IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 111 OF 2017 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND

IN THE MATTER OF THE WIMBLEDON FUND, SPC (IN VOLUNTARY LIQUIDATION)

In Chambers

Appearance:	Mr Nick Hoffman and Mr Dhanshuklal Vekaria of Harneys on behalf of the Petitioner Mr Michael Pearson of FFP (Voluntary Liquidator) Mr Richard Murphy of FFP Mr Kyle Broadhurst and Ms Kate McClymont of Broadhurst LLC on behalf of the Wimbledon Financing Master Fund Ltd (in Official Liquidation) Mr Russell Homer of Chris Johnson and Associates Ltd, one of the JOLs of Wimbledon Financing Master Fund Ltd (in Official Liquidation) and Mr Graham Robinson, also of Chris Johnson and Associates Ltd
Before:	The Hon. Justice Raj Parker
Heard:	29 November 2017
Draft Judgment Circulated:	1 December 2017
Judgment Delivered:	14 December 2017

HEADNOTE

Cayman Islands fund in liquidation under supervision of the Grand Court- application in the New York Court by way of receivership and contempt motion to appoint a receiver over certain disputed assets- application by voluntary liquidator of the Fund for anti-suit injunction to restrain the continuation of the New York proceedings- principles applicable to the grant of such an anti-suit injunction.

Introduction

1. On 29 November 2017 I heard argument on an application for an urgent ex parte injunction against Wimbledon Financing Master Fund Ltd (in Official Liquidation) (the Master Fund) acting by its official liquidators (Master Fund JOLs).

2. The application was brought by The Wimbledon Fund, SPC (the Fund). Following what was in effect an inter parties hearing (notice was given to the Master Fund JOLs, albeit short notice,) I granted the order sought to restrain the Master Fund from continuing certain proceedings in the United States or commencing any further or other proceedings in the courts of the United States or elsewhere against the Fund, which are directed at obtaining any form of liquidation, administration, receivership or bankruptcy order as regards the Fund. There now follows my reasons for doing so.

3. The Fund is a segregated portfolio company registered in the Cayman Islands on 17 May 2006. On 23 May 2017, the Fund's shareholders unanimously appointed Mr Michael Pearson of FFP Ltd as voluntary liquidator of the fund. Mr Pearson has petitioned to have the Fund supervised in Cayman and brought into official liquidation. Mr Pearson petitioned the Court on 7 June 2017 requesting that an order be in accordance with section 124 of the Companies Law (2016 Revision) and in compliance with Order 15 of the Company's Winding Up Rules. The first hearing of the petition took place on 14 July 2017 and upon adjournment the second hearing took place on 7 September 2017. That hearing was also adjourned and the petition is next due to be heard on 10 January 2018. The only outstanding question concerning the likelihood of a supervision order being made and official liquidators appointed to oversee the liquidation of the Fund is the question of the identity of the official liquidators, which is in dispute because the Master Fund objects to the appointment of Mr Pearson as joint official liquidator of the Fund.

4. On 25 October 2017, the Master Fund commenced proceedings in the New York Court by way of a Receivership and Contempt Motion to appoint Mr Graham Robinson as Receiver over certain disputed assets - the assets of class C. The Receivership and Contempt Motion is due to be heard by the New York Court on Tuesday, 5 December 2017. That is why the application was urgent.

5. A summary of the actual and potential assets and liabilities of Class C is set out in Mr Pearson's fourth affidavit dated 1 September 2017.

6. Mr Pearson, by way of his eighth affidavit, sworn on 22 November 2017 summarises the reasons for the application, namely:

    a) The Fund is in the process of being brought under the supervision of the Cayman Court - the supervision hearing itself has already commenced and is part heard and due to be completed on 10 January 2018;
    b) the Fund is insolvent and must be brought under the supervision of the Court. Both the Fund and the Master Fund are Cayman Islands entities, and the seat of the liquidation must therefore be Cayman;

c) the Master Fund's claim in respect of a judgment award it obtained in the New York Court earlier this year would be admitted in full in the official liquidation;

d) if the US Court were to grant the Receivership and Contempt Motion and a US Receiver was appointed over the assets of Class C there would be two separate officeholders in two different jurisdictions which would result in :

-confusion for creditors and debtors,
-conflicting actions being taken by different representatives,
-increased costs and lower realisations,
-the potential to undermine claims against the Master Fund,
-a conflict of interest because the Master Fund JOLs seek to appoint Mr Robinson who is an employee of the Master Fund JOLs as Receiver in the US (having withdrawn him as a potential representative in the Cayman proceedings)
-the Master Fund, having already submitted to the Cayman liquidation process, to enjoy an unfair advantage in the liquidation over other creditors which would not be to the benefit of the estate as a whole.

