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CROSS-BORDER INSOLVENCY IN THE CAYMAN ISLANDS: PICARD –V– PRIMEO

John Harris

A recent decision of the Grand Court of the Cayman Islands offers helpful guidance in respect of the remedies open to an office-holder appointed in respect of an insolvent foreign company who wishes to bring insolvency claims in the Cayman Islands. In *Irving H Picard and Bernard L Madoff Investment Securities LLC -v- Primeo Fund*, the Court considered the nature and effect of recognition of a foreign office-holder under Part XVII of the Companies Law and the availability of insolvency remedies to a foreign office holder following the United Kingdom Supreme Court's decision in *Rubin -v- Eurofinance*.

Mr Picard, the US-appointed trustee for the liquidation of Bernard L Madoff Investment Securities ("BLMIS"), sought to bring claims against Primeo, one of the so-called "feeder funds" which channelled monies to BLMIS, for monies paid by BLMIS to it in the period prior to the commencement of BLMIS' liquidation.

On a trial of preliminary issues, Mr Justice Andrew Jones QC considered whether it was open to the trustee to bring avoidance claims applying either US substantive law, pursuant to Part XVII of the Companies Law, or alternatively applying Cayman Islands law as if BLMIS were being wound up in the Cayman Islands, applying the principles set out in the Privy Council's decision in *Cambridge Gas Transportation Corporation -v- Official Committee of Unsecured Creditors of Navigator Holdings plc*.

Previously, the Cayman Islands legislation did not make any provision at all for cross-border insolvencies. In 2009, however, the new Part XVII of the Companies Law came into force. It provides a mechanism under which a foreign office holder's appointment can be recognised by the Cayman Court, and ancillary orders made including for the turnover of property belonging to the foreign company. The trustee had previously obtained an order under Part XVII recognising his appointment and now argued that the effect of the statute was to give the Cayman Court power to apply the law governing the BLMIS liquidation, i.e. US bankruptcy law. In the alternative, the trustee argued that he could bring claims under Cayman law, relying on *Cambridge Gas*, as if BLMIS were being wound up under the jurisdiction of the Cayman Court.

As the Judge put it, "what I have to decide in this case is whether the scope of the assistance available to the Trustee, whether under section 241 or at common law, enables him to pursue transaction

avoidance claims against Primeo and, if so, whether this Court should apply the substantive foreign law applicable in the New York bankruptcy proceeding or the domestic law which would be applicable if a winding up order had been made against BLMIS in this jurisdiction."

Dealing first with Part XVII of the Companies Law, the Judge held that section 241 sets out an exhaustive list both of the powers available to a foreign office holder under Part XVII *and* the purposes for which they may be exercised.

The Judge also considered whether the trustee's right to bring such a claim would be dependent on the nature of BLMIS' connection with the Cayman jurisdiction.

The Judge then considered whether the power in section 241(e), to make an order for "the turnover to a foreign representative of any property belonging to a debtor" could extend, as the trustee argued, to setting aside an antecedent transaction and ordering the repayment of money to the trustee. The Judge held that it could not, and that section 241(e) relates only to property belonging to the company prior to the commencement of its liquidation, and not to property which is recoverable only by an office-holder pursuant to transaction avoidance powers. The Judge took the view that Part XVII provides foreign office-holders with a simple procedural mechanism for obtaining ancillary relief, but does not extend to complex disputes such as would arise in an avoidance action.

Turning to the position under the common law, the Judge considered the principle established in *Cambridge Gas*, and reaffirmed by the English High Court in *Schmitt -v- Deichmann*, that recognition of a foreign office holder carries with it the active assistance of the Court, by doing whatever it could have done in a domestic insolvency. The Judge asked whether this remains the law following the Supreme Court's decision, in *Rubin -v- Eurofinance SA*, that *Cambridge Gas* was wrongly decided. The Judge held that the Supreme Court's reversal of *Rubin* applies only to the question of enforcement of foreign judgments and did not disturb the principle that recognition at common law carries with it the active assistance of the Court. He therefore held that a foreign office holder does in principle have the right under common law to bring an avoidance claim in the Cayman Islands under Cayman law.

