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

CLAIM NO: BVIHCV 2009/0372

IN THE MATTER OF:

BRITISH AMERCIAN ISLE OF VENICE (BVI) LIMITED

Appearances: Mr Mark Forte and Ms Tameka Davis for the Liquidator

JUDGMENT

[2011: 22 March; 8, 15 April]

(Application to fix interim payment of liquidator's remuneration – liquidator's conduct criticised by US Bankruptcy Court judge in the course of Chapter 15 proceedings – whether BVI Court bound by such criticisms – whether BVI Court should adopt such criticisms – whether such criticisms if binding upon or adopted by the BVI Court should affect the quantum of interim remuneration fixed by the Court)

[1] **Bannister J [ag]:** This judgment is given on a specific issue which has arisen in the course of the winding up of British American Isle of Venice (BVI) Limited ('the Company'). On 28 October 2009 Mr Casey McDonald, a Director of KPMG (BVI) Limited ('the Liquidator') was appointed provisional liquidator of the Company. He was appointed liquidator of the Company on 15 February 2010. The issue has arisen in the course of a second application to the Court by the Liquidator for the fixing of interim remuneration. Subject to some minor deductions, I fixed the quantum of interim remuneration, but the Liquidator has very properly drawn to my attention the fact that in the course of certain proceedings in the United States his probity has been called into question by a judge of the United States Bankruptcy Court. He has drawn the fact to my attention both generally and in case I should take the view that as a result of those criticisms his remuneration should be reduced or, ultimately, disallowed.

Background

[2] The Company had, through a chain of subsidiaries, carried on the business of real estate holding and development in the United States and has significant assets within that jurisdiction. The Liquidator has therefore been concerned both to realise those assets and to protect them from adverse claims in the United States.

[3] Accordingly on 29 April 2010 the Liquidator applied under what is familiarly known as Chapter 15 of the United States Bankruptcy Code ('Chapter 15') for recognition in the United States of these proceedings as a foreign main proceeding. The United States Bankruptcy Court heard that application on 16 November 2010 in what is described as an 'evidentiary hearing' (i.e. a hearing at which witnesses were called and cross examined). The hearing was attended by a company called Green Island Holdings LLC ('Holdings'), which claims to be a creditor of the Company and which opposed the Liquidator's application. I have a copy of the Company's petition for Chapter 15 relief but I do not think that I have been supplied with written submissions (if any) put in by Holdings.

The findings of the United States Bankruptcy Court Judge

[4] On 23 December 2010 the Judge of the United States Bankruptcy Court ('the Judge') made an order recognizing these proceedings as a foreign main proceeding ('the order'). The order contains the Judge's reasoning for doing so. So far as is possible to deduce from the reasoning contained in the order and from an affidavit of Ms Leya F Blanco ('Ms Blanco'), the lawyer who argued the petition for the Liquidator, the only public policy issue raised by Holdings at the evidentiary hearing against the granting of relief was an alleged conflict on the part of the Liquidator because he acts as judicial manager for the Montserrat branch of British American Insurance Company Limited ('BAICO'). BAICO is the company's parent and its largest creditor. BAICO is in general judicial management and the general judicial manager (if that is an appropriate term) is a Mr Juan Lopez ('Mr Lopez'), an appointee of the Bahamian Court. Mr Lopez is a partner or director of KPMG in the Bahamas.

[5] The fact that the Liquidator is the judicial manager of the Montserrat branch of BAICO was disclosed to this Court on the application for his appointment as Provisional Liquidator and I took the view that the fact was no impediment to the Liquidator's appointment.

