

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA APPLICATION No: 08 of 2016

ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No: FSD 30 of 2010 – AJJ

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND

IN THE MATTER OF PRIMEO FUND (IN OFFICIAL LIQUIDATION)

BEFORE:

**THE RT. HON. SIR JOHN GOLDRING, PRESIDENT
THE HON. SIR GEORGE NEWMAN, JUSTICE OF APPEAL
THE HON. (CECILE) DENNIS MORRISON, JUSTICE OF APPEAL**

Appearances: Mr Tom Smith QC instructed by Mr. Peter Hayden and Mr. Jonathan Moffatt of Mourant Ozannes for Primeo.

Mr. Richard Gillis QC and Mr. Toby Brown, instructed by Mr. Andrew Pullinger of Campbells for the HSBC Respondents.

Mr David Allison QC instructed by Ben Hobden of Conyers Dill & Pearman for the Appellant.

(Hearing: 31 August 2016
Judgment delivered: 18 November 2016)

JUDGMENT ON COSTS

Released: 19 January, 2017

1. The parties, Pioneer Alternative Investment Management Limited (“Pioneer”), Primeo Fund (“Primeo”) and HSBC Securities Services (Luxembourg) SA and Bank of Bermuda (Cayman) Limited (together “HSBC”), have delivered written submissions in response to the Court’s Order dated 18 November 2016. Save to the extent that it is agreed that the Court should make an order for costs in favour of Pioneer, there has been no agreement between Primeo and HSBC as to where the liability for costs should lie.
2. The origin and the subsequent course of this interlocutory episode in the action for damages made by Primeo against HSBC has been fully traced and recorded in the judgment of the Court. The Court is satisfied that, but for the attempt by HSBC to obtain third party disclosure from the parties in Austria, neither Primeo, the JOLs nor Pioneer would have been exposed to the costs of making or resisting disclosure in accordance with the Letter of Request. In the Court’s judgment it is not now possible to regard, as the submissions of HSBC suggest, that these costs have been incurred in connection with the liquidation of Primeo and that the matter

should be governed by CWR Order 24 rule 9(2) and GCR 62 rule 6(2). The application for the Letter of Request was a deliberate and legally misconceived attempt to obtain third party disclosure so as to assist HSBC in its defence to the claim for damages being made against it by Primeo. Whilst Primeo changed its position and showed a measure of indecision in deciding how best to respond to the favourable response which HSBC's submissions received from the judge, it maintained its basic submission that it had acted reasonably throughout and attempted to obtain the voluntary delivery up of documents. Further that it had no reason to believe that there were more documents which were relevant and that such prospect as might exist did not justify the expense which would be incurred in seeking to obtain them.

3. HSBC expressly disregarded the likely costs to which the pursuit of its application would give rise on the basis that it had spent a considerable sum and could see no reason why Primeo should not be put to the costs and expense of obtaining disclosure for HSBC's benefit. As this Court has already stated the only purpose which could be served by the disclosure was that it would assist HSBC in the conduct of the litigation.
4. The Court accepts that the JOLs were placed in a difficult position. Once the judge had concluded that there was jurisdiction to require the JOLs to issue a Letter of Request and had not been persuaded that he should exercise his discretion against making the order on the ground that it was unreasonable and disproportionate, it was reasonable for Primeo to anticipate that further resistance was capable of being misinterpreted.
5. In the circumstances although it was Primeo which issued the summonses which failed, it did so because it was clear that the application by HSBC had found favour with the judge and it was not unreasonable, having regard to the tenor and content of the issues being raised, for Primeo to adopt a pragmatic approach to this interlocutory application.
6. This Court is satisfied that the underlying stakeholders in the Primeo estate, being the victims of the Madoff fraud, should not have to pay any of the costs incurred by the unsuccessful attempt by HSBC to circumvent the rules in order to obtain a benefit for itself.
7. **ORDER:** HSBC should pay all the costs incurred by Primeo and Pioneer in resisting the application for the issue of a Letter of Request in this Court and the court below save that the costs of the hearing before the judge on the 15 December 2015 are to remain as costs in cause.