



Court of Appeal overrules unprecedented attempt to introduce non-party extra territorial discovery



Author:

Sarah Lewis, Associate

In a Judgment handed down on 18 November 2016, the Cayman Islands Court of Appeal ruled that using liquidators' powers to obtain extra territorial non-party disclosure was outside the reach of the *Cayman Islands Companies Law (2013 Revision)* (the "Companies Law"). Specifically, that the official liquidators ("JOLs") could not use the machinery of a letter of request based on Section 103 and/or 138(1) of the Companies Law to compel a foreign bank and several of its employees to deliver up documents situated out of the jurisdiction for the purpose of providing discovery in Cayman litigation to which none of them are parties, as liquidators' statutory powers are not available for the benefit of a party to an action where the purpose of the liquidation will not be served.

Background

Primeo entered into official liquidation in 2009 following the discovery of the Madoff fraud. Thereafter, Primeo commenced proceedings in the Grand Court in order to recover damages arising out of the fraud against Pioneer Alternative Investment Management Ltd, Bank Austria and the 'Austrian Directors' (being employees of the Bank and directors of Primeo) (together the "Austrian Parties"), a claim that was ultimately settled. Primeo also commenced proceedings to recover damages against Bank of Bermuda (Cayman) Limited and HSBC Securities Services (Luxembourg) SA (the "Defendants"). In the course of these proceedings, as part of an extensive application for discovery, the Defendants applied for a Letter of Request to be issued by the JOLs against a number of parties, including the Austrian Parties, in order to obtain documents the Defendants believed were being held by the Austrian Parties.

Grand Court Ruling

At the first of two hearings on this issue, in May 2015, the JOLs submitted that the exercise was speculative and likely to be a disproportionately expensive exercise. Jones J accepted that the JOLs had no reason to apply to obtain the documents prior to the issue being raised by the defendants, as in the JOLs' judgment the documents were not needed for the purposes of liquidation. He remarked that the JOLs did not appear to have "tried particularly hard to obtain information", but stated that he was not criticising the JOLs. The Court of Appeal concluded that this lack of criticism is significant, as it is well established that the relevant test to be applied before interfering with the conduct of a liquidator is to ask whether he has "done something so utterly unreasonable and absurd that no reasonable man would have done it" (Edennote Ltd. (1996) 2 BCLC 389).



However, minded to conclude that Bank Austria were in possession of relevant documents, Jones J adjourned consideration of the issue to allow the Defendants 'a second bite of the cherry' with regard to the Letter of Request.

Following the issuing of a fresh summons, a second hearing took place in December 2015, at which the Defendants adduced evidence of Austrian law that the Austrian authorities would adhere to the Letter of Request which they asked the Court to order the JOLs to issue under the statutory powers conferred by Section 103(7) and Section 138 of the Companies Law and common law.

There is a jurisdiction provision under Section 103(7) of the Companies Law to make an order that a Letter of Request be issued. Section 103(7) provides that the Grand Court has jurisdiction "(a) to make an order under this section against a relevant person resident outside the Islands; and (b) to issue a letter of request for the purposes of seeking the assistance of a foreign court in obtaining the evidence of a relevant person outside the jurisdiction." The Court of Appeal made it clear that the Court should not exercise its jurisdiction unless satisfied that the factual basis for its exercise has been established. Section 138 provides that (1) where any person has in his possession any property or documents to which the company appears to be entitled, the Court may require that person to pay, transfer or deliver such property or documents to the official liquidator; and (2) where the official liquidator seizes or disposes of any property which he reasonably believed belonged to the company, he shall not be personally liable for any loss or damage caused to its true owner except in so far as such losses or damage is caused by his own negligence. Essentially, Section 138(1) is a procedural provision which cannot give a liquidator any better right to property or documents than the company itself. Although the expression 'any person' must include foreigners, Section 138 contains no express power for the Court to issue a letter of request to a foreign court.

Primeo submitted that it was not permissible to use Sections 103 and 138 purely so that documents could be handed over to the Defendants, and where there was no point in the powers being exercised for the purpose of securing the fulfilment of the JOLs statutory powers. Jones J directed that an application to the Court for a Letter of Request should be issued by the JOLs, on the basis that it was inherently likely that the Austrian Directors' files were in the possession of Bank Austria, and that it was inherently unlikely that the Directors had themselves retained the files. He did not state his conclusions on the use of the Companies Law and did not state what test he had applied to the conduct of the JOLs, nor the reasons why he had exercised his discretion to make the order.

