

## BERMUDA SUPREME COURT

**CIVIL JURISDICTION 2018 NO: 129  
BETWEEN: DOUGLAS KELLEY (IN HIS  
CAPACITY AS THE TRUSTEE OF THE PCI  
LIQUIDATING TRUST) AND STEVEN G.  
STEVANOVICH; PARAGON MANAGEMENT  
LTD. N/K/A BERMUDA ADMINISTRATIVE  
SERVICES LTD; AND OTHERS**

*APPLICATION TO SET ASIDE ORDER FOR  
EXAMINATION – RSC 0.70 OF THE RULES OF THE  
SUPREME COURT – POWERS OF THE COURT TO  
ORDER EXAMINATION UNDER SECTION 27Q OF  
THE EVIDENCE ACT 1905 – FISHING EXPEDITION –  
DISCRETION*

### REASONS FOR RULING

**[2018] SC (Bda) 69 Civ (18 October 2018)**

This matter came before the Court on the Defendant's contested summons application dated 2 July 2018 to set aside an ex parte Order made on 26 April 2018 for Bermuda Administrative Services Ltd. ("BAS") to comply with the terms of a Request from the United States Bankruptcy Court for the District of Minnesota for International Judicial Assistance for a proper representative of BAS to submit to examination under oath by a Bermuda appointed examiner. The ex parte Order also required the Defendant to produce various documents.

#### The Background Evidence

Various companies filed for voluntary bankruptcy in the United States Bankruptcy Court District of Minnesota under Chapter 11 proceedings following the discovery of their involvement in the Thomas Petters' Ponzi scheme.

Several special purpose vehicles ("SPVs") were formed as part of the Ponzi scheme to entice investors to lend or invest money in the SPVs for bonds entitling them to an interest in receivables due to these SPVs. It is alleged that between 2003 and 2009 over a US\$83,000,000 in fraud proceeds were paid to the bank account of Paragon Management Ltd, now known as BAS.

The PCI Liquidating Trust was created under a liquidating plan of reorganization for the purpose of recovering the fraud proceeds. The Plaintiff, Douglas Kelly, having been appointed by the US Bankruptcy Court to recover these proceeds which were paid to

third party creditors/investors commenced a series of ancillary legal proceedings against third parties on the basis of their allegations that those third parties were recipients of proceeds of the fraudulent scheme. The Plaintiff's tracing claims named Steven Stevanovich as a Defendant in those ancillary proceedings where it was alleged that he and/or his family and associates were the ultimate beneficiaries of monies which emanated from the Ponzi scheme.

The Plaintiff averred that the monies from which Mr. Stevanovich and others benefitted were channelled through BAS. Capital Strategies Fund Limited (now known as Barrington Capital Group Limited) was in voluntary liquidation in the British Virgin Islands. In the affidavit evidence of Andrew Martin, he deposed that the Plaintiff '*will require production of evidence concerning the relationship amongst and the transfers between Capital Strategies..., Paragon and other parties...*'

BAS was initially a named defendant amongst the Plaintiff's various actions for recovery of fraudulent proceeds. However, the action against BAS was dismissed on a without prejudice basis while the same litigation against 14 other named Defendants (and 9,999 unnamed John Doe defendants) had matured into an advanced post-discovery stage. It is against this factual background that the Defendant opposed the US Court's request for assistance.

## The Application to Set Aside the Ex Parte Order

The application to set aside the ex parte order was made on the grounds that it was part of a 'fishing expedition' and contained requests which did not meet the strict requirements of Bermuda law.

### Relevant Law

The Court has historically aligned itself (see *Edward C. Abell, Jr. & Carey Walton v Potomac Insurance Co. of Illinois, National Union Fire Insurance Co. et al* Civil Jurisdiction 1986 No. 421) with *Rio Tinto Zinc and Westinghouse* (1978) 1 All E.R. 434.

Order 70 of the Rules of the Supreme Court (RSC) governs the procedural law for obtaining evidence in Bermuda for use by overseas courts. Orders compelling a party to provide evidence are made pursuant to section 27Q of the Evidence Act 1905.

### Requests for Production of Actual and Specified Documents vs a call for a Fishing Expedition

The basis for an application to discharge at least parts of the original *ex parte* Order which gave full effect to the Request was made on the ground that the request for the production of documents was lacking in requisite particularity and consequently amounted to a wide discovery request and a 'fishing expedition'.

Counsel for the Defendant relied on the judgment of the learned Justice Ian Kawaley (as he then was) in *NetBank v Commercial Money Center* [2004] LR 46. To illustrate the degree of precision and particularity required to be identified in the request for documents, Counsel cited *Marjorie S Dean et al v Skadden, Arps, Slate Meagher & Flom et al* [1998] Bda LR 43.

### Analysis and Decision

The Court determined that an order for the production of documents should be restricted to particular and specified documents known to be in existence and those documents must appear to the Court to be, or to be likely to be, in the witness' possession, custody or power. Requests for documents outside of this nature will likely be refused on grounds that the requesting party is embarking on a fishing expedition. The Court must also be further satisfied that there is an intention that the foreign proceedings should continue to trial.

Accordingly, the ex parte Order was amended to set aside certain parts relating to the production of documents for which the request failed to meet the required standard for particularity.