NOVEMBER 2017

UPDATE

Fairfield – US Redeemer Claims to proceed

Update prepared by Eleanor Morgan (Partner, BVI)

By judgment dated 20 November 2017, the Eastern Caribbean Supreme Court of Appeal refused to bring to an end claims issued in the US by the liquidators of the Fairfield Funds against previous investors who had redeemed their investments prior to those Funds entering liquidation. In doing so, the Court of Appeal confirmed that, to take advantage of s273 Insolvency Act (to challenge a decision or act of a liquidator) an applicant must have an interest in the estate. The Court also confirmed that the remedies available to liquidators pursuant to s294 Insolvency Act can be exercised by foreign courts giving aid to BVI liquidators.

Background

By judgement dated 20 November 2017, the Eastern Caribbean Supreme Court of Appeal has affirmed the decision of Leon J refusing relief sought by a number of defendants to actions brought by the liquidators of the Fairfield Funds (**Fairfield**).

Fairfield were BVI investment funds that invested the vast majority of their assets into Bernard L Madoff Securities LLC (**BLMIS**) and went into liquidation shortly after the discovery of Madoff's fraud. The Court appointed liquidators of Fairfield (the **Liquidators**) have attempted to claw back funds which were paid to a number of redeeming investors before Fairfield went into liquidation (the **Redeemer Claims**). Some of the Redeemer Claims were issued in the BVI and earlier briefings consider the decisions of the Eastern Caribbean Supreme Court of Appeal and the Privy Council in relation to these claims, which were ultimately unsuccessful.

The vast majority of the Redeemer Claims, by value, have been issued in the US Bankruptcy Court (the **US Proceedings**). This was made possible by the fact that the subscription agreements by which the investors had subscribed to Fairfield are governed by New York law and expressly waive any objection to the US jurisdiction in New York. The US Proceedings were brought with the sanction of the Eastern Caribbean Supreme Court of Appeal (overturning a decision of Bannister J in which sanction was refused) and have been ongoing for a number of years.

A small number of the defendants to the US Proceedings sought relief from the BVI Court (the **273 Applicants**):

- to exercise its supervisory power over the Liquidators, in essence restraining them from pursuing the US Proceedings pursuant to section 273 of the BVI Insolvency Act (**IA**), under which the BVI Court may overturn the decision of any BVI liquidator on application by a person aggrieved by the liquidators' decision; and/or
- granting an anti-suit injunction restraining the Liquidators from taking any further steps to pursue the US Proceedings.

In March 2016, Leon J refused that relief. The decision of Leon J is considered in our legal update from June 2016 titled *Fairfield – the final chapter?*

The 273 Applicants sought to appeal the decision of Leon J, and judgment was handed down by the Eastern Caribbean Court of Appeal on 20 November 2017 refusing that appeal.

Court of Appeal – Standing to bring an application under s273 IA

The Court of Appeal confirmed the finding of Leon J that the 273 Applicants did not have standing to bring an application under s273 IA.

The Court confirmed that in considering whether a person qualifies as a *person aggrieved* for the purposes of seeking relief pursuant to s273 IA, it would consider whether there was a legitimate interest in the relief sought. The 273 Applicants did not bring the application as creditors of Fairfield, but as defendants to proceedings brought by the Liquidators. In that capacity, the Court of Appeal held that they *are strangers to the liquidation* and have no legitimate interest in the relief sought.

The 273 Applicants complained that the Liquidators were behaving in a vexatious and oppressive manner or that the Liquidators' conduct in the US Proceedings constituted an abuse. The Court of Appeal noted that, even if this was the case, the 273 Applicants had an available remedy which they were actively pursuing it in the US Proceedings, where applications for dismissal have been filed.

Anti-suit injunction

The 273 Applicants also argued that, even if they did not have standing to bring an application under section 273 IA, the Court should nevertheless use its power to grant an anti-suit injunction. They argued that:

- the earlier decision of the Privy Council in the Redeemer Claims brought before the BVI Court (Migani) created an issue estoppel (because the Privy Council had dismissed those claims);
- the Liquidators' actions amounted to an abuse of process; and
- section 249 IA (on which the US Redeemer Claims are founded) cannot be operated by any court other than the BVI Court.

The Court of Appeal rejected those arguments, holding that:

- the US Proceedings are not brought in respect of the same redemption payments as were previously before the BVI Courts;
- the Court was not satisfied that the decision in Migani excluded all further considerations of the matters in dispute but, in any event, a judge of the US Bankruptcy Court is quite able to decide if, and to what extent, Migani has determined any of the issues in dispute;
- the 273 Applicants are fully engaged in the US Proceedings and have raised these issues before that Court. The Court noted that pursuing the appeal in circumstances where the same issues are already being argued before the US Court may, itself, be viewed as an abuse of process; and
- relief pursuant to s249 IA can be granted by the US Bankruptcy Court.

In considering the ability of the US Court to apply s249 IA, the Court noted that:

> *It has never been the understanding that a domestic court is unable to apply foreign law in relation to a dispute between parties before it. It is commonplace where international trade and international business disputes are the order of the day…*
>
> *… as a policy reason it could not be appropriate for BVI to provide for international business companies to conduct international business outside of BVI and not expect a foreign court to be able to apply BVI law to matters in dispute involving them before their Courts. But it is clear from the IA itself that there is full recognition of cross-border co-operation….[Parts XVII and XIX IA] capture the essence of reciprocity and comity between countries in insolvency matters. It would absurd indeed were the BVI court able to grant relief in aid of foreign proceedings but a foreign court could not grant relief in aid of BVI insolvency proceedings.*

Conclusion

The Court of Appeal's confirmation of the limits of the scope of section 273 IA will be welcomed by liquidators, as will the confirmation that the remedies available to them in section 249 IA are not confined to proceedings before the BVI Court.

For now, the US Proceedings will continue, though as the Court of Appeal noted, a number of the arguments raised before the BVI Court have also been raised in dismissal proceedings in the US, so this saga is far from over.

Contacts

Eleanor Morgan
Partner, Mourant Ozannes
BVI
+1 345 814 9235
elenor.morgan@mourant.com

2021934/73148167/1