MAY 2019

UPDATE

Privy Council confirms the broad jurisdictional reach of statutory tools available to BVI liquidators in cross-border insolvencies

Update prepared by Eleanor Morgan (Partner, BVI), Jennifer Maughan (Counsel, Hong Kong) and Jaclyn Mannheim (Knowledge Management, Cayman Islands)

In the most recent skirmish arising out of the Madoff fraud[1], the Privy Council, on appeal from the Eastern Caribbean Supreme Court, confirmed that BVI insolvency law can be applied by foreign courts. Applying the usual principles of comity, the Privy Council refused to grant an anti-suit injunction which would prevent claims founded in domestic BVI insolvency legislation from proceeding before the US Bankruptcy Court in New York. This decision confirms that the BVI courts do not have exclusive jurisdiction over the avoidance provisions in BVI insolvency legislation and BVI liquidators can pursue BVI Insolvency Act claims in foreign jurisdictions (subject to applicable principles of private international law).

Background

The dispute arose out of the Madoff investment scandal, in which Bernard L Madoff operated a multi-billion dollar Ponzi scheme 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 (collectively the **Fairfield Funds**) incorporated in the BVI. Sigma and Lambda invested in Sentry and in turn Sentry invested almost all of its funds in BLMIS. The Madoff fraud was exposed in December 2008 and at the time Sentry was the largest feeder fund into BLMIS with approximately US$7.2 billion invested in BLMIS. After exposure of the Madoff fraud the Fairfield Funds entered into liquidation proceedings in the BVI.

The liquidators of Sentry brought proceedings in the United States seeking to recover funds paid out to Sentry investors who redeemed their shares prior to the exposure of the fraud in December 2008, at valuations which, it is now understood, bore no relationship to the actual value of their shares (the **US proceedings**). The claims made in the US proceedings were intended to rectify the position that those investors who realised their investment prior to the uncovering of the fraud profited significantly from that same fraud, while those investors who invested later or did not realise their investment before the fraud became public, lost everything. The US proceedings relied on section 249 of the BVI Insolvency Act 2003 (**Section 249**) and on common law grounds. The US Bankruptcy Court dismissed the liquidators' claims at common law, except to the extent that the claims alleged a constructive trust against defendants who had knowledge of the fraud. The US Bankruptcy Court allowed the statutory avoidance claims under Section 249 to proceed.

[1] *UBS AG New York and others v Fairfield Sentry Ltd (In Liquidation) and others* [2019] UKPC 20.

UBS AG New York and others (collectively **UBS**), as defendants to the liquidators' claims, sought an anti-suit injunction from the BVI courts to restrain the liquidators from pursuing the US proceedings. UBS's application for an anti-suit injunction was dismissed by the BVI High Court and again on appeal by the Eastern Caribbean Court of Appeal. UBS brought the present appeal to the Judicial Committee of the Privy Council.

Section 249

Section 249 gives the BVI High Court the power to set aside voidable transactions and the discretion to make various orders for relief following the decision to set aside such transactions. The provision provides that if, on application by an office holder, the court is satisfied that a transaction entered into by a company is voidable, the court may make an order to set aside the transaction (in whole or in part), or in the case of an unfair preference or undervalue transaction, make such order as it considers fit to restore the position to what it would have been had the company not entered into the voidable transaction.

Leading counsel for UBS contended, amongst other things, that the section, properly construed, conferred the right to order such relief only on the BVI High Court being the court charged with the domestic supervision of the liquidation enabling only *it* to alter the consequences of concluded transactions which would otherwise be binding on the insolvent company. Leading counsel for the liquidators contended, to the contrary (amongst other things), that it was for the US Bankruptcy Court, applying US rules of private international law, to decide whether it would apply BVI insolvency law to the liquidators' claims in the US proceedings.

Privy Council

The central question on appeal was whether Section 249 conferred an exclusive jurisdiction on the BVI High Court, so as to preclude foreign courts assisting in BVI liquidation proceedings from exercising such powers. The Privy Council determined that it did not.

The Privy Council observed that it was not uncommon for the courts in one country to apply the insolvency laws of another country when providing assistance. The BVI statutory regime also facilitated similar assistance to foreign insolvency proceedings which indicated that the BVI legislature must have expected foreign courts to be able to apply BVI Insolvency law, which strongly negates the purported exclusivity of the BVI High Court in Section 249.

The Privy Council concluded that the application for an anti-suit injunction was misconceived, finding that –

1. Sentry's liquidators had raised the US proceedings with the sanction of the BVI High Court, and as officers of the BVI High Court. If the BVI High Court wished to prevent the US proceedings from continuing it could have simply revoked its permission - which it had not done.

2. The principles of comity required that it was a question for each foreign court, from which a BVI office holder sought assistance, to determine whether it could apply the statutory tools which BVI insolvency legislation had conferred on its domestic courts. There were no grounds in the present case for departing from the normal principles of comity. It was a question for the US courts to decide whether they would apply BVI law.

3. Section 249 contained no express prohibition on a foreign court from exercising the powers on request of a BVI office holder and no such prohibition arose by implication. There was no question of vexatious or oppressive litigation and there was no injustice of the type which would ordinarily warrant the grant of an anti-suit injunction.

The Privy Council dismissed the appeal.

Conclusion

This decision will be of interest to insolvency practitioners in the BVI and common law jurisdictions alike who are considering the various avenues open to them, at home and abroad, to recover funds which may form part of the insolvent estate. While the decision, in reality, decided a comparatively narrow question of statutory interpretation, it re-iterates the general principles of comity that, provided there are no express legislative

provisions prohibiting the foreign application of domestic laws, and no injustice will ensue, the applicability of statutory provisions from another jurisdiction will remain in the discretion of the foreign court, applying principles of its private international law. The decision confirms, from a BVI law perspective, the broad jurisdictional reach of potential statutory tools available to liquidators at home and abroad.

Contacts

Eleanor Morgan
Partner and Head of Litigation and Insolvency practice, BVI
+1 284 852 1712
eleanor.morgan@mourant.com

Shaun Folpp
Partner and Head of Litigation and Restructuring & Insolvency practices in Asia, Hong Kong
+852 3995 5729
shaun.folpp@mourant.com

2021934/75601846/1