Easter Term
[2019] UKPC 20
Privy Council Appeal No 0082 of 2018

JUDGMENT

UBS AG New York and others (Appellants) *v* Fairfield Sentry Ltd (In Liquidation) and others (Respondents) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Reed
Lord Hodge
Lord Briggs
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

20 May 2019

Heard on 25 and 26 February 2019

Appellants
Lord Falconer QC
Tom Smith QC
Henry Phillips
(Instructed by Gibson
Dunn & Crutcher LLP)

Respondents
Gabriel Moss QC
Stephen Midwinter QC
William Hare
(Instructed by Forbes Hare
LLP (London))

LORD HODGE:

1. This appeal, which comes to the Board with the leave of the Court of Appeal of the Eastern Caribbean Supreme Court ("the ECCA"), is an appeal against the judgment of the ECCA dated 20 November 2017 (Pereira CJ and Blenman and Thom JJA) dismissing the appeal by the appellants (referred to collectively as "UBS") against Leon J's judgment dated 11 March 2016. The subject of the appeal to the Board is the ECCA's upholding of Leon J's refusal to grant an anti-suit injunction to restrain the liquidators of Fairfield Sentry Ltd ("the liquidators") from pursuing proceedings in the United States under section 249 of the British Virgin Islands' Insolvency Act 2003 ("the IA 2003"). This section empowers the High Court of the BVI ("the High Court") to set aside voidable transactions, such as an unfair preference or an undervalue transaction, and to make orders to restore the position to what it would have been if the company had not entered into such transactions.

2. The dispute arises out of the multi-billion dollar Ponzi scheme which Bernard L Madoff operated through his company Bernard L Madoff Investment Securities LLC ("BLMIS"). Fairfield Sentry Ltd ("Sentry"), Fairfield Sigma Ltd ("Sigma") and Fairfield Lambda Ltd ("Lambda") were "feeder" funds. Sigma and Lambda invested in Sentry which in turn invested over 95% of its funds in BLMIS. Between 1997 and 2008 Sentry invested some US$7.2 billion in BLMIS. After Mr Madoff's fraud came to light following his arrest in December 2008, the High Court made orders to wind up each of Sentry, Sigma and Lambda.

3. Ponzi schemes have in common with many asset bubbles, including share speculations, that those who invest early and realise their investment before the crash can make significant profits, while those, who invest later or otherwise retain their investment in the scheme when it crashes, lose everything. It is, as an anonymous pamphleteer during the South Sea Bubble of 1720 stated, a case of "devil take the hindmost". The liquidators' claims are an attempt to modify that unfortunate result and share the pain among investors.

4. In the case of Sentry the matter arose in this way. Investors purchased redeemable shares in Sentry, which were offered at the net asset value per share ("NAV") of Sentry's mutual fund ("the Fund") at the opening of business on the effective date of purchase. Those investments provided funds for Sentry to invest principally in BLMIS. Investors could withdraw their investment in Sentry by redeeming their shares in accordance with article 10 of Sentry's articles of association. The redemption payment on a share was based on the NAV of the Fund on the day of the request to redeem or the following day and certificates of NAV were issued by Sentry's administrator on behalf of the directors, giving a binding valuation of the

shares which were redeemed. Those valuations of the Fund by the Fund's administrator on behalf of the directors of Sentry were based on fraudulent reports created by BLMIS, which did not have assets under its management which could give rise to the purported valuations.

5. The liquidators by raising proceedings in the United States under section 249 of the IA 2003 and on common law grounds are seeking to recover funds paid out to investors in Sentry who redeemed their shares at valuations which, as hindsight reveals, bore no relationship to the actual value of their shares. Proceedings have been commenced against several hundreds of defendants in the United States and they are currently before the US Bankruptcy Court in New York. The proceedings relating to UBS concern redemptions of shares in Sentry made between 2004 and 2008. By order dated 6 December 2018 United States Bankruptcy Judge, Bernstein J, dismissed the liquidators' claims at common law against all defendants except to the extent that the claims alleged a constructive trust against defendants who had knowledge of the Madoff frauds but allowed the statutory avoidance claims under section 249 of the IA 2003 to proceed.

6. The liquidators were appointed by the High Court by order dated 21 July 2009. They raised the proceedings in the United States with the permission of the High Court in an order dated 10 November 2010. UBS did not challenge that order at the time. Sanction to proceed with the litigation in the United States was removed and later restored in proceedings in the BVI. The liquidators are officers of the High Court (section 184(1) of the IA 2003) and are subject to the direction of that court.

