20th April, 2013

Litigation Update: The Cayman Islands and The British Virgin Islands (BVI)

- Irving H. Picard (As Trustee for the Liquidation of the Business of Bernard L. Madoff Investment Securities LLC) -v- Primeo Fund (in Official Liquidation), Jones J. 14 January 2013, Grand Court Cayman Islands.

The Grand Court of the Cayman Islands dealt with the powers of foreign officeholders in Irving H. Picard (As Trustee for the Liquidation of the Business of Bernard L. Madoff Investment Securities LLC ("BLMMIS")) -v- Primeo Fund (in Official Liquidation), Jones J. 14 January 2013, in a trial of preliminary issues.

The decision has important implications for insolvency procedures and particularly the difference between Cayman Islands law and the UK and USA. Picard obtained a Grand Court recognition order in accordance with the Companies Law (2012 Revision). The issue for the court was to determine whether the Plaintiff may establish avoidance claims in the Cayman Islands under section 241 (1) (e) of the Law or at common law. The Grand Court noted that the reliefs listed at section 241 (1) did not include an order to apply the avoidance provisions of either domestic or foreign law in support of a foreign bankruptcy proceeding. Accordingly the Companies Law did not provide the court with the power to allow the Trustee (Picard) to bring such avoidance claims in the Cayman Islands. The court held that the claim may be brought at common law and not under section 241(1)(e).

The court considered whether it could actively assist the US bankruptcy proceedings by allowing the Trustee to bring avoidance

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claims in Cayman. The court decided that it did have the jurisdiction to allow the Trustee to bring Cayman law (but not US law) avoidance claims. Furthermore the court held that even if section 241 contained the power to allow avoidance claims it would not apply a foreign law (USA) to uphold a claim by a recognised officer under Cayman law. The Cayman Islands has not applied the relevant provisions of the UNCITRAL Model Law unlike the USA and the UK in the recognition of foreign officeholders. Cayman law is determined at the court's discretion in the interpretation of section 241 of the Companies Law and common law as appropriate.

Having determined that the Trustee is entitled to recognition under section 241, it follows that the court has discretion at common law to entertain the Plaintiff's claim as if BLMIS was the subject of a local winding up order. That power is not dependant upon establishing that there is jurisdiction under section 91 (d) to make a winding up order in respect of BLMIS in the Cayman Islands. The court held that Picard has the right at common law, only, to make avoidance claims and we await application of the court's discretion regarding the substance of those claims.

As a result of this decision, the Cayman Grand Court seems to depart from the English Supreme Court decision in Rubin -v- Eurofinance SA 2012 UKSC 46 which determined that foreign insolvency judgments fell to be treated in like manner as all other foreign judgments. Such judgments would not be enforceable if made against persons who were not subject to the jurisdiction of the foreign court. The Supreme Court in Rubin decided that any reform of the law in this area would be for the legislature and not the judiciary to embark on such reforms. The approach by the Privy Council in Cambridge Gas Transportation Corporation -v- Official Committee of Unsecured Creditors of Navigator Holdings PLC 2007 1 AC 508, which held that an order made in US insolvency proceedings could be enforced by a domestic court, was thereby rejected by the Supreme Court in Rubin.

The Grand Court decision in Picard seems to reinstate the Cambridge Gas approach to this complex legal topic of recognition of foreign office holders in the Cayman jurisdiction. As a result of the decision by the Grand Court the position is that a company incorporated in the Cayman Islands can be subject to a Cayman law avoidance action brought by the recognised office holder of a company incorporated in another jurisdiction. Reciprocity to Cayman office holders is not a requirement. The law on this topic needs clarification as liquidations across jurisdictions and issues involving recognition of office holders are becoming more frequent. It is not surprising that both parties have sought to appeal the Picard decision which affords the higher courts an opportunity to interpret the legislation and case law on foreign office holders in international liquidations.

Somers Dublin Ltd A/C KBCS and Ors -v- Monarche Pointe Fund Limited (In liquidation), 11 March 2013, Court of Appeal, Eastern Caribbean Supreme Court, British Virgin Islands. This is an appeal court decision.

The appellants are redeemed shareholders in the respondent mutual fund incorporated in the BVI. The Fund was in liquidation and the external creditors were paid. There were insufficient funds remaining to pay the redeemed shareholders. The liquidator wished to pay the remaining assets to the redeemed shareholders pro rata and made an application to the High Court for directions to do so. The trial judge held as a matter of law that the claims of the redeemed members and of the continuing members should rank equally. This being an interlocutory order in the winding up

petition, the redeemed members appealed to the Court of Appeal.

The appeal was upheld. It was held by the Court of Appeal that a redeemed member is a creditor in respect of his unpaid redemption payment. The purpose of section 197 of the Insolvency Act 2003 (BVI) is to subordinate the former members claims as creditor to that of unsecured creditors. It was therefore incorrect for the trial judge to have held that the redeemed members in their character as such, should rank equally with the continuing members claiming a return on capital. It was wrong to have held that redeemed members were not deferred creditors and entitled to have their claims against the company satisfied in priority to any claim by the continuing members. The redeemed members must be paid before any surplus is ascertained out of which the continuing members may be paid.

The BVI Court of Appeal decision establishes certainty in distributions following liquidation of funds and reaffirms a conventional approach that debts owed to past members for redemption proceeds provide them with deferred creditor status and thereby rank behind external creditors of the company. Their redemptions, however, rank in priority over existing members in a liquidation.

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