



A person aggrieved? Limitations on the court's supervisory jurisdiction over its officers

On 20th November 2017 the Court of Appeal handed down its judgment in the latest round of litigation arising out of the fallout of Bernard Madoff's multi-billion-dollar ponzi scheme. The judgment brings further clarity to the question of standing with respect to applications made under Section 273 of the BVI Insolvency Act 2003 (the Act).

The appellants were the former shareholders of Fairfield Sentry Ltd (In Liquidation) (Fairfield) which had operated as the largest feeder fund to Madoff's company BLM Investment Securities (BLMIS). The respondents were the court appointed liquidators (the Liquidators) following the insolvency of Fairfield and the other corporate respondents (the Funds).

Background

To understand the context of the Court of Appeal's judgment, one must revisit earlier Fairfield litigation.

In *Fairfield Sentry Ltd (In Liquidation) v Migani & Ors* (the BVI Proceedings), the Liquidators brought claims against the appellants to recover redemption monies paid out to them based on alleged mistaken calculations of the Net Asset Value (NAV) of the shares occasioned, on the liquidators' case, by Madoff's fraud. The Liquidators aimed to return those redemption payments or their excess to the Funds' insolvent estates for the benefit of those investors who suffered loss.

The BVI Proceedings proceeded on the basis of the determination of four preliminary issues (the Preliminary Issues). Preliminary Issues 1 to 3 considered whether documents recording the NAV per share or the redemption price were binding on Fairfield under its Articles. Preliminary Issue 4 considered whether Fairfield's former shareholders, by surrendering their shares, gave good consideration for the money they received on redemption.

The Preliminary Issues in the BVI Proceedings were finally resolved by the Privy Council which concluded *inter alia* that (a) the documents were binding on Fairfield under its Articles; and (b) in surrendering their shares, a redeeming member of Fairfield gave good consideration for the payment by Fairfield of the redemption price.

Subsequent to the determination of the Preliminary Issues, the Liquidators' claims in the BVI Proceedings were either dismissed or discontinued.

However, with the sanction of the Court of Appeal, the Liquidators issued proceedings against the appellants in the United States (the US Proceedings) in which they seek the recovery of redemption monies on behalf of the Funds, albeit in respect of different redemptions to those which were the subject of the BVI Proceedings, but which are said to be based on the same subject matter and to raise the same issues. In addition, in the US Proceedings the Liquidators seek declaratory and substantive relief under section 249 of the Act on the basis that the redemptions constituted voidable transactions. The US Proceedings are brought pursuant to Chapter 15 of the US Bankruptcy Law which provides for bankruptcy proceedings in the US in aid of a foreign insolvency, in this case the BVI. There is no dispute that the BVI Court is the supervisory court for the liquidation of the Funds.

The US Proceedings provide the backdrop to the first instance judgment of Leon J in this matter, whose decision was the subject of the appeal.

In the BVI Commercial Court at first instance, the appellants:

- (a) applied under Section 273 of the Act and invited the Court to exercise its supervisory power over the Liquidators to restrain them from pursuing the US Proceedings on the basis that they were “persons aggrieved” by the Liquidators’ decisions and/or actions in pursuing the US Proceedings; and
- (b) in the alternative, they sought an anti-suit injunction to the same effect. This was sought on the basis that the Liquidators’ pursuit of the US Proceedings constituted vexatious and/or oppressive conduct having regard to the BVI Proceedings, as the appellants ought not to be twice vexed by a re-litigation in the US Proceedings of the issues already decided by the Privy Council in the BVI Proceedings.

Leon J dismissed the appellants’ applications.

The appellants appealed on the grounds that:

- (a) Leon J had erred in the manner in which he had determined the question of standing and that they were “persons aggrieved” within the meaning of Section 273 of the Act;
- (b) the restitution claims in the US Proceedings were met by estoppel and/or were abuses of process; and
- (c) only the BVI court could grant relief under Section 249 of the Act and therefore the Liquidators’ pursuit of such relief in the US Proceedings was hopeless and oppressive.