7. The dispute between the liquidators and investors who redeemed their investments before the crash has been strenuously undertaken both in the BVI, including an appeal to the Board in 2014, and in the United States. It is not necessary to set out the varied skirmishes and battles which have led to this appeal to the Board. Nor is it necessary to discuss the merits of the liquidators' claims. It suffices to state that UBS as a potential debtor of the liquidators' claims under section 249 of the IA 2003 seeks an anti-suit injunction from the BVI courts to restrain the liquidators from proceeding with their claims in the United States. After Leon J dismissed UBS's application for an anti-suit injunction and the ECCA dismissed its appeal, UBS appeals to the Board with the leave of the ECCA.

8. Lord Falconer QC in a skilful presentation urged the Board to grant an anti-suit injunction, which failing, declaratory relief. The core of his submission was that section 249 of the IA, properly interpreted, conferred a right to grant relief only on the High Court which was the domestic court charged with the supervision of the winding up, enabling it to alter the consequences of concluded transactions which would otherwise remain binding on the insolvent company. As a result, no foreign court was empowered to grant such relief. The High Court had no authority to delegate power to grant such

relief to a foreign court and had not purported to do so. Accordingly, it would involve a misapplication of the insolvency regime of the BVI if a foreign court were to exercise powers under section 249, would introduce commercial uncertainty and would be oppressive to the interests of alleged debtors of the insolvent company. Further, the BVI courts were the natural forum for the claims and the liquidators had put forward no evidence that proceedings in the United States would enable them to obtain more assets for the liquidation than proceedings in the BVI.

9. Gabriel Moss QC for the liquidators in a powerful submission submitted, first, that UBS had already argued in the US Bankruptcy Court the question whether the section 249 claims can be pursued in the United States and had lost. It was an abuse of process to attempt to relitigate the issue in the BVI. Secondly, UBS offered no coherent basis on which it could be argued that the US proceedings were vexatious or oppressive so as to justify an anti-suit injunction. Thirdly, UBS had no standing before the High Court to invoke the anti-suit injunction. Fourthly, there was no basis for the declaratory relief, which UBS sought for the first time before the Board, because it was for the US Bankruptcy Court to decide under US rules of private international law whether it would apply BVI insolvency law in dealing with the liquidators' applications. Section 249 of the IA did not bear the meaning which UBS advanced. It was not unusual for courts to assist foreign liquidation proceedings by applying the law of those proceedings, including a statutory power to adjust or reverse voidable transactions. As Pereira CJ had held, there was no reason why BVI law should wish to prevent a foreign court from applying BVI insolvency rules in the context of cross-border cooperation relating to an insolvent BVI company.

Discussion

10. Section 249 of the IA 2003 so far as relevant provides

> "(1) Subject to section 250, 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,
>
> (a) may make an order setting aside the transaction in whole or in part;
>
> (b) in respect of an unfair preference or an undervalue transaction, may make such order as it considers fit for restoring the position to what it would have been if the company had not entered into that transaction; …"

Subsection (2) lists some of the powers which may be exercised under subsection (1)(b), including payment to the office holder of such sums as the court may direct. Section 244 defines "voidable transactions" as including an unfair preference or an undervalue transaction and those transactions are defined in sections 245 and 246. Section 250 protects the interests of third parties who have acquired an interest in good faith and for value. Of more direct relevance to the dispute is the definition of "Court" in section 2 of the IA 2003, which provides that it means the High Court.

11. Section 249 gives the court a discretion, once it has set aside the voidable transaction, to make such order as it thinks fit to restore the position of the company. This provision, like those in the modern statutory insolvency regimes of several common law countries, has empowered the court to devise a suitable remedy to achieve restitution rather than merely annulling the transaction and leaving the consequences of that annulment to the operation of the general law. But the existence of that discretion to devise a remedy, in the Board's view, casts no light on whether the power to unravel voidable transactions is conferred solely on the High Court at first instance.

12. The central question on the appeal is a question of statutory interpretation. It is whether section 249 of the IA 2003 either expressly or by necessary implication confers an exclusive jurisdiction on the High Court so as to preclude foreign courts, which assist in a BVI liquidation, from exercising such powers. The answer is that it does not. The section is a provision in the domestic insolvency law of the BVI. It, read with section 2, identifies the court within the BVI which is to exercise the statutory powers which it confers. It gives jurisdiction to the High Court and not the magistrates' court. It contains no express prohibition on a foreign court from exercising those powers at the request of a BVI office holder and no such prohibition arises by necessary implication. In short, the section does not address the matter of the powers of a foreign court; one would not expect it to do so. On the contrary, it is a question for each foreign court from which a BVI office holder seeks assistance to determine whether it can use the statutory tools which BVI insolvency legislation has conferred on the BVI court.

