

Confirmation of the Grand Court's Powers to Assist Foreign Liquidators and Trustees of Foreign Companies and Other Entities by Applying Cayman Islands Transaction Avoidance Legislation

In a recent judgment, the Cayman Islands Court of Appeal has confirmed the scope of the jurisdiction of the Grand Court, under sections 241 and 242 of the Companies Law (2013 Revision) (the "Law"), to assist foreign liquidators and trustees of foreign companies and other entities in foreign bankruptcy proceedings in their jurisdiction of incorporation by reversing pre-liquidation transactions under transaction avoidance legislation.

Picard v Primeo Fund, 16 April 2014, Cayman Islands Court of Appeal

Background

The case, *Picard (as trustee (the "Trustee") for the liquidation of Bernard L Madoff Investment Securities LLC ("BLMIS")) v Primeo Fund ("Primeo")*, is another chapter in the litigation arising out of the Madoff fraud. The Defendant, Primeo, is an open ended investment fund incorporated in the Cayman Islands. It "invested" heavily in BLMIS through its two sub-funds. In 2009, Primeo was placed into voluntary liquidation, and the liquidation continues under the supervision of the Grand Court.

In February 2010, Justice Jones made an order recognising the right of the Trustee to act in the Cayman Islands on behalf of BLMIS. The Trustee then commenced an action in the Grand Court against Primeo seeking to recover approximately US\$145 million, said to have been received by Primeo from BLMIS prior to June 2007, based on the transaction avoidance provisions of the United States Bankruptcy Code (the "Bankruptcy Code Claims"). A further voidable preference claim, seeking to set aside approximately US\$588 million worth of transactions said to have been made during the 6 months prior to the commencement of the BLMIS liquidation, was made under section 145 of the Law (alternatively at common law) (the "Cayman Preference Claims").

Justice Jones determined two preliminary issues concerning the jurisdiction of the Grand Court to determine the Trustee's claims. He held that the Grand Court was not able to apply United States insolvency law under sections 241 or 242 of the Law or at common law. He therefore struck out the Bankruptcy Code Claims. However, he also held that although the Grand Court had no jurisdiction under sections 241 and 242 of the Law to apply the transaction avoidance provisions of Cayman Islands insolvency law in aid of foreign insolvency proceedings, the Grand Court did have such a power at common law. Both parties appealed.

The Court of Appeal distilled three issues for consideration as follows:

1. Whether the Grand Court has jurisdiction under sections 241 and 242 of the Law to apply transaction avoidance provisions of foreign insolvency law (and, in particular, provisions of United States bankruptcy law) in aid of foreign insolvency proceedings.
2. Whether the Grand Court has jurisdiction under sections 241 and 242 of the Law to apply transaction avoidance provisions in Cayman Islands insolvency legislation in aid of foreign insolvency proceedings.
3. Whether the Grand 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 Grand Court has such jurisdiction but only in a case where it would have jurisdiction under section 91 of the Law to make a winding up order in respect of the foreign company in question.

Issue 1

The Court of Appeal agreed with Justice Jones on the first issue and held that the Grand Court did not have jurisdiction under sections 241 and 242 of the Law to apply transaction avoidance provisions of foreign insolvency law. The Judge's order striking out the Bankruptcy Code Claims would therefore be upheld.

While the Court of Appeal acknowledged, as Justice Jones had, the apparent illogicality of applying domestic law to transaction avoidance claims when any proceeds of such claims would be distributed in accordance with the foreign law, Chadwick P took the view that to hold that the Grand Court had a statutory power to apply foreign avoidance legislation *"would represent so radical a departure from the common law that, had the legislature intended that result, it could have been expected to say so in clear terms. It did not do so."* Whilst he did not make it express, it must be implicit in Chadwick P's reasoning that there is no power at common law for the Grand Court to apply the provisions of foreign transaction avoidance legislation.

Issue 2

The Court of Appeal disagreed with Justice Jones in relation to the second issue. It held that the Grand Court does have jurisdiction under sections 241 and 242 of the Law to apply transaction avoidance provisions of Cayman Islands insolvency law in aid of a foreign insolvency proceeding. The Cayman Preference Claims could therefore be pursued, albeit on a statutory basis rather than at common law as decided by Jones J.

Amongst other matters, section 241(1) of the Law provides:

Upon the application of a foreign representative the Court may make orders 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.

Justice Jones had held that section 241 provided an exhaustive list of the Grand Court's powers to grant ancillary relief in aid of foreign proceedings. He construed the words "*property belonging to a debtor*" in section 241(1)(e) as being limited to property which belonged to the debtor immediately prior to the commencement of its liquidation, so excluding any property of the debtor's liquidation estate comprising causes of action under transaction avoidance legislation, such as the Cayman Preference Claims, which were only available to a liquidator as a result of a winding up order having been made.

The Court of Appeal disagreed with the learned judge in this regard. Chadwick P said that the interpretation of section 241(1) was to be informed by the provisions of section 242(1)(c) ("*In determining whether to make an ancillary order under section 241, the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with...the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate*"). Chadwick P said "*as it seems to me... section 242(1)(c) was also included as a guide to the exercise of the power to make orders ancillary to a foreign bankruptcy proceeding for the purpose described in [section 241(1)(e)]*". The question, he concluded, was therefore whether "*the making of a transaction avoidance order in aid of foreign bankruptcy proceedings is the making of an order ancillary to foreign bankruptcy proceedings for the purposes of [section 241(1)(e)]*." Chadwick P answered that question affirmatively because the making of such an order restored property to the foreign debtor, which could then be turned over to its foreign representative.

Issue 3

The Court of Appeal did not determine the third issue, namely whether the Cayman Preference Claims could be pursued at common law, as there is a relevant pending appeal in the Privy Council which is shortly due for hearing concerning the interaction between the observations of Lord Hoffman in *Cambridge Gas v Navigator* [2007] 1 AC 508 and the comments of Lord Collins in *Rubin v Eurofinance SA* [2012] UKSC 46. A further judgment will be issued by the Court of Appeal when the decision of the Privy Council is known.

Conclusion

This is clearly an important decision which provides useful clarification of the scope of the Grand Court's powers to assist foreign bankruptcy proceedings. It also demonstrates the willingness of the courts of the Cayman Islands to play a full role in the protection of creditors, wherever they might be situated, by adopting a purposive interpretation of its domestic legislation. However, bearing in mind the value of the claims to the Primeo and BLMIS estates, it seems likely that the decision will be appealed and that the Privy Council will have the final say.

This advisory has been prepared as a summary of the law and is for general guidance only. It is not intended to be, nor should it be used for, a substitute for specific legal advice on any particular transaction or set of circumstances.

Should you have any queries regarding the above, or if we can be of any assistance, please do not hesitate to contact your usual Campbells contact or any of the following:



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