

Fairfield Sentry Limited (in liquidation) – Court of Appeal decision - 20 November 2017

In a significant decision, the Court of Appeal of the Eastern Caribbean Supreme Court has rebuffed attempts by former shareholders in Fairfield Sentry to challenge the continuance of claims brought against them in the US. In doing so, the Court of Appeal clarified two important points of BVI law and practice which will be of widespread application: the meaning of *persons aggrieved* under section 273 of the Insolvency Act, 2003 and the availability of avoidance relief pursuant to section 249 of the Insolvency Act, 2003 outside of the BVI.

Background

Actions against redeemed former shareholders in Fairfield Sentry (in liquidation) (**the Appellants**) to recover redemption monies paid out based on a mistaken calculation of the relevant net asset value (caused by the Madoff Ponzi scheme) were dismissed in the BVI following the Privy Council's widely reported decision in *Fairfield Sentry Ltd (in liquidation) v Migani and others* [2014] UK PC 9. Notwithstanding this adverse outcome, the liquidators of Fairfield Sentry (**the Liquidators**), with the sanction of the Court of Appeal, commenced further claims in the US which included the Appellants amongst a large number of redeemer defendants (**the US Proceedings**). Although these claims concerned a different set of redemptions, they were said to be based on the same factual matrix grounded in restitution for unjust enrichment, monies had and received, mistaken payment and constructive trust. The US Proceedings included claims for relief pursuant to section 249 of the Insolvency Act, 2003 (**the Act**) on the basis that the redemptions and/or payment of the redemption proceeds constituted unfair preferences and undervalue transactions and were therefore voidable.

The Appellants disagreed with the commencement of claims in the US which they saw as re-litigating issues already finally decided in the BVI. In addition to taking steps in the US Proceedings to have those claims dismissed, the Appellants sought to restrain the Liquidators by applying to the BVI Court on two bases.

First, the Appellants applied pursuant to **section 273 of the Act** on the basis that they were *persons aggrieved* by the Liquidators' decisions and actions in pursuing the US Proceedings. They asked the BVI Court to exercise its supervisory powers to restrain the Liquidators from pursuing the US Proceedings.

Secondly, the Appellants sought **an anti-suit injunction** on the basis that the US Proceedings were vexatious and/or oppressive. This application argued that (i) the issues arising in the US Proceedings had already been determined by the BVI Court and (ii) the claims in the US Proceedings were hopeless because the US Court was unable to grant relief under section 249 of the Act, those powers being for the BVI Court alone to exercise.

At first instance the Appellants were unsuccessful. By Judgment of 10 March 2016, Leon J dismissed the Appellants' applications. The Appellants appealed and the Court of Appeal has now given its judgment, handed down on 20 November 2017.

(i) Section 273: "persons aggrieved"

Section 273 of the Act provides:

A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder.

The Court of Appeal considered the meaning of a *person aggrieved*, finding that the phrase must take its meaning and colour from the context of the particular statute in which the words appear. It concluded that a person cannot be considered as aggrieved unless the person has a sufficient interest in the outcome of the act, omission or decision of a liquidator. When considering the issue, the capacity in which the person is seeking relief must be identified. Merely because a person may have technical capacity, which would otherwise entitle it to standing, this *'alone would not suffice if the circumstances demonstrate that the relief is sought not in that capacity but in some other'*.

On the facts, the Court of Appeal found that the Appellants had failed to show that they were persons aggrieved within the meaning of section 273. The Court was not persuaded that the Appellants, as alleged debtors, would be concerned or affected by the ultimate distribution of an estate in liquidation. It observed that the Appellants *'do not suggest that they have any interest in the assets of Sentry or the manner in which they are distributed or spent'* and found that the Appellants were applying in their capacity as mere defendants in the US Proceedings. In that capacity, the Appellants were strangers to the liquidation and they had no legitimate interest in the relief sought. The Court also noted that the Appellants had an obvious alternative remedy (mounting applications in the US Proceedings) which was sufficient to prevent the Appellants from falling within an exception to the general approach or otherwise qualifying as *persons aggrieved*.

This conclusion denied the Appellants standing to apply under section 273 of the Act and disposed of this application. This left the Appellants falling back on their application for an anti-suit injunction.

(ii) Anti-suit injunction

The Court of Appeal proceeded to consider the Appellants' application for an anti-suit injunction on the basis that the US Proceedings were vexatious and/or oppressive. The Court noted that the decision at first instance was the exercise of a discretion and there were limited circumstances in which it is appropriate for an appellate court to interfere. In the circumstances, the Court was not satisfied that this threshold was met.

The Court found that the claims in the US Proceedings were not in respect of the same redemption payments as were previously before the BVI Courts. It took the view that the scope and effect of the Privy Council's decision was, in the circumstances, arguable and that this was an issue which as a matter of comity and common sense should be addressed in the US Proceedings. The Court decided that it would be wrong for the BVI Court to determine these claims summarily.

As to the argument on section 249 of the Act, this provides that ‘*where it is satisfied that a transaction entered into by a company is a voidable transaction the Court, on the application of the office holder*’ may make a variety of orders. The Appellants argued that this section could only be operated by the BVI Court; any claim purportedly brought pursuant to the same in the US Proceedings was therefore doomed to fail.

The Court of Appeal disagreed. The Court had regard to the importance of cross-border cooperation and was satisfied that section 249 was not subject to the exclusive jurisdiction of the BVI Court. Rather the use of the word “Court” in that section was a procedural provision which merely directs where a claim may be made. In the premises, the Court saw no good reason to prohibit the US Bankruptcy Court from rendering assistance to the BVI main insolvency proceedings and refused to make the Order sought.

The last word

It remains to be seen whether this decision will be the subject of a further appeal. As matters stand, the decision is a disappointing one for the Appellants in their long-running dispute with the Liquidators which shows no sign of coming to an end as we approach the nine year anniversary of Madoff’s arrest on 11 December 2008.

As for the practical significance of the decision, the market is likely to pay close attention to the comments on the scope of sections 249 and 273 of the Act, particularly given the widespread application of these provisions.

To discuss the significance of these decisions further or any queries arising, please do not hesitate to contact the authors detailed below.



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