

**BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO: BVIHCV 0140 of 2010

IN THE MATTER OF BERNARD L MADOFF INVESTMENT SECURITIES LLC (In Securities Investor Protection Act Liquidation)

AND IN THE MATTER OF THE INSOLVENCY ACT 2003

BETWEEN:

IRVING H PICARD

Applicant

and

**BERNARD L MADOFF INVESTMENT SECURITIES LLC
(In Securities Investor Protection Act Liquidation)**

Respondent

Appearances: Mr Seamus Andrew and Mr Nikitas Olympitis for the Applicant

JUDGMENT

[2010; 11, 12 November]

(Foreign insolvency proceeding – foreign representative seeking recognition in British Virgin Islands – foreign representative seeking order that he is entitled to make applications pursuant to section 467(2) of the Insolvency Act, 2003 – foreign representative seeking order that he be entitled by written notice to require any person to deliver up to him any property of the foreign estate – proper form of order to be made)

- [1] **Bannister J [ag]:** On 11 November 2010 I heard an application by Mr Irving H Pickard ('Mr Pickard'), the Trustee appointed on 15 December 2008 by the United States District Court for the Southern District of New York as trustee for the liquidation of the business of Bernard L Madoff

Investment Securities LLC ('BLMIS') with the duties and powers of a trustee as prescribed in the United States Securities Investor Protection Act of 1970 ('SIPA', 'the SIPA liquidation'). As I understand it, a SIPA liquidation is conducted under the auspices of (and paid for) by the United States Securities Investor Protection Corporation, but a trustee so appointed is vested with the same powers as a trustee appointed under the United States bankruptcy code. Importantly, for present purposes, a SIPA liquidation is subject to the supervision of the Court. In the present case, the SIPA liquidation is proceeding under the supervision of the United States Bankruptcy Court for the Southern District of New York (the Honourable Burton R Lifland).

[2] Mr Pickard's application to this Court was issued on 25 October 2010 and sought the following relief:

- '1. That the Applicant be recognized under the laws of the Virgin Islands as a foreign representative in the foreign proceedings in respect of which he is authorized, being the SIPA Liquidation of the Respondent (US Bankruptcy Court Southern District of New York – Adv. Pro. No. 08-179 BRL) ("the SIPA Liquidation"), within the meaning of Part XIX of the Act;
2. That the Applicant be entitled to apply to the Court for one or more orders under subsection (3) of section 467 of the Act in aid of the SIPA Liquidation;
3. Without prejudice to the generality of the foregoing, that the Applicant be entitled by written notice to require any person to deliver up to the Applicant any property of the Respondent ("SIPA Liquidation Property");
4. That any person affected by this Order, and in particular any person who is the subject of a notice pursuant to paragraph 3, shall have liberty to apply, within 28 days of receipt of the written notice referred to at paragraph 3 of this Order, upon 14 days' written notice to the Applicant's legal representatives.'

[3] I indicated at the hearing that I was not prepared to make an order in the terms sought and gave my reasons for that in the course of argument. It seems to me that this is a matter of considerable importance, both from the perspective of this jurisdiction and from the perspective of the United States Bankruptcy Court. In the interests of comity, therefore, if nothing else, it seems to me that I should set out my reasons for acting (or, as Mr Pickard would see it, failing to act) as I have done.

[4] Current insolvency legislation in the British Virgin Islands is enshrined in the Insolvency Act, 2003, as amended ('the Act'). Cross-border matters are dealt with in Part XVIII (entitled 'Cross-Border

Insolvency’) and Part XIX (entitled ‘Orders in Aid of Foreign Proceedings’). Part XVIII is, in short, an enactment of the code familiarly known as the UNCITRAL code (‘UNCITRAL’). It proceeds on the basis of permitting persons appointed as administrators (put shortly) of insolvent estates to apply to the local court to have those proceedings recognised and lays down criteria for recognition. It is a precondition for recognition that the foreign insolvency proceedings are being conducted under the control or supervision of a court within a ‘designated’ jurisdiction. In other words, no proceedings may be recognised unless they are being conducted in a ‘designated’ state. Once recognition is granted, certain consequences (principally, stay and freezing relief) follow automatically and the foreign representative may apply to the local court for a wide range of relief designed, if granted, to enable the foreign representative to act in the British Virgin Islands as if, or substantially as if, he were a locally appointed liquidator or bankruptcy trustee.

[5] Part XVIII is not in force in the British Virgin Islands.

[6] Part XIX is in force. Under Part XIX a foreign representative (defined for practical purposes in the same way as in Part XVIII) appointed to act in a ‘relevant’ (rather than a ‘designated’) foreign country may apply to the British Virgin Islands Court for an order in aid of the proceedings in which he is appointed. The United States of America is a ‘relevant’ foreign country for the purposes of Part XIX. I had better set out in full the provisions of section 467 of the Act:

‘Order in aid of foreign proceeding

467(1) For the purposes of this section “property” means property that is subject to or involved in the foreign proceeding in respect of which the foreign representative is authorized.

(2) A foreign representative may apply to the Court for an order under subsection (3) in aid of the foreign proceeding in respect of which he is authorized.

