

## CAYMAN ISLANDS COURT OF APPEAL

### ***Irving Picard & Bernard Madoff Investment Securities LLC -v- Primeo Fund (in official liquidation) CICA 1-2/2013, per Chadwick J, Mottley J, Campbell J (16 April 2014)***

### TRANSACTION AVOIDANCE - FOREIGN INSOLVENCY PROCEEDINGS

This was an appeal from a decision of Jones J on preliminary issues raised by the parties relating to the proceedings brought by the Trustee for the Madoff liquidation against Primeo Fund, founded on transaction avoidance provisions of the US *Bankruptcy Law* (including Sections 547, 548 and 550 of the US *Bankruptcy Code* and transferee claims under the *New York Debtor and Creditor Law*) and also claims founded on Section 145 of the *Companies Law* (voidable preference) or equivalent common law rules.

The three specific issues for determination on appeal were: (1) whether the Court has jurisdiction under Sections 241 and 242 of the *Companies Law* to apply transaction avoidance provisions of foreign insolvency law (and, in particular, provisions of US *Bankruptcy Law*) in aid of foreign insolvency proceedings; (2) whether the Court has jurisdiction under Sections 241 and 242 of the *Companies Law* to apply transaction avoidance provisions in Cayman Islands' insolvency legislation in aid of foreign insolvency proceedings; and (3) whether the Court has jurisdiction at common law to apply transaction avoidance provisions in Cayman Islands' insolvency law in aid of a foreign insolvency proceeding, or, in the alternative, whether the Court has such jurisdiction but only in a case where it would have jurisdiction under Section 91 of the *Companies Law* to make a winding up order in respect of the foreign company in question.

The Court of Appeal handed down an interim Judgment, addressing only the first two issues, on the basis that the answer to the third issue could be influenced by another case in Bermuda (*PricewaterhouseCoopers -v- Saad Investments Company Limited and Singularis Holdings Ltd* [2013] Bda LR

82), currently on appeal to Privy Council. That case involves the consideration of whether the observations by Lord Hoffman in *Cambridge Gas -v- Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 should be followed in light of the subsequent comments of Lord Collins in *Ruben -v- Eurofinance SA* [2012] UKSC 46.

In respect of the first issue, the Court of Appeal held that the Cayman Court does not have jurisdiction under Sections 241 and 242 of the *Companies Law* to apply transaction avoidance provisions of foreign insolvency law. Chadwick J acknowledged that it is illogical to apply domestic law to transaction avoidance issues when the distribution regime is governed by a foreign law, however, His Lordship took the view that that would represent such a radical departure from common law that had the legislature intended that result, they would have been expected to say so in clear terms.

In respect of the second issue, the Court of Appeal held that the Cayman Court does have jurisdiction under Sections 241 and 242 of the *Companies Law* to apply transaction avoidance provisions of Cayman Islands insolvency law in aid of a foreign insolvency proceeding. This conclusion was reached on the basis that, firstly, the power conferred by Section 241 is to be exercised only for one or more of the purposes described in paragraphs (a) to (e) of Subsection(1); which meant the relevant question was whether a power to make transaction avoidance orders is a power which is exercisable for one or more of those purposes.

Secondly, Section 242(1)(c) of the *Companies Law* is a clear indication that it was intended by the legislature that the Court, in exercising the powers under that section, would have regard to the need, in the context of the foreign bankruptcy proceeding, to avoid preferential or fraudulent dispositions.

Thirdly, that Section 242(1)(c) was also included as a guide to the exercise of the power to make orders ancillary to foreign bankruptcy proceeding described in Section 241(1)(e). Fourthly, it can properly be said that the making of a transaction avoidance order in aid of a foreign bankruptcy proceeding is the making of an order *“ancillary to a foreign bankruptcy proceeding for the purposes of (e) ordering the turnover to a foreign representative of any property belonging to a debtor”*.

Finally, the avoidance of *“preferential or fraudulent dispositions of property comprised in the debtor’s estate”* has the effect of restoring the property to the debtor; so enabling an order to be made for the turnover to the foreign representative of *“property belonging to the debtor”* in the strict sense. Therefore, the reference to *“property belonging to a debtor”* in Section 241(1)(e), rather than to *“property comprised in the debtor’s estate”*, is appropriate and gives rise to no difficulty.

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