THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

A.D. 2014

Claim No: ANUHCV 2013/0682

SHARON CORT-THIBOU
(A Partner of the Partnership trading as Cort & Cort which was formerly known as Cort & Associates)

Applicant

(1) STANFORD INTERNATIONAL BANK (IN LIQUIDATION)
(Acting by and through its Joint Liquidators, Marcus A. Wide and Hugh Dickson)

(2) STANFORD DEVELOPMENT COMPANY LIMITED (IN LIQUIDATION)
(Acting by and through its Joint Liquidators, Marcus A. Wide and Hordley E. Forbes)

Respondents

Appearances: Mr Douglas Mendes, S.C., Mr Dane Hamilton Q.C., Mr Stewart Young, Counsel for the Applicant; Mr Malcolm Arthurs, Ms Nicolette Doherty and Mr Craig Christopher, Counsel for the Respondents

JUDGMENT
[2014: 26 March and 23 April]

(Application for permission to bring claim outside compulsory winding up proceedings – factors informing Court's discretion.)

[1] **Wallbank J. (Ag):** Ms Cort-Thibou comes to the Court to ask for permission to bring a claim against the Respondents, both of which have been ordered by the Court to be wound up. She does so as a partner in the Antiguan law firm Messrs Cort & Cort, which was formerly known as Messrs Cort & Associates. Ms Cort-Thibou's application is in effect an application brought on behalf of Messrs Cort & Cort. Ms Cort-Thibou,

Messrs Cort & Cort and Messrs Cort & Associates can conveniently be referred to simply as the Applicant.

[2] The claim that the Applicant seeks permission to bring is for an indemnity. The Applicant was been sued on 15 February 2013 in the United States District Court for the Northern District of Texas, Dallas Division, in a civil action styled 3:11-cv-00298-N, *SEC vs Stanford International Bank Ltd., et al.* by what is known as the Official Stanford Investors Committee (which I shall refer to as "OSIC").

[3] OSIC claim to have identified payments to the Applicant of at least US$1,113,553.53 which it says were derived from proceeds of sale of Certificates of Deposit ("CD Proceeds").

[4] OSIC seek the return of this money. OSIC say that the Applicant performed no services for the CD Proceeds, or performed services which did not constitute reasonably equivalent value, or performed only services in furtherance of Mr Stanford's Ponzi scheme, and OSIC claim that in any event the Applicant cannot establish that they are good-faith transferees.

[5] OSIC seek to impute a degree of fraud upon the Applicant, on the basis that it either knew, or should have known, that the monies it had received derived from a fraudulent Ponzi scheme.

The Applicant's position

[6] The Applicant states that it considers that claim to be frivolous, vexatious and devoid of any legitimate cause of action and that its U.S. legal advisers are confident that they will prevail with a defence.

[7] The Applicant maintains before this Court that it received funds from the Respondents by way of retainer fees for a wide array of bona fide legal services provided to the Respondents almost exclusively in Antigua and in the English speaking Caribbean. It asserts that it can demonstrate this with reference to voluminous files.

[8] The Applicant denies it worked in the United States and any, or any material, connection with Texas.

[9] The Applicant says that as a result of the proceedings in Texas it has incurred (as at the time of filing its application now) approximately US$255,000 in legal fees to United States attorneys, approximately US$40,000 for opportunity costs loss (essentially Messrs Cort & Cort's time costs taken up in dealing with the matter) and approximately US$1.5million for damage to professional reputation and goodwill.

[10] The Applicant claims that it is entitled to an indemnity from the Respondents on grounds that it had entered into retainer agreements to provide legal services to them, alternatively that the Respondents' constitutive documents confer an express indemnity in favour of their agents, alternatively by way of an implied term.

[11] The indemnity that the Applicant seeks would cover it not just for the loss and damage identified above, but also for its continuing legal costs burden of defending itself, and also any eventual principal liability it might come under. The Applicant seeks a full indemnity.

[12] The Applicant had filed a claim for essentially the same relief on 27 June 2013. The Respondents however, in a letter dated 12 July 2013, called the Applicant's attention to the fact that there is an insolvency moratorium in place on claims outside the winding up proceedings in relation to the

Respondents, and invited the Applicant to file a proof of debt in the respective liquidations. The Applicant thereupon discontinued its claim. What the Applicant did not do was file a proof of debt in the liquidations. It filed this application instead, on 22 October 2013 and served it on 30 January 2014.

[13] The Applicant has acknowledged that no claims can be brought against the Respondents without leave of this Court pursuant both to an express provision, clause 20, in the winding up order over the first Respondent and to section 386 of the Antigua and Barbuda Companies Act 1995.