13. Further support for this conclusion can be found in other provisions of the IA 2003. Part XIX of the IA 2003 is in force and relates to orders which the BVI court may make in aid of foreign proceedings. Section 467 allows a foreign representative (such as an insolvency body, officer or practitioner) to apply to the High Court for an order in aid of the foreign insolvency proceeding and empowers the High Court to make such order or grant such other relief as it considers appropriate. Section 467(5) provides that the High Court in making such an order may apply the law of the BVI or the law applicable in respect of the foreign proceeding. The High Court's power to make an order is subject to section 468 which sets out the matters which the court must consider. This provision, which appears to be modelled on the now-superseded section 304(c) of the United States Bankruptcy Code, instructs the court to be guided by "what will best ensure the economic and expeditious administration of the foreign proceeding to the extent consistent with" specified public policy goals. Those goals (set out in section

468(1)) include the just treatment of all persons claiming in the foreign proceeding, the prevention of preferential dispositions of property subject to the foreign proceeding, and comity. They also include the protection of persons in the BVI against prejudice and inconvenience in the processing of claims in the foreign proceedings (section 468(1)(b)) and the need for the distributions in the foreign proceedings to be substantially in accordance with the order of distributions in a BVI insolvency (section 468(1)(d)). Section 468(3) prohibits the court from making an order under section 467 that is contrary to the public policy of the BVI. The existence of this domestic regime to assist a foreign insolvency proceeding strongly militates against any implication of exclusivity in section 249. No issue of a lack of comity arises. As Mr Moss submitted, the BVI legislature must have been expecting foreign courts to be able to apply BVI insolvency law.

14. In the Board's view, UBS can derive no assistance in interpreting section 249 from Part XVIII of the IA 2003, which is designed to implement the UNCITRAL Model Law on Cross-Border Insolvency, because the BVI legislature has not brought those provisions into force. In any event, it is by no means clear that incorporation of the UNCITRAL Model Law would disincline, let alone forbid, a court from applying a foreign insolvency law. It appears to the Board that the United States Courts have interpreted the relevant statutory provisions as permitting the application of foreign insolvency law in both their now-superseded section 304 of the US Bankruptcy Code (*In re Metzeler* 78 BR 674, 677 (Bkrtcy SDNY 1987) and chapter 15 of the US Bankruptcy Code, which is based on the UNCITRAL Model Law, *In re Atlas Shipping A/S* 404 BR 726, (April 27 2009, SDNY), *In re Condor Insurance Ltd* 601 F 3d 319 (March 17 2010, 5th Cir), and *In re Hellas Telecommunications II* 535 BR 543, 566-567 (Bkrtcy SDNY 2015)).

15. The Board also observes that it is not uncommon for the courts in one country to apply the insolvency laws of another when giving assistance to the latter country. In the United Kingdom section 426(5) of the Insolvency Act 1986, like section 467(5) of the IA 2003, gives the court authority to apply the insolvency law of the jurisdiction of the court which is requesting assistance. Thus, in *England v Smith* [2001] Ch 419, the Court of Appeal of England and Wales applied the insolvency law and practice of the requesting Australian court, and not the practice of the English courts, in dealing with an application to examine an accountant who had been involved in the audit of the accounts of the insolvent Australian company. It held that the requesting court had exercised its discretion under section 596B of the Australian Corporations Law in seeking the examination and that the English court should not perform that task again unless it was shown that the requesting court had been ignorant of some material fact or subsequent events had undermined the justification for the order of the requesting court (paras 22-28 per Morritt LJ). Lord Falconer sought to distinguish *England v Smith* from the circumstances of this appeal on the ground that in the former case the Australian Court had exercised its discretion to order examination of the accountant whereas it would fall on the US court to apply section 249. While accepting that *England v Smith* gives no direct guidance on the ambit of section 249, the Board

observes that it is an example of an English court adopting Australian practice rather than domestic practice in its decision-making in assisting in a cross-border insolvency. The case and the statutory provisions which the Board mentions in para 13 provide a backdrop against which section 249 is to be construed.

16. It is correct, as UBS submits, that in exercising powers under section 249 of the IA 2003 a foreign court would not be vindicating property rights which a BVI company had prior to its winding up. It would be responding to an application by the liquidators for that court to exercise a discretionary power in the BVI's statutory insolvency scheme to adjust concluded transactions in the interests of the company's creditors as a whole. There is also a possibility that different foreign courts may exercise the discretion so conferred in different and not necessarily consistent ways, particularly if their conceptions of public policy differed. Just as section 468(1)(b) and (d) (to which the Board refers in para 13 above) influence the exercise of the High Court's discretion under section 467 in response to applications for assistance by foreign representatives, so may foreign courts be constrained by their domestic legislation. But those considerations do not militate against the Board's conclusion that section 249 does not prohibit a foreign court from exercising the powers which it confers.

17. The Board is satisfied that the application to the BVI courts to seek an anti-suit injunction against the liquidators is misconceived. First, the liquidators have raised the proceedings in the United States with the authority of the High Court. They are officers of the High Court. If there were grounds for preventing the liquidators from proceeding with the US claims, the High Court would not need to grant an injunction but could revoke its permission for the proceedings to continue. The High Court has not done so.

