IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 111 of 2017 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF THE WIMBLEDON FUND, SPC (IN OFFICIAL LIQUIDATION)

IN CHAMBERS

Appearances:	**Mr. Nick Hoffman and Mr. Lachlan Greig of Harneys on behalf of the Wimbledon Fund, SPC (In Official Liquidation)**
	Mr. Kyle Broadhurst of Broadhurst LLC on behalf of the Wimbledon Financing Master Fund Ltd (In Official Liquidation)
Before:	**The Hon. Justice Parker**
Heard:	**4 December 2018**
Draft Judgment Circulated:	**18 December 2018**
Judgment Delivered:	**7 January 2019**

HEADNOTE

Application for leave to commence proceedings under section 97(1) of the Companies Law-threshold test-exercise of discretion-choice of procedure-proceedings for which leave sought to be in New York-appropriate forum

JUDGMENT

INTRODUCTION

1. The joint official liquidators of the Wimbledon Financing Master Fund Ltd (in Official Liquidation) (the **MF JOLs**) apply by way of summons filed on 28 August 2018 for leave to commence and prosecute proceedings in New York against the Wimbledon Fund SPC (**SPC Fund**) concerning monies received by the SPC fund segregated portfolio class TT (**class TT**).

Factual background

2. The SPC Fund, the Wimbledon Financing Master Fund Ltd (the **Master Fund**) and Weston Capital Partners Fund II Ltd (**Partners II**) were managed by Weston Capital Asset Management (Weston). The two main principles behind Weston were Albert Hallac and Keith Wellner.

3. These two men conspired with David Bergstein to defraud the funds under their management. The transaction relevant to this application concerns a series of agreements whereby the Master Fund's assets were purportedly transferred from an entity called Gerova Financial Group to a newly created Delaware corporation called Arius Libra Inc (**Arius Libra**) and then used by Arius Libra to secure a borrowing facility from Partners II (the **Arius Libra transaction**).

4. In exchange the Master Fund was to receive a shareholding in Arius Libra which in turn held an ownership interest in another Delaware corporation called Pineboard Holdings Inc (**Pineboard**). The Master Fund became a shareholder in Arius Libra which in turn was a shareholder in Pineboard. However, the assets of Pineboard were misappropriated by Messrs Bergstein, Hallac and Wellner. Mr Hallac and Mr Wellner pleaded guilty to fraud and Mr Bergstein has been found guilty of fraud in the United States in relation to this transaction.

5. On 16 April 2018 the Master Fund issued proceedings in the Supreme Court of the State of New York concerning approximately US$ 3 million that has been allegedly taken from Pineboard. It is alleged that US$ 1 million of that US$ 3 million was transferred to class TT. It is also alleged that no consideration was paid for the transfer.

6. On 30 July 2018 Justice Segal granted the Master Fund leave to pursue the claims against Mr Bergstein and others in New York and to bring the present application seeking leave to also bring proceedings against class TT.

7. The MF JOLs assert that US$ 1 million was sent from Pineboard to Swartz IP Inc (**SIP**) and then almost immediately onto class TT in order to satisfy a class TT redemption request. It is alleged Pineboard did not receive consideration for the transfer and/or

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 10/17

that Pineboard was insolvent at the time of the transfer or became so as a result. It is also alleged that the transfer of the funds to class TT was fraudulent, as more particularly set out in the "Summons with Notice" that the Master Fund filed in the New York proceeding. I should state that the SPC Fund does not accept that the transfers were made at all, quite apart from a defence based upon consideration having been given.

The law

8. Section 97(1) of the *Companies Law* (2018 Revision) states:

> *"When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court may impose".*

9. The threshold question on such an application for leave is whether the applicant has shown that he has a claim that is 'worth entertaining'. This test has been expressed in a number of ways. The rationale for the test is that the company in liquidation and its liquidators should not be burdened by defending a futile claim.

10. Mervyn Davies J expressed the test as the applicant having to show 'an arguable case' in *Re Exchange Securities & Commodities Ltd* [1983] BCLC 186.

11. James LJ in *re David Lloyd & Co (1877) 6 Ch. D 339* explained the rationale in this way:

> *"These sections... were intended, not for the purpose of harassing or impeding, or injuring third persons, but for the purpose of preserving the limited assets of the company... in the best way for distribution among all the persons who have claims upon them. There being only a small fund of a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and incurring costs which would increase the claims against the company and diminish the assets which ought to be divided among the creditors."*

12. It is only if the court is satisfied that this threshold test has been met that it moves on to consider the question whether to grant leave (and if so whether to impose any conditions) and in this regard the court's discretion is broad and unfettered.