The Judge also considered whether the trustee's right to bring such a claim would be dependent on the nature of BLMIS' connection with the Cayman jurisdiction. It was argued by Primeo that the Court could only extend to a foreign office holder the right to exercise statutory avoidance powers, if it was established that the Cayman Court would itself have had jurisdiction to wind up BLMIS. According to Primeo, if the foreign company did not meet the criteria for a local winding up so as to bring it within the ambit of the Companies Law, it was not open to the Court to allow it to obtain remedies which that statute provides solely to an official liquidator appointed in the context of such a winding up. The Judge rejected this argument, following decisions of the South African and Bermudan courts that the existence of jurisdiction to make a winding up order was irrelevant to the question of common law recognition and assistance.

The final question considered by the Judge was whether Primeo was entitled to the benefit of insolvency set-off as

between the trustee's avoidance claims, and claims which Primeo itself asserts against BLMIS as a victim, as it says, of the Madoff fraud. The Judge held that no such set off is available, relying on the well settled principle that pre-liquidation claims cannot be set off against post-liquidation avoidance claims. Equally, the Judge held that Primeo could not rely on the equitable rule in *Cherry -v- Boultbee* to achieve the same result.

John Harris is an Associate in the Firm's Litigation practice group in the Cayman Islands and acted for the Madoff Trustee in this case. He has significant experience in commercial litigation with an emphasis on insolvency, primarily acting for financial institutions and insolvency practitioners

CIVIL AVIATION (AMENDMENT) ACT 2012

Alexandra T. Hall

On the 12th December, 2012, the Civil Aviation (Amendment) Act 2012 (the "Amendment Act") received the assent of Parliament. To date, no appointed day notice has been published in the Gazette.

The long title of the Amendment Act provides that the purpose of the amendment is to "establish measures for the organization and designated responsibilities within The Bahamas for the safeguarding of passengers, crew, ground personnel and the general public against acts of unlawful interference with civil aviation and for connected matters". The Amendment Act seeks to achieve this by inserting into the principal Act a new Part VIA which addresses security issues.

Among the protocols that will be required once the Amendment Act comes into force is the entering into of a memorandum of agreement with the Royal Bahamas Police Force regarding threat and risk assessments at airports.

Under this new Part VIA, the Director of the Bahamas Civil Aviation Department ("BCAD") is designated as the appropriate authority for civil aviation in accordance with the requirements of the Chicago Convention on International Civil Aviation (the "Chicago Convention"). It also provides that the Director has all of the responsibilities specified in Annex 17 of that Convention.

Among the protocols that will be required once the Amendment Act comes into force is the entering into of a memorandum of agreement with the Royal Bahamas Police Force regarding threat and risk assessments at airports.

The Amendment Act states that the Director is tasked with the responsibility of drafting the National Civil Aviation Security Programme ("NCASP") along with the Minister responsible for Foreign Affairs, the Royal Bahamas Defence Force, the Royal Bahamas Police Force, the Office of the Attorney General, the Customs Department, The Department of immigration, the Post Office Department and any other organization and person the Director deems appropriate.

Airport aviation security inspectors may be appointed by the Director to assist in fulfilling regulatory oversight requirements. These inspectors will have access to all aerodromes and aircrafts in The Bahamas in accordance with procedure specified in the NCASP and the National Civil Aviation Security Quality Control Programme ("NCASQCP"). They will also have the authority to directly interview any person within the Commonwealth of The Bahamas who

may have information applicable to aviation security. The Amendment Act provides that it is an offence for a person to impede, hinder, delay or otherwise interfere with an aviation security inspection or to knowingly provide false or misleading information to these persons.

The Amendment Act gives the Director the authority to amend the NCASP from time to time as necessary and provides that such amendment will be effective upon receipt of its notification and may apply to aerodrome operations, aircraft operations and all other entities regulated under the NCASP.