18. The Board observes that the High Court, when considering whether to grant or revoke permission to the liquidators to bring proceedings in New York, would have had the opportunity to form its own view as to whether it would be unjust and oppressive for the prospective defendants to be sued in that jurisdiction and whether New York was an appropriate forum for such a challenge. The Board also attaches considerable weight to the view of the ECCA (judgment of Pereira CJ para 79) that the public policy of the BVI favours the enforcement of the BVI's insolvency regime overseas.

19. Secondly, it is now a question for the US courts whether they should apply BVI law as the liquidators request. Lord Falconer concedes that it is arguable that the US court could competently apply BVI law under US rules of private international law. In *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2010] 1 WLR 1023, para 50, Toulson LJ summarised key principles concerning anti-suit injunctions and forum non conveniens. He recognized the need for caution out of considerations of comity because an anti-suit injunction involves interference in the process of a foreign court. The Board has repeated this need for caution in its judgment in *Stichting Shell*

Pensioenfonds v Krys [2014] UKPC 41; [2015] AC 616, para 42 in which, in a judgment delivered by Lord Sumption and Lord Toulson, it stated:

> "Where the issue is whether the BVI or the foreign court is the more appropriate or convenient forum, it can in principle be decided by either court. Comity will normally require that the foreign judge should decide whether an action in his own court should proceed: *Barclays Bank plc v Homan* [1993] BCLC 680, *Mitchell v Carter* [1997] 1 BCLC 673 (Millett LJ)."

There is no ground in this case for departing from the norm which considerations of comity support. This appeal is not concerned with the extent of the powers of a BVI court to give assistance to a foreign liquidation. As a result there is no need to address the boundaries of a common law principle of modified universalism which have been discussed in the judgment of the UK Supreme Court in *Rubin v Eurofinance SA (Picard intervening)* [2012] UKSC 46; [2013] 1 AC 236 and the judgment of the Board in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675. It is for the US court to interpret chapter 15 of the US Bankruptcy Code and to apply the rules of its private international law.

20. Thirdly, absent a prohibition in section 249 on a foreign court from using the powers which it conferred, there is no question of vexatious or oppressive litigation, such as might justify the grant of an injunction. In *Deutsche Bank AG* (above) Toulson LJ observed that the courts had refrained from attempting a comprehensive definition of vexatious and oppressive litigation. But its general nature is clear. The Board in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, 893-897 identified as examples of such litigation proceedings which were so absurd that they could not possibly succeed, proceedings raised simply to annoy or harass a defendant, and proceedings in a foreign court which it would otherwise be unjust to allow the claimant to pursue. No such injustice arises in this case.

21. The Board in its judgment dated 16 April 2014 (*Fairfield Sentry Ltd v Migani* [2014] UKPC 9), which related to other redemptions of Sentry's shares, rejected the liquidators' claims in unjust enrichment based on a mistake on the ground that the defendants were contractually entitled to receive the sums paid on redeeming their shares. The US Bankruptcy Court has similarly dismissed such claims and claims in contract in relation to the redemptions which it is considering except to the extent that the liquidators amend their common law claims to plead a constructive trust in cases where there is evidence that the recipients of the redemptions had knowledge of the fraud, and otherwise confined the liquidators' claims to those under section 249 of the IA 2003 (para 5 above). The liquidators' claims against UBS which have been allowed to proceed are not in conflict with the Board's decision in 2014.

22. The Board can deal shortly with UBS' application for a declaration. What UBS seeks is a declaration on the interpretation of section 249 of the IA 2003 which contradicts the conclusion which the Board has reached in paras 10-16 above. The Board would not necessarily have refused the application on the ground that it is a new claim for relief which was not sought in the courts in the BVI, because it is a remedy addressed to the same subject matter as the application for the injunction and it interferes less in the foreign proceedings than such an injunction. But the Board questions whether it is the task of the BVI courts to give an advisory opinion to the US courts at the request of a defendant in US proceedings for use in those proceedings, particularly as it appears that the US court treats foreign law as a matter of law rather than a question of fact: *In re Hellas Telecommunications II* (above), 562 footnote 23.

23. Having reached these conclusions, the Board does not need to consider the liquidators' challenge to UBS's standing to raise these proceedings or the liquidators' submission that these proceedings are an abuse of process because the parties have already argued these matters without success before the US Bankruptcy Court in New York.

Tribute to Gabriel Moss QC

24. While this judgment was being prepared the Board received the very sad news of the untimely death of Gabriel Moss, who so skilfully presented the case for the liquidators. The Board wishes to pay tribute to his intellect and humanity and acknowledge his unrivalled contribution to corporate insolvency law as a practitioner, author and university teacher.

Conclusion

25. The Board will humbly advise Her Majesty that the appeal should be dismissed.