13. If the court is satisfied that there is a real issue to be tried so that the threshold test is met, the general discretion as to whether to grant leave is to be exercised by taking all relevant circumstances into account in the assessment of a fair outcome to the parties. This includes consideration of whether there are fair, realistic and appropriate alternative methods to resolve the dispute either (and as a matter of preference for

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 10/17

economic and efficiency reasons) within the winding up proceedings, or if not in the winding up proceedings, by way of some other dispute resolution mechanism.

14. In *Ogilvie–Grant and anor v East 7 ACLR 669*, the Supreme Court of Queensland observed:

> *"It, of course, follows that it is quite impossible to state in an exhaustive manner all of the circumstances in which leave to proceed may be appropriate, but in the past they have been said to include factors such as the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved, and the stage to which the proceedings, if already commenced, may have progressed."* per Macpherson J.

15. If the proposed action for which leave is sought raises issues which can be conveniently decided in the course of the winding up, then leave should be refused as there is an obvious benefit in having matters decided in liquidation proceedings, which ought to be less expensive and faster than separate litigation. There are however circumstances where it is appropriate to allow proceedings to take place outside of that process: see *In the matter of Madison Niche Opportunities Fund Ltd (In Liquidation)* (unreported, 30 May 2016).

16. The issue the court needs to address is whether it is right and fair to all parties in the circumstances of the case to grant leave bearing in mind that the applicant has the burden of persuading the court that leave should be granted: see *Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Limited and forty two others* [2010] 1 CILR 553.

17. The essential question that the court needs to consider is the most appropriate procedural method for determining the proposed claim between the options available.

Submissions of the parties

18. Mr Kyle Broadhurst appeared for the MF JOLs. He submitted that the claim should be determined in litigation in New York as pleadings, discovery and witness evidence (with cross examination) will be necessary. In circumstances where litigation would be required in any case, even after having gone through the proof of debt and appeal process, it made no sense not to go straight to litigation. He also submitted that the claim concerned multiple defendants and those other defendants could not be brought before the Cayman court in the liquidation proceedings. The continuation of the stay would result in two separate sets of proceedings with the risk of inconsistent decisions.

19. Further he submitted that New York was both the natural and most appropriate forum as the claims were governed by New York law. He submitted that prior decisions of the New York Court involving the parties and related transactions were of relevance

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 10/17

to the issues arising in the claim and so the New York Court will be in a better position to determine the impact of those prior decisions.

20. There was no real connection to the Cayman Islands. In particular the multiple parties to the proceedings were not resident in the Cayman Islands (apart from the Master Fund and class TT).

21. He also pointed out that the causes of action advanced included double derivative claims involving companies incorporated in Delaware and that the litigation process was the only feasible and effective way of determining those claims. Moreover the relevant witnesses were located in New York or elsewhere in the United States. The relevant transfers took place in United States and the proceedings concerned frauds committed in the United States.

22. He submitted that the evidence did not establish that proceedings in the Cayman Islands would be any less expensive than proceedings in New York as the same lay witnesses would be required in either jurisdiction and expert evidence of New York law will be required to be determined in Cayman if the matter proceeded through the proof of debt process.

23. In any event the cost of the proceedings is a relevant consideration but not the only consideration. Even where the underlying company is insolvent and even where creditors may be prejudiced by the cost of litigation it is not the deciding factor - see *New Cap Reinsurance Corporation Ltd v HIH Casualty & General Insurance Ltd* [2002] EWCA Civ 300. In this case the SPC Fund has asserted that it is solvent so shareholders should be able to stand behind it. The court should not lose sight of deciding the matter on the basis of what is fair and right in all the circumstances.

24. Mr Nick Hoffman appeared for the SPC Fund. He submitted that the threshold test had not been met and that the claim was not 'worth entertaining'. Even if I was persuaded that the claim was genuine, there was no good reason why the proof of debt procedure should not be followed.

25. In his submission the process under the *Companies Winding Up Rules* (**CWUR**) in Cayman was clearly preferable on the facts of this case. The claims which the Master Fund wishes to bring were put in a complicated way involving double derivative claims for fraud which alleged various types of conduct against various parties and the relief sought was similarly complex. The Master Fund sought compensatory damages, punitive damages, declaratory relief and a constructive trust against class TT.

26. However, he pointed out that despite the complexity of these claims and the legal burden that the Master Fund bears to demonstrate that it had a claim worth entertaining, no expert evidence as to New York law had been filed nor any accurate picture of how the claims would be determined had been provided.

