

UPDATE

## Fairfield – the final chapter?

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This update analyses recent attempts by former investors in Fairfield, who are defendants to claw-back claims brought against them in the US Courts, to seek relief from the BVI Court preventing the Fairfield Liquidators from progressing the Funds' US claims.

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### Background

The recent March 2016 judgment of the BVI Court marks a new chapter in the litigation between the Fairfield Liquidators and the former investors that had successfully redeemed from the Fairfield funds.

The Fairfield funds (**Fairfield**) were BVI investment funds that invested the vast majority of their assets (totaling \$7.2 billion) into Bernard L. Madoff Investment Securities LLC (**BLMIS**). Like many other Madoff-affected funds, Fairfield went into liquidation shortly after the discovery of Madoff's fraud.

Since then, the Fairfield Liquidators have attempted to claw back funds which were paid to a number of Fairfield's investors (the **Redeemers**) prior to the funds' demise. Those claims have been litigated in the BVI courts for several years (the **BVI Proceedings**). Our earlier updates covered the decisions of the:

- BVI Commercial Court and Eastern Caribbean Court of Appeal (a link to which is found here); and
- Privy Council (a link to which is found here);

on the Funds' restitution claims for mistake and common mistake, against the Redeemers, which were ultimately unsuccessful.

### The US Redeemer Claims

In addition to the BVI Proceedings, the Liquidators also pursued similar claims against certain Redeemers (the **US Redeemers**) in the United States Bankruptcy Court for the Southern District of New York (the **US Bankruptcy Court**).

In these proceedings (the **US Proceedings**), the Liquidators pursue claims for:

- unjust enrichment (based upon arguments that the certificates that were so pivotal to the Privy Council decision, were not actually issued in good faith, a point not argued in the BVI proceedings); and
- declarations that redemption payments made in the period 2004–2008 constituted voidable transactions under section 244 of the BVI Insolvency Act 2003, being unfair preferences and/or undervalue transactions under sections 245 and/or 246 of that Act; together with orders under section 249 of the Act setting those payments aside.

### The Section 273 Application

The US Proceedings had been stayed pending the outcome of the BVI Proceedings. Following the conclusion of the BVI Proceedings, the US Redeemers made an application to the BVI Court under section 273 of the Insolvency Act, seeking orders:

- discharging any permission the Liquidators had from the BVI Court to pursue the US proceedings;

- reversing the Liquidators' decision to pursue the US Proceedings; and/or
- granting anti-suit injunctions restraining the Liquidators from taking any further steps to pursue the US Proceedings (the **Section 273 Application**).

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.'

### **Liquidators' arguments**

The Liquidators sought the dismissal of the Section 273 Application. Their arguments included the following:

- First, that the US Redeemers lacked the necessary standing and interest to qualify for relief under section 273. The Liquidators argued that the US Redeemers, as former members of the fund, were not 'persons with an ongoing interest in the liquidated company who are entitled to participate in the ultimate distribution', but were in fact adverse to the liquidations, as their true interest was as defendants to the US Proceedings.
- Second, that in any event, even if the US Redeemers did have standing to make the Section 273 Application, relief should still not be granted. The relevant test, that the Liquidators' actions are so 'utterly unreasonable and absurd that no reasonable person would have done it', had not been met.
- Finally, that an anti-suit injunction should be refused, because the Liquidators' actions were not 'vexatious or oppressive' and, in any event, the grant of such an injunction by the BVI Court would not be fitting, because the Court had more appropriate mechanisms available to it to enable it to regulate the Liquidators' actions.

### **Judgment**

Having considered the arguments, Mr Justice Leon dismissed the Section 273 Application, on the following grounds.

- Even if an applicant has standing to bring a Section 273 Application, it must also show that it has a legitimate interest 'in the relief sought'. In that respect, 'it is not sufficient that the applicant has an interest in making the application or may be affected by the outcome'. In the present case Leon J. noted that the US Redeemers' primary interest was as defendants to the US Proceedings, and held that The Applicants' interest as former members of the Funds who are defendants in proceedings brought by the Liquidators does not give them a legitimate interest upon which this Court may act to grant relief.
- Leon J. was not persuaded by the US Redeemers' arguments that the claims in the US Proceedings were doomed to fail. On that basis, he held that, even if they did have a legitimate interest in the relief sought, the US Redeemers had nonetheless not satisfied the test by showing that the Liquidators' actions were so unreasonable or perverse so as to justify relief being granted in the terms sought.

Leon J. also declined to grant the anti-suit injunction sought by the US Redeemers. He held that the Liquidators' actions were not vexatious or oppressive, and that it would not be consistent with judicial comity between the BVI and US Courts to grant such an injunction. He also queried whether the grant of an injunction was an appropriate method by which the BVI Court should control the conduct of one of its own officers.

Finally, Leon J. considered whether the BVI Court's inherent jurisdiction to control the conduct of its own officers has been replaced by Section 273 of the Insolvency Act. He made no finding on this issue, on the basis that the US Redeemers would not be proper persons to invoke any such wider jurisdiction, for the same reasons that they would not be proper persons to invoke the Section 273 jurisdiction.

### **Conclusion**

This case provides a timely reminder about the extent of the BVI Court's powers to regulate the conduct of BVI liquidators, and the circumstances in which people affected by Liquidators' decisions may seek relief from the Courts.

## Contacts

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