whether either the common law or the Companies Law gave the Court jurisdiction to adjudicate the Trustee's claw-back claims (whether under the substantive laws of the Cayman Islands or US bankruptcy laws). The Trustee attempted to rely on Paragraph (e) of Section 241(1) of the Companies Law, which provides that an ancillary order may be made for the purposes of "ordering the turnover to a foreign representative of any property belonging to a debtor". However, the Court found that this paragraph did not constitute a statutory claw-back mechanism. The Court noted the difference between the notion of the "property of the debtor" and the "property of the estate of the debtor," the latter being those assets available for distribution to creditors in the context of a winding up order. As the assets in question did not fall into this category (there being no winding up order) relief could not be found in this section of the Companies Law.

The Court further held that, in the event that it was wrong and the Trustee could avail himself of section 241 as a basis for his claim, such claim would still need to be made out under the substantive law of the Cayman Islands, and not under U.S. bankruptcy law. The Court concluded that "This Court's common law jurisdiction to provide assistance in respect of foreign corporate insolvency proceedings (whatever its scope) depends on the application of domestic law. If the Legislature had intended this rule to be abolished by the enactment of Part XVII, it would have said so expressly".

The analysis then turned to the Trustee's common law rights to seek the assistance of the Cayman Islands Court. This required a careful review of the UK Supreme Court's decision in *Rubin -v- Eurofinance* [2012] UKSC 46 ("Rubin") as well as its impact on the decision in *Cambridge Gas Transportation Corporation -v- Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 ("Cambridge Gas"). Cambridge Gas stood for the principle that at common law a domestic Court has jurisdiction to assist a foreign officeholder in a liquidation by doing whatever it could have done in a domestic insolvency proceeding. In Rubin, the UK Supreme Court concluded that Cambridge Gas had been wrongly decided; however, Jones J. noted that "they did not reject the underlying proposition that recognition at common law "carries with it the active assistance of the court". They only rejected the proposition that 'active assistance' extended to the enforcement of *in personam* judgments made in bankruptcy proceedings which would not otherwise be enforceable in accordance with the established conflict of laws rules articulated in Dicey's Rule 43. Jones J. therefore determined that it was open to the Court to find that the scope of the assistance available at common law in this case includes the power to entertain a preference claim under Cayman Islands law.

The Court concluded its analysis by considering whether the scope of assistance at common law is dependent on the existence of jurisdiction to make a winding up order. Having reviewed the general principle of 'modified universalism,' Jones J. came to the conclusion, "not without some hesitation, that this Court does have jurisdiction at common law to apply to avoidance provisions of Cayman Islands insolvency law in aid of the BLMIS liquidation whether it would have had jurisdiction to make a winding up order". The decision is being appealed by both parties.