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 10/17

27. In any event he submitted that there was no reason why the alleged claims should not be resolved by the relatively inexpensive and expedient Cayman Islands proof of debt process rather than a resource and time intensive litigation in New York between some fourteen parties.

28. He submitted that on the evidence before the court it is clear that it will be more economic to deal with this claim in the proof of debt process and the likely costs of the New York litigation will equal if not exceed the amount in dispute. The liquidation of the class TT portfolio will be significantly extended with increased fees and expenses if it is required to defend the proposed litigation.

29. Both the Master Fund and SPC Fund are Cayman Islands companies subject to Cayman Islands court supervised liquidations and the location of the other twelve proposed defendants is irrelevant. They do not need to be involved in the proof of debt process at all.

30. He rejected the argument that New York was clearly the most appropriate forum to determine these claims as, if necessary, the Cayman court can hear evidence of New York law and there is no evidence to support the assertion the claim requires all the processes of litigation in New York with the consequent costs risk to the successful party.

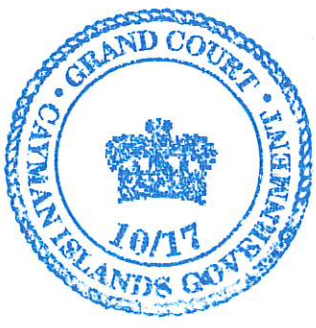
The evidence

31. The first affidavit of Russell Homer, one of the MF JOLs, dated 28 August 2018 sets out at paragraphs 15 to 18 the evidence in support of transfers from Pineboard to SIP in April 2012. The transfer from SIP does not identify the ultimate payee. However, Mr Homer asserts that:

> ... *it is clear from contemporaneous communications between Mr Hallac, Mr Wellner and Mr Bergstein that class TT received the funds* (paragraph 17).

32. In support of that assertion he refers the court to transcripts of the criminal trial of Mr Bergstein and various contemporaneous emails between the three. I have also reviewed an affirmation of David Bergstein in New York proceedings on 17 April 2015 where he refers to the fact of the payment having been made.

33. Mr Hoffman has pointed to a number of deficiencies in the evidence in support of the transfers having been made as Mr Homer suggests. I have reviewed this evidence and, whilst not determining the merits of the factual issues in dispute on this application, I am prepared to accept that the facts for which Mr Homer contends are arguable.



34. At paragraph 26 Mr Homer gives reasons why civil litigation in New York and not the winding up process is the appropriate way for the Master Fund to establish its claims against class TT.

35. He points to the following:

i) the causes of action include double derivative claims concerning companies incorporated in Delaware and so could not be brought within the liquidation proceedings;

ii) the claims will be governed by the laws of New York and potentially Delaware;

iii) there are multiple parties to the proceedings none of whom with the exception of class TT are located in the Cayman Islands and so nearly identical litigation would still be needed in New York with resulting increased costs and the risk of inconsistent findings;

iv) the resolution of the claim will require all the processes of litigation including the exchange of pleadings, discovery, witness statements and cross-examination of witnesses;

v) New York is plainly the appropriate forum for determining the claim: the relevant evidence and witnesses are based there or elsewhere in the United States; and the claims are subject to New York and potentially Delaware law; and

vi) The resolution of the proceedings would not give the Master Fund any advantage over other creditors in the class TT liquidation and would not interfere with the equal distribution of assets among creditors as any judgment debt would be dealt with in accordance with the liquidation process in the Cayman Islands and would not be used as a mechanism to obtain preferred status in the liquidation.

36. The second affidavit of Richard Murphy, (who works under the direct supervision of the SPC Fund JOLs,) sworn on 19 September 2018 responds to Mr Homer's first affidavit. He points out that a trial of the type proposed in New York would be very expensive. At paragraph 9 he says that class TT's New York attorney has estimated that its legal professional fees to act for class TT in defending this proceeding would be in the range of US$ 500,000 to US$ 1 million. There will then be travel, hotel and other expenses associated with the SPC Fund JOLs attendance and that of Cayman attorneys to the extent required at any New York trial (paragraph 10). The defence would likely seek to adduce evidence from the directors of the SPC Fund who reside in the Bahamas (paragraph 11). As to the time it would take for the New York Court to provide a final judgment, the SPC Fund's New York attorney estimates that it may take

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 10/17

between 2 to 4 years and there is then the possibility of an appeal. By contrast the estimate for the claim to be resolved by way of proof debt process would be between one month and one year in Cayman, including an appeal to the Grand Court if the proof of debt was rejected.