Primeo did not seek leave to appeal any part of the Order but, after being given notice that Pioneer was maintaining that the liquidators were precluded by the settlement agreement between Primeo, Pioneer and the Austrian Parties ("Settlement Agreement"), sought a hearing to determine the correct construction of the Settlement Agreement. At the hearing on 5 April 2016, Pioneer argued in addition to the effect of the Settlement Agreement, that it would be an abuse of the jurisdiction under the Companies Law to direct the JOLs to issue a Letter of Request. Jones J was not with Pioneer on this, distinguishing the facts of the instant matter from the case law cited to him where liquidators had used their statutory powers not for the purposes of a liquidation, but for obtaining an advantage over opponents in actual or contemplated litigation, and made an Order that a Letter of Request should be issued to the Austrian Federal Ministry. The order also required the JOLs to "take all such steps as are necessary or appropriate to carry the Letter of Request into effect".



Court of Appeal Ruling

The Court of Appeal was critical of Jones J's ruling in several respects. First, that Jones J did not consider whether there was any risk that Bank Austria might be brought into the damages claim by the Defendants by the use of third party contribution proceedings or whether they could otherwise be made a party to action taken by the Defendants. Second, that although the Judge had in mind the principle that the JOLs must exercise their statutory powers for the purposes for which the powers had been conferred by the Companies Law, and had concluded that collecting in the company's books and records was a proper exercise of the statutory powers of the JOLs and therefore could be directed to issue a Letter of Request, his approach neglected to consider that the undisputed evidence from the JOLs was that whilst a proper exercise, it was not a necessary exercise for that purpose as there was no ground for believing the Austrian parties held documents which were necessary. Third, deeming the JOLs had not taken sufficient or appropriate steps to obtain the relevant documents came nowhere near meeting the test for interfering with the exercise of a liquidator's discretionary powers laid down in Edennote. Fourth, in finding that it was not an abuse for the JOLs to use the machinery of a letter of the purposes of complying with disclosure obligations, Jones J had conflated the JOLs statutory duties with the obligations which Primeo had to discharge under the GCR with regard to discovery. Fifth, Jones J erred by failing to give sufficient weight to the JOLs' opinion that the exercise had nothing to do with the liquidation and would be speculative and expensive. Finally, the Judge failed to take account of the likelihood that there would be re-litigation on the true effect of the settlement agreement. For all these reasons, the Appeal was allowed and the Order directing the JOLs to issue a Letter of Request be set aside.

Court of Appeal's Conclusions

Official liquidators do not by reason of their office when conducting litigation in the name of a company have greater obligations under the GCR than any other litigant has to discharge. To do so would make the discovery process extraordinarily burdensome and expensive for liquidators of insolvent companies and leave liquidators with a duty to assist an opponent in adversarial litigation by seeking letters of request against non-parties who may be in possession of documents located outside of the jurisdiction. Section 103 of the Companies Law must not be used for giving a litigant, who happens to be an office holder, special advantages in ordinary litigation. Further, on the basis that an abuse can arise when a statutory power conferred for certain purposes is deliberately used for purposes beyond the contemplation of the statute, this holds equally true with respect to other parties. Ultimately, liquidators' statutory powers are not available for the benefit of a defendant to an action by a liquidator to enforce for the defendant's benefit where the purpose of the liquidation will not be served.

Paul Smith and Ben Hobden of Conyers, instructed David Allison QC on behalf of the successful Appellant.



Contacts

Paul Smith

Partner

+1 345 814 7777

paul.smith@conyersdill.com

Ben Hobden

Associate

+1 345 814 7366

ben.hobden@conyersdill.com

Global Contacts

Kerri L. Lefebvre

Director

Head of **Dubai** Office

kerri.lefebvre@conyersdill.com

Nigel K. Meeson QC

Partner

Head of Asia Disputes & Restructuring Group

nigel.meeson@conyersdill.com

Linda Martin

Director

Head of **London** Office

linda.martin@conyersdill.com

Alan Dickson

Director

Head of **Singapore** Office

alan.dickson@conyersdill.com

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