7. The claims against the Master Fund referred to above involve a claim for breach of contract concerning the alleged release of Class C's ownership interest and security interest in various hedge funds that are now held by the Master Fund but for which it is alleged Class C has not been paid. Sanction has been obtained from this Court for substantive proceedings to be issued in the liquidation of the Master Fund and a hearing has been set down for 13 December 2017 before Justice Quin. The Master Fund has rejected the Fund's proof of debt and there is to be an appeal of that decision. I was shown the reasons why the claim was rejected by Mr Broadhurst who appeared on behalf of the Master Fund. There is also a claim against an entity known as Partners II concerning the allegedly fraudulent transfer of money from Class TT to Partners II where it is alleged that that entity and the Master Fund have agreed to assign certain of the assets of Partner II to the Master Fund. Sanction has also been obtained to bring this claim.

8. Mr Broadhurst advanced a number of arguments as to why the relief sought should not be granted. They covered three main areas: that the long-running proceedings against Class C in New York ought to be permitted to continue, there was no potential for any prejudice to any of the other creditors if those proceedings continued, but there is prejudice to the Master Fund if the proceedings were halted; that the Fund had not been full and frank in its disclosure in support of the application; and that the application had been brought forward in a way which was unfair and prejudicial so that I should not grant the relief sought as a matter of discretion and fairness.

The Law

9. The principles upon which I direct myself in relation to this application are well established both in this and other jurisdictions. As I understood the submissions of

Mr Broadhurst and Mr Hoffman (who appeared on behalf of the Fund) the principles are not in dispute.

10. The Companies Law (2016 Revision) Section 96(b) empowers this Court to stay or restrain proceedings in a foreign court in these circumstances at any time after the presentation of a winding up petition and before a winding up order has been made.

11. The principles relating to anti-suit injunctions in the context of insolvency proceedings in this jurisdiction were summarised in *Ardent (unreported, 13 May 2016 FSD 54 of 2016)* a decision of Chief Justice Smellie.

The learned Chief Justice referred to the Privy Council decision in *Stichting Shell [2014] UKPC 41* to assess the issue of

"…. Whether, when a company is being wound up in the jurisdiction where it is incorporated, an anti-suit injunction should issue to prevent a creditor or member from pursuing proceedings in another jurisdiction which are calculated to give him an unjustifiable priority…."(paragraph 1)

12. At paragraph 34, Smellie CJ set out the decision of the Board as expressed by Lords Sumption and Toulson

"*The court does not purport to interfere with any foreign court, but may act personally upon the defendant by restraining him from commencing or continuing proceedings in a foreign court where the ends of justice require. The 'ends of justice' is a deliberately imprecise expression. It encompasses a number of distinct legal policies whose application will vary with the subject matter and the circumstances …"*

And at paragraph 35

"….. In protecting its insolvency jurisdiction, to adopt Lord Goff's phrase, the court is not standing on its dignity. It intervenes because the proper distribution of the company's assets depends upon its ability to get in those assets so that comparable claims to them may be dealt with fairly in accordance with a common set of rules applying equally to all of them. There is no jurisdiction other than that of the insolvent domicile in which that result can be achieved. The alternative is a 'free for all' in which the distribution of assets depends on the adventitious location of assets and the race to grab them is to the swiftest, and the best informed, best resourced or best lawyered".

13. Chief Justice Smellie granted the relief sought in *Ardent* to restrain such a 'free for all' race to grab the assets-see paragraph 36.

14. He went on to hold at paragraph 47 that if the effect of a foreign court's order was to interfere with the conduct of the liquidation in Cayman before this Court where the relevant company was incorporated, it would be, to borrow a phrase from *Stichting Shell,* contrary to the

".. ordinary principle of international law that only the jurisdiction of a person's domicile can affect a universal succession to its assets (paragraphs 14 and 15 of the PC decision in Stichting Shell).

