Anti-suit injunction safeguards the universality of insolvency proceedings

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The Grand Court of the Cayman Islands has granted an anti-suit injunction restraining a creditor (the "**Creditor**") of a Cayman fund in Official Liquidation under the Companies Law (2013 Revision) (the "**Fund**") from instigating duplicative winding up proceedings in a foreign jurisdiction (the "**Application**").

In preventing the Creditor from instigating a parallel liquidation in another jurisdiction the Cayman Court upheld the central tenet of modified universalism that the assets of an insolvent company should be administered by a single proceeding to avoid the inevitable free for all that would ensue if creditors were able to commence competing proceedings in other jurisdictions in order to serve their own interests.

Background

The Fund was established as an open-ended investment Fund. In early 2016 the directors of the Fund became concerned that the Fund's investments and assets were impaired. This ultimately led to the appointment of Michael Pearson and Andrew Childe of Fund Solution Services as the Joint Official Liquidators ("**JOLs**") to the Fund on 26 April 2016.

Following their appointment, the JOLs took steps to bring the assets of the Fund under their control, to notify creditors of the Fund of their appointment and called for proofs of debt to be filed. On 19 May 2016 the Creditor, the largest creditor of the Fund, filed a proof of debt in the Cayman insolvency Prior to filing its proof of debt, the Creditor issued a winding up petition to commence a winding up of the Fund in Barbados (the "**Barbados Proceedings**"). The Creditor had not given any prior indication that it had any concerns regarding the Cayman liquidation or the appointment of the JOLs, nor had the Creditor served on or given notice of the Barbados

Proceedings to the JOLs. There were no assets in Barbados, there were no debtors located within that jurisdiction and it was not clear on what basis the duplicative costs of commencing the Barbados Proceedings could be justified.

The JOLs brought the Application to restrain the Creditor from continuing the Barbados Proceedings, and prevent any analogous proceedings being instigated.

The Law

The two issues before Chief Justice Smellie QC were:

a) whether the Cayman court should grant an anti-suit injunction preventing a creditor from taking action another jurisdiction; and

b) did the Cayman Court have personal jurisdiction over the Creditor.

In answering the first question in the affirmative, Smellie CJ upheld the principles of modified universalism that a debtor should be subject to a single winding up procedure for the benefit of all creditors to ensure the orderly distribution of the insolvent estate. Smellie CJ turned to the dicta of the Privy Council which had recently considered the same issues in *Stichting Shell Pensioenfonds v Krys & Anor* [2014] UKPC 41 (on appeal from the BVI Court). In that case a fund was in liquidation in the BVI and the challenging creditor had filed a proof of debt in those proceedings. The same creditor then issued proceedings in the Dutch courts in an attempt to secure priority over assets held by a Dutch custodian that were the beneficial property of the fund. It was held by the Privy Council that on the making a winding up order a statutory trust and statutory distribution regime applied to all the debtor's assets for the benefit of all its unsecured creditors, wherever situated, the Board stated that this:

> *"....reflects the ordinary principle of international law that only the jurisdiction of a person's domicile can effect a universal succession of its assets....This necessarily excludes a purely territorial approach in which each country is regarded as determining according to its own law the distribution of assets of an insolvent company located within its territorial jurisdiction...."* (cited at *Ardent*, paragraph 32).

On considering the principles applicable to granting anti-suit injunctions, Lords Sumption and Toulson made it clear that *"The Court does not purport to interfere with any foreign court, but may act personally upon a defendant by restraining him from commencing or continuing proceedings in a foreign court where the ends of justice require. The "ends of justice" is a deliberately imprecise expression. It encompasses a number of distinct legal policies whose application will vary with this subject-matter and the circumstances"* (cited at *Arden*t, paragraph 34). Those broad circumstances have included where the action is vexatious and oppressive, where the secondary forum is inappropriate and where the proceedings are restrained because they are contrary to equity and good conscience. Notably, the Court is

concerned to act in the interests of the general body of creditors which brings into account a broader public interest in the ability of the insolvency court to conduct an orderly winding up, in these circumstances the Court

> *"....intervenes because the proper distribution of the company's assets depends upon its ability to get in those assets so that comparable claims to them may be dealt with fairly in accordance with a common set of rules applying equally to all of them. There is no jurisdiction other than that of the insolvent's domicile in which that result can be achieved. The alternative is a free-for-all in which the distribution of asserts depends on the adventitious location of assets and the race to grab them is to the swiftest, and the best informed, best resourced or best lawyered*". (cited at *Ardent*, paragraph 35).

On the facts before the Cayman Court Smellie CJ granted the Application so as to restrain any such *"free-for-all".* It was clear to his Lordship that the Barbados Proceedings would directly interfere with the conduct of the liquidation before the Cayman Court, to the detriment of the creditors of the Fund. Further, his Lordship stated that allowing the duplicative proceedings would be *"anathema"* to the principles pertaining to the universal succession of assets canvassed in *Stichting* (paragraph 47).

A related question was whether the Cayman Court had personal jurisdiction over the Creditor. There were two bases for holding that it did: (i) the Creditor was a shareholder of the Fund, and Order 11 rule 1(1)(ff) of the Grand Court Rules, provides that the Cayman Court has jurisdiction over *"a person who is... a member of a company registered within the jurisdiction... and the subject matter of the claim relates in any way to such company..."* and (ii) the Creditor had filed a proof of debt in the liquidation of the Fund. Consistent with *Stichting*, Smellie CJ held that the filing of a proof of debt alone constituted submission to the jurisdiction of the Cayman Courts. In this regard, Smellie CJ remarked that should the Creditor disobey the anti-suit injunction its disobedience "*would certainly redound in the context of the distribution of dividends"* (paragraph 42).

Commentary

The notable limitation to this jurisdiction is that where a foreign creditor takes action in his home jurisdiction to wind up a debtor but has not also filed a proof of debt in the principal winding up proceedings of that same entity, an anti-suit injunction may not be available to assist the officeholders and wider body of creditors. Save in those circumstances, the general body of creditors of a Cayman debtor are subject to the principles and procedures mandated by the Companies Law (2013 Revision) irrespective of where they are situated.

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