37. He makes the point if the Master Fund's claim against class TT is advanced by way of the proposed litigation in New York, the liquidation of class TT will be an 'active' liquidation for at least one to three years longer than if the claim was advanced by way of proof of debt (with consequential fees of the SPC Fund JOLs) (paragraph 17).

38. He sets out at paragraphs 19 to 33 the defence that class TT would run to the payment alleged to have been made which concerns the giving of consideration pursuant to a Note Purchase Agreement. He also sets out paragraphs 34 to 45 details of class TT's New York action and subsequent proceedings to enforce a money judgement that it had obtained against SIP. He sets out the Master Fund's alleged knowledge of these circumstances at paragraphs 46 to 53.

39. Mr Homer responds to Mr Murphy's affidavit by way of his third affidavit sworn on 26 November 2018. He deals with the consideration point at paragraphs 9 to 21 setting out his reasons why Class TT would not be able to establish that SIP provided any consideration to Pineboard for the monies, whilst accepting these matters would all ultimately need to be determined at trial.

40. Mr Homer deals with the appropriate method for determining the claim at paragraphs 22 to 25. He repeats the points he made in his first affidavit which he says Mr Murphy does not address, concerning why the claim is most appropriately determined in New York. From Mr Murphy's affidavit he says that he is fortified in his view the claim can only justly be determined by way of litigation in New York. He highlights the following:

i) prior decisions involving the parties and related transactions are of relevance and so the New York Court will be better positioned to determine the impact of those prior decisions;

ii) discovery will be needed regarding documents which will be located in the United States;

iii) other defendants would resist litigation in the Cayman Islands on jurisdictional grounds and the New York Court would have jurisdiction to determine this claim as the relevant transfers occurred within the United States; and

iv) the proceedings concern frauds committed within the United States.

41. He concludes (without giving reasons) that litigation in the Cayman Islands would not be less expensive or time-consuming than litigation in New York.

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 10/17

42. He exhibits a letter from Kaplan Rice, the Master Fund's New York attorneys, dated 26 November 2018 which deals in particular with the merits of the consideration point as a matter of New York law.

Decision

43. I have come to the view that the threshold test is met, notwithstanding the imperfect factual basis disclosed on the evidence. It is arguable at this stage that there is a factual basis for the claim and I cannot conclude that it is devoid of any substance and may only be of a nuisance nature, or would be futile to pursue.

44. However, as a matter of discretion I am not prepared to grant leave. The case has not been presented in a way which allows the court to form a clear view of what it would really involve. I do not have a clear understanding of the nature of the various claims and how each of them is to be litigated against the SPC Fund as a matter of US law and procedure. There is very little factual evidence upon which the claim can be easily understood and how it would be proven as against class TT and no evidence whatsoever of New York law or Delaware law, or indeed procedure. There is insufficient evidence to explain the necessity of resolving the claims against the multiple other parties in the same proceeding and how the claims and defences of the parties might interrelate.

45. The amount in dispute ($1 million) set against the suggested complexity of the claims asserted in the "Summons with Notice" and the number of defendants makes it clear to me that a disproportionate use of resource would be required to meet the claim if it were proceeded with as the Master Fund suggests. I accept that time and cost are not the only factors that I should give weight to. However I give considerable weight to the risk of prejudice to the SPC Fund of being unable to complete the work remaining in the liquidation and to recover its costs in the event that it was successful in its defence of this claim.

46. I have considered carefully factors which might persuade me to lift the stay. Those include the points made by Mr Broadhurst in his submissions and by Mr Homer in his evidence (and also that the SPC Fund is solvent).

47. As a matter of fairness and looking at the way the claim is formulated in the round, against the lack of evidence to describe material elements of how it would be litigated, particularly as to US law and procedure, I have concluded that the case ought to proceed pursuant to the proof of debt process, and if necessary on appeal in Cayman. This would clearly be in the interests of saving expense and time and of proportionality, given the amount at stake.

48. It follows that I am not prepared to grant leave in circumstances where to do so would drag the SPC Fund into protracted litigation in New York based on the basis outlined in the "Summons with Notice" and on the evidence in support of this application.

49. The Cayman proof of debt process (and any appeal) is capable of dealing with a dispute of this value largely on affidavit evidence and expert reports if need be. The court can also make other procedural orders including directions for the filing of pleadings, written statements and even for the cross-examination of witnesses and discovery if shown to be appropriate. There is considerable flexibility to do justice as between the parties utilising if necessary the powers under the CWUR O.16, 17 and 18.

50. For these reasons the application is dismissed.

THE HONOURABLE JUSTICE PARKER
JUDGE OF THE GRAND COURT
18 DECEMBER 2018