15. It is important to note in the context of insolvency cases that the court is not primarily considering the usual grounds which arise on anti- suit applications, namely those of vexation or oppression or unconscionability, but a different principle, namely: the protection of the court's jurisdiction to do equity between claimants to an insolvent estate-see paragraph 21 of *Stichting Shell at E*.

"Where a company is being wound up in the jurisdiction of its incorporation, other interests are engaged. The court acts not in the interests of any particular creditor or member, but in that of the general body of creditors and members.....There is a broader public interest in the ability of the court exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of its jurisdiction."

The Master Fund's objections

16. The New York proceedings were commenced on 23 May 2016 and the Master Fund was awarded summary judgment on 22 December 2016. Judgment was formally entered on 11 May 2017 and from that time the Master Fund began enforcement efforts in New York. I am told by Mr Hoffman that it was these events which precipitated the insolvency of the Fund and on 23 May 2017 Mr Pearson was appointed voluntary liquidator.

17. Mr Broadhurst says representations were made by the Fund to the New York Court that it was not seeking a stay of enforcement. I am satisfied that the statement given in support of Class C's motion in the New York proceedings to enlarge the time it had to perfect the appeal it lodged against the Class C judgment does not preclude the Fund from obtaining the relief it seeks here. In those proceedings it was stated that there would be no prejudice to the Master Fund because Class C would not be seeking a stay and the Master Fund was free to continue its efforts to enforce the judgment it had obtained. I accept what is said by Mr Pearson at paragraph 40 of his eighth affidavit and Mr Hoffman's submissions that this has to be seen in the context of the New York Court being made aware of the existing Cayman proceedings and was not intended to and does not prevent the Fund from seeking to protect the Cayman proceedings. As Mr Pearson points out, the Master Fund JOLs would have been aware that the consequence the petition for supervision would in due course be a mandatory stay of the New York proceedings and that enforcement was always therefore to be subject to the liquidation process in Cayman and a stay (backdated to the date of the presentation of the supervision petition).

18. As an ancillary point Mr Broadhurst suggested that there was a material non-disclosure on the application because in the context of having obtained sanction to issue separate proceedings against the Master Fund in New York (in the two sets of

proceedings referred to above), the rejection of the proof of debt submitted by Class C which Mr Broadhurst showed me was not disclosed. In fact that matter was disclosed, as Mr Hoffman pointed out, and appears in the skeleton argument of the Fund at paragraph 8(d)i. Mr Broadhurst was not to have known that as I understand that he was not given sight of the skeleton argument in advance.

19. Mr Broadhurst says this application was brought at the eleventh hour with minimal notice which deprived his client from being fully able to address this complex matter satisfactorily.

20. I find that the time taken by Mr Pearson to obtain legal advice in order to deal with the Receivership and Contempt Motion was reasonable. I also accept the points he makes at paragraphs 16 to 18 of his eighth affidavit explaining the steps he took which I consider to be reasonable.

21. I also find that although the Master Fund was only served with a copy of the summons, eighth affidavit of Mr Pearson and bundle of authorities at 4:35 PM on 27 November 2017, as is clear from the 15 page skeleton argument and cogent and forceful submissions of Mr Broadhurst at the hearing, no real prejudice has been suffered in relation to contesting the application. It is clear from the correspondence between Harneys and Broadhurst, which preceded the application, that each side was perfectly well aware of their respective cases which were set out in full in correspondence between 14 and 16 November 2017.

22. As to the competing prejudice considerations, I am satisfied that the right thing to do in this case is to protect the integrity of the Cayman liquidation process and by doing so that fairly reduces the prospect of any unfair advantage to any particular party who has an interest in the outcome. Indeed to allow the Master Fund having already submitted to Cayman liquidation process, to continue its enforcement action in New York would place it in an unfair position over other creditors and that would not be to the benefit of the estate as a whole.