Airport certification is not required for aerodromes where aircraft passenger operations are conducted only because the airport has been designated as an alternate airport.

In April 2012, the Civil Aviation (Safety) (Amendment) Regulations, 2012 (the "Amendment Regulations") were published. The Amendment Regulations inserted into the Civil Aviation (Safety) Regulations a new Schedule 21 which addresses aerodrome certification and operations. This new Schedule applies to:

- Airports that serve scheduled and unscheduled air carrier aircraft with more than 30 seats;
- Airports that serve scheduled air carrier operation in aircraft with more than 9 seats but less than 31 seats; and
- Any other aerodrome, where the Minister is of the opinion that it is in the public interest for that aerodrome to meet the requirements necessary for the issuance of an airport certificate.

Airport certification is not required for aerodromes where aircraft passenger operations are conducted only because the airport has been designated as an alternate airport.

No international aerodrome serving scheduled and unscheduled air carrier aircraft with more than 30 seats and no international aerodrome serving scheduled air carrier operation in aircraft with more than 9 seats but less than 31 seats may operate without certification. Additionally, where the Minister responsible for civil aviation is of the opinion that it is in the public interest for any other aerodrome to be certified, such airport must receive certification. Exempted aerodromes are however not required to have airport certification.

The certification and regulation of aerodromes falls under the purview of BCAD and it is the BCAD which may impose restrictions on any aerodrome and has authority to limit or totally prohibit the use of any aircraft that does not meet its requirements.

The Amendment Regulations seek to codify industry best practices in The Bahamas and Schedule 21, in addition to outlining the certification process for aerodromes, addresses: (i) the preparation of aerodrome manuals; (ii) the obligations of aerodrome operators; and (iii) the requirements of aerodrome designs and operations.

Alexandra T. Hall is an Associate in the Ocean Centre office and is a member of the Commercial practice group with experience in various aspects of company and commercial law.

THE BAHAMIAN 'SMART' FUND PRODUCT

Christel Sands-Feaste

The Bahamian "SMART" Fund (formally known as Specific Mandate Alternative Regulatory Test Fund) represents a flexible yet regulated investment fund product.

By way of background, there are no predefined regulatory criteria for SMART Funds; instead, the *Investment Funds Act* authorizes the Securities Commission of The Bahamas (the "Commission") to establish the rules and requirements applicable to each category of SMART Fund. Whilst seven SMART Fund models have been authorized to date (with six of those models in use), this approval structure facilitates the continued evolution of new SMART Funds to meet market demand.

SMART Funds have been used (i) by financial institutions, financial advisors and family offices as a part of the wealth planning structures for private clients...

Two of the most commonly used models are (i) SFM Model 004 which is limited to no more than five investors, where the annual audit can be waived with the consent of all of the investors and a term sheet is optional and (ii) SFM Model 002 which, is limited to no more than 10 investors (all of whom must be professional or accredited investors), requires a term sheet and allows for the audit requirement to be waived. It is anticipated that SFM Model 007 (or the super qualified investment fund), which was approved for use in August, 2012, will rapidly increase in popularity; a single investor is expressly permitted, the maximum number of investors is 50, there is a minimum investment of US$500,000 and the administrative functions can be outsourced to any reputable person in a jurisdiction (which not be The Bahamas) on an as needed basis.

The attractive features of a SMART Fund include (i) the ability to utilize a term sheet instead of a traditional lengthy offering memorandum resulting in lower startup costs than those for a traditional investment fund, (ii) the ability to waive the requirement for an annual audit with the unanimous consent of the investors, (iii) the certainty of regulatory oversight through the licensing regime and (iv) prompt licensing by an administrator with an unrestricted license, under delegated authority from the Commission, subject to compliance with anti-money laundering requirements and fit and proper thresholds by service providers in accordance with international best practice on the prevention and detection of money laundering and counter terrorist financing.