The Court of Appeal unanimously dismissed the appeal.

Standing under Section 273 of the Act

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.”

The Court of Appeal held that the phrase “person aggrieved” must take its meaning and colour from the context of the statute in which it appears. The proper question therefore, in this case, must be whether, having regard to the context of Section 273 of the Act and the remedy which is thereby given, a person who has no proper or legitimate interest in a liquidator’s act, omission or decision in respect of an insolvent company’s estate may be said to be a “person aggrieved” [30].

In the context of section 273, a person cannot be considered as being “aggrieved” unless that person has a sufficient interest in the outcome of an act, omission or decision taken by a liquidator in the liquidation or, shortly put, a sufficient interest in the relief sought [31].

The Court of Appeal found that it is important to identify, for the purposes of Section 273 of the Act, the capacity in which a person is praying in aid the relief sought [32].

In this case, the appellants did not suggest they had any interest either in Fairfield’s assets or in the way they were to be distributed or spent. The appellants invoked section 273 of the Act as mere defendants to the US Proceedings. In such circumstances, the Court of Appeal held that the appellants were strangers to the liquidation and had no legitimate interest in the relief sought [36]. In such circumstances, the appellants had no standing under section 273 of the Act to apply for the restraint of the Liquidators in pursuing the US Proceedings.

Estoppel/Abuses of Process

The claims made by the Liquidators in the US Proceedings were not in respect of the same redemption payments as were before the court in the BVI Proceedings. The Court of Appeal held that although the claims in the US Proceedings relate to similar redemption payments, the factual context will require ventilation of other considerations as pleaded in those claims. Further, it would be inappropriate for the Court of Appeal to make a summary determination of issues which have been squarely placed before the US Court in the US Proceedings [61i].

In other words, the effect of the BVI Proceedings is within the purview of the US Bankruptcy Court to be decided within the context of the US Proceedings and it was not for the Court of Appeal to pre-empt its consideration.

Further, and in any event, the Court of Appeal noted that the appellants were fully engaged in the US Proceedings and had moved, along with the other defendants in the US Proceedings on the same grounds of cause of action estoppel, issue estoppel and abuse of process as argued before the Court of Appeal [62].

The Court of Appeal felt that the running of parallel arguments before two different courts in respect of the same issues was most undesirable and, as the Liquidators had submitted, the appeal itself could be viewed as an abuse of process [63].

Can only the BVI Court grant relief under section 249 of the Act?

The Court of Appeal recognised that although it would be most unusual for the domestic legislature to expressly confer powers on a foreign court, 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 clear from the Act itself that there is full recognition of cross-border cooperation – Parts XVIII and XIX of the Act deal with cross-border insolvency and orders which may be made in aid of foreign proceedings. These parts of the Act capture the essence of reciprocity and comity between countries in insolvency matters [79].

The Court of Appeal found that the word “Court” in section 249 of the Act is not an expression giving exclusive jurisdiction to the BVI Court to deal with statutory avoidance claims and for granting relief. Rather, it is a procedural or allocation provision which merely directs where a claim may be made [80].

In this case, the Court of Appeal found that there was no good reason for prohibiting the US Bankruptcy Court from rendering assistance to the BVI main insolvency which may inure to the fair and equal treatment of all of the Funds’ creditors [81].

In this context, the Court of Appeal found that this cannot be viewed as harassment or as being vexatious and oppressive to the appellants, nor can it be perceived as an affront to the BVI court or its processes. The appellants had failed to discharge the burden of demonstrating that the statutory avoidance claims were hopeless and/or that the Liquidators should be enjoined from pursuit of them [81].

Subject to any successful appeal to the Privy Council, the BVI Court has refused to intervene and stop the US Proceedings and the appellants will have to argue their case as defendants in the US Proceedings. As things stand, a former shareholder of a company in liquidation is not a “person aggrieved” in the context of BVI insolvency legislation.

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