23. In this regard I also accept Mr Pearson's evidence as set out at paragraph 24 of his eighth affidavit

".. Whilst class C is technically cash flow insolvent, and hence creditors interests come first, it should be recalled that there are some $3.2m of assets at face value, plus several hundred thousand dollars of cash. Even if the securities are heavily discounted at 50% there should be ample assets available to repay creditors in full. Accordingly, some acknowledgement should be given to the likely economic interests of shareholders. An official liquidator, under a duty to the Cayman court, would be far better placed to ensure that the best possible process is followed and that the best possible value is obtained for the assets of class C, which would ensure that the interests of all the creditors of class C are put first and that the interests of investors are, not only also taken into account, but not disregarded."

24. While Mr Broadhurst made certain submissions about Mr Pearson's motives and conduct he stopped short of suggesting that he was acting for some collateral purpose or in bad faith. Mr Broadhurst accepted that I could not form any view as to the claims brought by the Fund against his client (which he says are baseless) but he does submit that the money spent pursuing those claims will be wasted to the ultimate detriment of his client.

25. His real complaint would seem to be that he does not trust Mr Pearson's judgement nor the advice he is receiving and that his client is at real risk as the costs of the liquidation and litigation will leave insufficient funds to pay the Master Fund. He says this is particularly egregious because his client is the only significant creditor of Class C (and possibly the only real creditor) and if Mr Pearson is to be believed there are sufficient assets to ensure that all creditors will be paid regardless of the Master Fund's claim. I do not accept that these are good reasons not to maintain the Cayman Court's interest to protect the general body of creditors and members, not just the Master Fund. That can only be achieved by applying a common set of rules applicable to all within the same insolvency process.

Decision

26. I of course approach the exercise of discretion with caution in this case, as has often been said should be the approach in anti-suit injunctions, and would have refused relief if in the particular circumstances of this case it would not serve the ends of justice.

27. However, I have come to the clear view that the court should act in circumstances where the court has personal jurisdiction over the Master Fund. The Master Fund is a Cayman incorporated entity and the Master Fund JOLs have been appointed by the Cayman Court and its liquidation supervised in Cayman. The Master Fund has clearly submitted to this jurisdiction. The Master Fund JOLs have entered an appearance in the supervision hearing concerning the Fund and I am told by Mr Hoffman do not challenge that a winding up order should be made in due course. Mr Pearson has stated that the Master Fund's proof of debt will be admitted in the official liquidation of the Fund. In my judgment the Cayman Court is best placed to adjudicate on the question of the liquidation of assets of Class C.

28. To allow the Master Fund to continue with its application in the New York Court would be to frustrate the Cayman liquidation proceedings in order to gain an advantage by prioritising the satisfaction of its claim and to adversely affect the potential remedies that may be available if the Fund is successful in its claims against the Master Fund, to the detriment of other creditors.

29. Of course, this could be portrayed as an indirect interference with the course of existing New York proceedings. Mr Broadhurst was keen to emphasise that I should view this application as such an interference, especially when Class C represented to the New York Court that it would not seek to stay enforcement, which he submits it is now attempting to do. He submits that any application should be made to the New

York Court and not to this Court. He went so far as to suggest that the principles of comity would be offended if I granted the order sought.

30. I would like to make clear that this decision is not a case of the Cayman Court standing on its own dignity over the New York Court, nor does it purport to interfere with the New York Court - *see per Lord Goff in: Societe National [1987} AC 871.* The order is not directed against the New York Court. It is an exercise of personal jurisdiction over the Master Fund to meet the ends of justice by ensuring the natural and most appropriate insolvency jurisdiction is not circumvented. The conditions necessary for the exercise of this jurisdiction are clearly met in this case, and for the reasons set out in Mr Pearson's eighth affidavit explaining the undesirable consequences of two distinct office holders in two different jurisdictions attempting to deal with the same assets, an order restraining the Master Fund should be made.

31. I heard argument on costs and ruled that costs should follow the event. I rejected Mr Hoffman's submission that he should have an order for indemnity costs. I do not consider that the Master Fund has conducted the proceedings improperly or unreasonably. The Master Fund should pay the Fund's costs of contesting this application, to be taxed on the standard basis, if not agreed within 14 days.

32. In providing these reasons for my decision, I acknowledge that they might be brought to the attention of the New York Court in the spirit of comity and judicial cooperation if Mr Hoffman's clients are advised that it is necessary to do so.

THE HON RAJ PARKER
JUDGE OF THE GRAND COURT