SMART Funds have been used (i) by financial institutions, financial advisors and family offices as a part of the wealth planning structures for private clients, (ii) by investment managers or promoters as a cost effective regulated structure to establish a track record or showcase a new investment product or strategy and (iii) by investors in jurisdictions where external investments are only permitted where they exceed a specified amount.

In summary, the SMART fund regime provides a framework for the ongoing development of innovative investment fund solutions which are responsive to clients' needs whilst subject to regulatory oversight.

Christel Sands-Feaste is a Partner and Chair of the Securities and Investment Funds practice group with extensive legal experience in corporate and commercial law.

FIRM SUPPORTS BAHAMIAN TEAM COMPETING AT THE JESSUP MOOT

(Back Row) Partners Vann P. Gaitor, Sterling H. Cooke, Surinder Deal; Managing Partner Oscar N. Johnson Jr.; Partners N. Leroy Smith and Stephen J. Melvin. (Front Row) Jessup Moot Team Members, Akeyra Saunders, David Whymns, Tamar Moss and Theominique Nottage; Partner Christel Sands-Feaste

Higgs & Johnson was pleased to support the Bahamian team competing in the Jessup Moot in Washington, D.C. for its second year. Jessup is the world's largest moot court competition, with participants from over 550 law schools in more than 80 countries. The Competition is a simulation of a fictional dispute between countries before the International Court of Justice, the judicial organ of the United Nations. One team is allowed to participate from every eligible school. Teams prepare oral and written pleadings arguing both the applicant and respondent positions of the case.

The team finished within the top 20%, once again advancing to the International Rounds. In their preliminary rounds, they won against Iraq in both Memorials and Orals and won against Israel in Memorials. Team member Theominique Nottage noted, “We were happy with our performance and look forward to continuing and improving upon the Jessup tradition in the UWI/COB LL.B programme”.

Partner, Surinder Deal said, “We wish to congratulate the team on their success at this year’s moot. The firm is happy to be a sponsor and recognizes the important role the private sector plays in assisting our students to compete on an international stage.”

FIRM RANKED BY 2013 EDITIONS OF LEADING LEGAL DIRECTORIES CHAMBERS GLOBAL AND IFLR1000

Higgs & Johnson has been ranked as a Tier 1 law firm by both IFLR1000 and Chambers Global for 2013. The firm was ranked in the Financial/Corporate category by IFLR 1000 and in General Business Law by Chambers Global. The firm has maintained its Tier 1 standing in The Bahamas for the past six years and is continually recognized globally as a leading commercial firm.

IFLR1000 noted that 'Higgs & Johnson is well regarded by competitors, with one competitor noting that the firm is a "major player" in the jurisdiction'. Chambers Global stated that, 'This long-established practice is known for its strong relationships in the financial services sector and clients praise the skill and experience of its lawyers.'

Partners Surinder Deal and Christel Sands-Feaste, of the Commercial and Securities practice groups, were listed yet again as leading lawyers in IFLR1000. Philip C. Dunkley, Q.C. – Senior Managing Partner and Partners, Heather L. Thompson, Christel Sands-Feaste and Philip S. Boni were listed as leading lawyers in Chambers Global. Ms. Thompson and Mrs. Sands-Feaste were recommended in General Business Law and Mr. Dunkley and Mr. Boni in General Business Law: Dispute Resolution.

FIRM SHORTLISTED FOR STEP CARIBBEAN AWARDS 2013

Higgs & Johnson is pleased to announce that its Private Clients & Wealth Management Group has been shortlisted for 'Team of the Year' at the inaugural STEP Caribbean Awards 2013. Dr. Earl A. Cash, Partner and Chair of the group said: "We are delighted to have been shortlisted for this prestigious award. Our team appreciates the vote of confidence demonstrated by the panel of judges." The STEP Caribbean Awards are part of the STEP Caribbean Conference held in St. Kitts, May 6-8, 2013. This year's award winners will be announced at the STEP Caribbean Conference Gala Dinner.