[14] In seeking to displace the default position that all claims are to be brought within the winding up proceedings, the Applicant asserts that whilst its claim is provable in the liquidations, those are not the proper forum for its adjudication. Ms Cort-Thibou states her reasoning at paragraph 44 of her Affidavit in support of the application: "*given that the basis of the said claim is for indemnification rather than that of a money claim of an ordinary creditor*."

[15] The Applicant submits that inevitably its claim will be denied by the Liquidators, and it will come back to Court for determination, either by way of an appeal by the Applicant, or by way of an application for directions by the Respondents. The Applicant argues that the Liquidators' invitation to submit its claim to proof in the winding up was cynical.

[16] The Applicant submits it would therefore be a waste of time and costs for it to be put to the futile trouble of submitting a claim in the liquidation. Less time and costs would be incurred, they say, if they should be permitted to bring a claim outside the winding up proceedings in a manner managed in accordance with the Eastern Caribbean Civil Procedure Rules ("CPR"). They suggest that the extra costs would come in because the Applicant

would have to incur the cost of dealing with the Liquidators if it were to be required to file a proof of debt in the winding up proceedings, before the Court would have recourse to a procedure akin to the CPR.

[17] The Applicant submits that if the claim were to be brought outside the liquidations, it would retain some control over the timing.

[18] The end, substantive, result, says the Applicant, will be the same.

The Respondents' position

[19] The Respondents strongly oppose the application. They submit that this Court has a very wide discretion whether or not to grant leave, which discretion is to be exercised under the guidance of judicial precedent.

[20] Whilst they are prepared to accept that the Applicant is in principle entitled to an indemnity, as equity implies an indemnity between a principal and an agent, they say there would be an issue concerning the extent and the quantum.

[21] The Respondents couch this with a further degree of uncertainty, as "*there is doubt established by a line of authorities on whether a defendant can enforce an indemnity for costs and expense incurred in defending a claim based on fraud*." The Respondents do not say what that line of authorities at this point, and they submit that it is not necessary for the Court to go into this at this stage. They cite ***Re Bank of Credit and Commerce International SA (No.4) [1994] 1 BCLC 419, BCC 453*** as authority for a proposition that the Court should not undertake an investigation into the merits of a proposed claim when considering an application for leave such as this.

[22] An apparent major difference between the parties is that whereas the Applicant is seeking a full indemnity, the Respondents, acting through their respective Court appointed Liquidators, do not agree that the Applicant should be treated as a secured creditor. The Respondents consider that the Applicant should rank *pari passu* with all other creditors, if it is entitled to some kind of indemnity.

[23] The Respondents submit that the Applicant's claims are capable of being proved in the liquidation, and properly of adjudication within the liquidations. They submit that the Liquidators "*can adjudicate the Applicant's claim more quickly and cheaply than would the Court in the context of litigation*." There are no exceptional circumstances, they argue, such as the need for extensive cross-examination of witnesses, which warrants the Court granting permission for the Applicant to pursue proceedings outside of the liquidations.

[24] The Respondents cite ***Re Legal & Equitable Securities PLC (In Liquidation); Beller v Linton [2012] EWHC 910 (Ch.)*** as authority for the proposition that a claim for an indemnity is a contingent claim against a company in liquidation which is provable in liquidation proceedings.

[25] The Respondents further cite ***Re Exchange Securities & Commodities and others [1983] BCLC 186***, in which the English High Court, Chancery Division, dismissed a similar application. In that case the Learned Judge stated:

"*My decision is that the companies are not to be at liberty to commence the proposed proceeding. My reason for this is that I must do what is right and fair in the circumstances: see the Aro case [1980] Ch 196 at p 209. It seems right and fair to me, in the circumstances of this case, not to allow the action. The approach should be, I think, that leave should be refused*

under s 231 if the action proposed raises issues which can be conveniently decided in the course of the winding up. … there seems to me to be positive benefit in having the issues decided in the liquidation because the procedure should be quicker and less expensive than writ or originating summons proceedings. … The lack of confidence expressed in the provisional liquidator's efforts to safeguard the investors' interests was, as I see it, without any foundation: the liquidator knows very well that he must act even-handedly as between all classes of claimant. On the other hand, nothing could be more calculated to make more for delay in the liquidation and add to the expense than to have the liquidator dealing not merely with the difficulties of this liquidation but also having to defend the action desired by the investors."

[26] In ***Re Bank of Credit and Commerce International SA (No.4) [1994] 1 BCLC 419, BCC 453 (supra),*** the English High Court considered that *"the essential question in considering an application* [such as this] *is what is the appropriate method for determining the proposed claims – is it separate proceedings or is it the winding-up process."*

[27] The parties' Learned Counsel appeared to agree that in the event that the Applicant would file a proof of debt, which would be rejected, section 4.83 of the English Insolvency Rules 1986 provides a procedure whereby the Applicant can apply to the Court for the Liquidators' decision to be reversed or varied, within 21 days of receipt of the rejection, whereupon the Court is to fix a venue for the application to be heard. After the application has been heard and determined, the proof shall, unless it has been wholly disallowed, be returned by the court to the liquidator.