(3) Subject to section 468, upon an application under subsection (1), the Court may

(a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor’s property;

(b) subject to subsection (4), restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor’s property;

- (c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;
 - (d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;
 - (e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;
 - (f) authorise the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;
 - (g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or
 - (h) make such order or grant such other relief as it considers appropriate.
- (4) An order under subsection (3) shall not affect the right of a secured creditor to take possession of and realize or otherwise deal with property of the debtor over which the creditor has a security interest.
- (5) In making an order under subsection (3), the Court may apply the law of the Virgin Islands or the law applicable in respect of the foreign proceeding.'

....

Section 470 of the Act provides as follows:

'Additional assistance

470. Subject to section 443, nothing in this Part limits the power of the Court or an insolvency officer to provide additional assistance to a foreign representative where permitted under any other Part of this Act or under any other enactment or rule of law of the Virgin Islands.'

[7] Even though Part XVIII is not in force, it is nevertheless part of the same statute as Part XIX. Neither Part, in my judgment, can be properly construed without reference to the other. Subsections 466(2) and (3) of the Act are in the following terms:

‘Interpretation for this Part

466(2) Notwithstanding subsection (1), a country or territory that is designated as a designated country for the purposes of Part XVIII ceases to be a relevant foreign country from the date of its designation as a designated country.

(3) The designation of a country for the purposes of Part XVIII does not affect the validity of any order made under this Part.’

It is thus clear that Parts XVIII and XIX are mutually exclusive. It follows, in my judgment, that, not having brought Part XVIII into force, the legislature must be taken to have intended and to intend that foreign representatives are for the present to be confined (subject always to section 470) to the grant of discretionary relief under section 467. In contrast to the provisions of Part XVIII, which operate on the basis of recognition of foreign *proceedings* and provides for certain consequences of such recognition to follow automatically in accordance with UNCITRAL, Part XIX is designed to operate (as its heading indicates) on an application-by-application basis. Although some of the relief obtainable by a foreign representative under Part XVIII is discretionary, the fundamental difference between Part XVIII and Part XIX is that Part XVIII confers *status* on the foreign representative through the recognition of the foreign proceedings in which he has been appointed, whereas Part XIX merely gives a foreign representative from a relevant country express rights to apply to the British Virgin Islands Court for orders in aid, but without conferring status.

[8] It follows, in my judgment, that the common law concept of recognition has no place under the British Virgin Islands legislation. Recognition has been codified under Part XVIII. Because the concept of recognition of an individual foreign representative is absent from Part XIX, the consequences of the making of such a recognition order would be uncertain. If it meant merely that the Court accepted (as of course I do) that Mr Pickard is the validly appointed trustee in the SIPA liquidation, then it would achieve nothing. If it was intended to mean that Mr Pickard had some status in this jurisdiction deriving from the authority of the Court, then, as I have attempted to explain, that is not something which the legislation currently in force envisages, or empowers me to confer.

[9] Quite apart from that, the incidents of any such status, not springing from any statutory source, would be undefined. If the Court is to confer authority, not only must the source of that authority be identifiable, so that it can be seen whether it is being used for the purposes for which it has been granted, but the nature and extent of the power granted must be strictly delimited. I hope I will not

be misunderstood if I say that in my judgment the relief sought on this application, even if I had the power to grant it, would not meet those essential criteria.

- [10] Mr Andrew, who appeared on this application together with Mr Nikitas Olympitis, argued with great skill that I could grant recognition under either section 467(3)(h) of the Act or under section 470. So far as section 467(3)(h) is concerned, that, in my judgment, is confined by context to orders in aid of the foreign proceedings. It does not give the Court the power to clothe the foreign representative with any general authority or status. As for section 470, given the elaborate statutory code enacted in Parts XVIII and XIX, that section cannot, despite the fact that Part XVIII is not in force, bring in by the back door the general common law concept of recognition. Section 470, in my judgment, does no more than provide, as its language makes plain, that the express provisions of Part XIX do not impliedly exclude the power of the Court to give assistance where it is otherwise able to provide it under any enactment or rule of law – for example, any rule of law which provided for the automatic vesting of property in a particular foreign representative. It does not mean that the whole common law edifice of recognition survives in tandem with Parts XVIII and XIX, which is a self contained code: see per Lord Hoffmann in **Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holdings Plc and others)**¹:

‘What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do.’

Compare Lord Walker of Gestingthorpe in **Al-Sabah v Grupo Torras SA**²

‘If the Grand Court had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 107 of its Bankruptcy Law in circumstances not falling within the terms of that section.’

- [11] I was invited to grant relief by way of declaration. In the light of my reasoning as set out above, the point is largely academic, but I should perhaps explain that my reluctance to grant any sort of declaration springs from the peculiar force which a declaration has in the law of the British Virgin Islands. A declaration, when made, binds all persons subject to the jurisdiction of the Court. It is

¹ [2007] 1 AC 508 at para 22

² [2005] 2 AC 333 at para 35

for that reason that it would take quite extraordinary circumstances for the Court to grant a declaration in unopposed proceedings in which there is, in reality, no respondent.

Conclusion

[12] For these reasons, I must decline to grant the relief sought in Mr Pickard's application. It is my hope that this will not be seen by Mr Pickard or by the United States Bankruptcy Court as evidencing any want of comity on the part of this Court, which remains ready, in a proper case, to grant whatever relief it may decide is appropriate upon an application made by Mr Pickard under Part XIX of the Act.

Commercial Court Judge

12 November 2010