Analysis

[28] I am satisfied that as a matter of fact the proposed claim for an indemnity is capable of being proven in the winding up proceedings.

[29] The case management procedure that the Court can adopt for an orderly hearing of an application to review an eventual refusal to admit a debt to proof is at large. It is not restricted to the procedures set out in the CPR.

[30] I would add that section 4.82 requires a liquidator who refuses a proof in whole or part to provide a written statement of his reasons for doing so and send it as soon as reasonably practicable to the creditor.

[31] I accept that the task of this Court is to do what is right and fair in all the circumstances of the matter. I must decide what is the appropriate method for determining the proposed claims. I would also observe that in both methods – whether within the winding up proceedings or outside pursuant to the CPR – the Court has an important role to play. It is not the case that within winding up proceedings the determination whether a creditor has proved his debt is left entirely up to the liquidator. The Court is available to resolve differences for the benefit of both creditors and the insolvency officers conducting the liquidation.

[32] Although the class of factors to be taken into consideration by the Court on the hearing of this application is open, costs overall, to all parties (creditors, the liquidators and the Court system), and timing, both for the benefit of the Applicant and for the orderly progress of the winding up proceedings, are clearly important factors.

[33] I do not agree that the Respondents' invitation to the Applicant to file a proof of debt was cynical. It was a recommendation to the Applicant to

commence the process of considering the Applicant's claim for the benefit of both the Applicant and the winding up proceedings as a whole.

[34] I accept that in all probability there will be relatively complex issues of law that either side will probably want to refer to this Court for further determination, consequently, that in all probability the Applicant's proof of debt will be met with an initial refusal in whole or in part.

[35] There may also be some, if perhaps not extensive (in the overall scheme of these liquidations), cross-examination required. Two areas which appear immediately evident are (i) whether the Applicant should, as a matter of Antigua law, have fraud or negative factors of which equity takes notice imputed to it and (ii) in relation to the claim for alleged damage to the Applicant's professional and business reputation.

[36] The proof of debt procedure, including the requirement for the Liquidators to provide written reasons for any rejection of a proof of debt, provides a valuable and efficacious mechanism whereby unresolved issues can be narrowed. Liquidators are after all Court appointed insolvency officers answerable to the Court and ultimately conducting the winding up in a disinterested manner for the benefit of all creditors under the control of the Court.

[37] The advantage of that procedure over the CPR is that relatively complex and well developed issues remaining in dispute can be referred to the Court for determination without the necessity for the preparatory processes provided by the CPR, and thus giving a significant saving in time and costs.

[38] In the present case the Applicant's desire to retain control over the timing of the claim, to the extent of preferring the known quantity of the CPR

procedures and time lines over a procedure which is more extensively in the control of the Court, displays an unwarranted lack of confidence in the ability of the Liquidators and of this Court to produce a fair, right and efficacious result.

[39] It is a normal part of a liquidator's function in considering a proof of debt to decide whether a claim is properly made out, and if so, in what amount; in other words, to assess causation and quantum.

[40] It would in my view also unfairly prejudice the other creditors if the Applicant should be allowed to conduct proceedings outside the winding up proceedings in accordance of the CPR, because it is in their interests for the winding up proceedings to be completed in the shortest time possible. The Applicant's Learned Senior Counsel acknowledged that the time line for determination of claims in accordance with the CPR is often in excess of 18 months, although they submitted that their claim could be determined within about 8 months. One consequence of the claim that this Court is keen to avoid is for the Applicant's claim unnecessarily to hold up completion of the winding up.

[41] It is regrettable that the Applicant chose not to file a proof of debt, which would have saved it time, and costs all round. It is evident that the Applicant had no intention of proposing itself for treatment along with other creditors. Whilst this Court recognizes that the Applicant must be in need of an early determination for its claim given the situation it finds itself in, I do not agree that the solution that they seek, of being permitted to bring and pursue their claim outside the winding up under the CPR, is right and fair for all concerned, nor that the circumstances of the proposed claim warrant permitting them to be treated differently from other creditors. I also do not agree that a claim outside the winding up is likely to be determined more quickly or for less cost.

[42] For the reasons set out above I therefore dismiss the application, with costs to the Respondents to be assessed if not agreed within twenty one days.

[43] Finally the Court expresses its gratitude to both sides' Counsel, as well as the Court Staff, for their assistance in this matter.

Gerhard Wallbank
High Court Judge (Acting)

23 April 2014