[6] In his reasoning of 23 December 2010 the Judge said that the fact that the Liquidator was judicial manager of the Montserrat branch of BAICO did not amount to a public policy ground for refusing recognition. While stating that the dual appointment meant that the Liquidator owes 'potentially competing fiduciary duties to BAICO and the [Company],' the Judge went on to refer to the fact that the appointment was disclosed to this Court; that Holdings had not objected to the appointment of the Liquidator as provisional liquidator; and remarked that there was no reason to believe that procedural fairness is generally lacking in the proceedings before this Court. He concluded on this point by saying that the Liquidator's conflict of interest did not constitute a material threat to the collective nature of the BVI proceedings. Having decided that the other requirements of Chapter 15 were met, he granted recognition and directed a further non-evidentiary hearing to decide what relief was to be granted pursuant to 11 USC § 1521.

[7] That hearing took place on 10 January 2011. The Judge appears to have given an oral decision at the end of the hearing and part of the transcript of that decision is before me. In what follows I keep fully in mind that I have not been shown or read the full transcript of the Judge's reasoning. At page 38 of the transcript the Judge is recorded as saying that:

> 'The evidence here causes the Court to question whether the [Liquidator's] actions are wholly consistent with his fiduciary duty to all creditors in the BVI action.
>
> First, there exists a material conflict of interest in that the [Liquidator] was appointed as judicial manager in a foreign action for . . . BAICO.
>
> BAICO is also the [Company's] largest creditor. Thus, the [Liquidator] has competing fiduciary duties to the [Company] and its creditors on the one hand, and to the [Company's] largest creditor on the other.'

[8] The bankruptcy judge went on:

> 'Second, the Court is alarmed by the [Liquidator's] recent actions with regard to the Green Island development.'

[9] This is a reference to a complicated series of transactions which I think I can safely summarise as follows. The Company owned 100% of a company called Green Island Ventures LLC ('Ventures'),

which it had purchased from Holdings. Part of the purchase price remains outstanding and is secured on the Ventures shares. Ventures' only asset was a landholding which was charged to secure the borrowing which had been assumed for the purchase of the land. The mortgagees had instituted foreclosure proceedings against the Ventures land. The advice received by the Liquidator was that the Ventures land was worth no more than US$85 million and possibly as little as US$25 million. The mortgage debt was in excess of US$170 million. Accordingly, in May 2010 the Liquidator agreed with the mortgagee that the Liquidator would have until 1 September 2010 to sell the land and if unsuccessful by that date he would not oppose a foreclosure sale under the supervision of the Court. An order to that effect was made by the Circuit Court on 24 May 2010. The Liquidator was unsuccessful in his attempts to sell the land and the property was sold pursuant to the consent foreclosure order sometime after 1 September 2010. The sale produced nothing for Ventures.

[10] In late May 2010 Holdings applied for relief from the interim stay produced as a result of the Liquidator's petition for recognition, lodged, it will be recalled, on 29 April 2010. Holdings wished to be able to foreclose on the shares in Ventures and to sue for the outstanding balance of their purchase price. In late July 2010 Holdings and the Liquidator reached an agreement under which the Liquidator would not oppose the prosecution of the foreclosure proceedings, but Holdings would abandon its claim for relief from stay in respect of the claim in debt. I sanctioned this agreement on 29 July 2010. By that stage, of course, the foreclosure order had already been made by the Circuit Court.

[11] In giving his decision on 10 January 2011 the Judge said of these transactions:

> 'The result of this transaction is that the [Company] delivered to [Holdings] effectively an empty shell. [Ventures] had been stripped of its value'

and described them as 'an example of the [Liquidator's] lack of good faith in his dealings with Holdings.' He continued:

> 'The [Liquidator] offered no explanation for this course of events. It's difficult to believe that the [Liquidator] did not know he was going to consent to relief from stay in this case when he caused [Ventures] to confess judgment to its mortgage

lender. The [Liquidator] testified that he thought Ventures had no equity in the land. It is also difficult to imagine there could be a good reason for this, and none was provided . . .

The Petitioner owes a fiduciary duty to the [Company's] creditors, including [Holdings]. It is possible that if [Holdings] had regained control of [Ventures] it could have injected capital into Ventures to stave off foreclosure on the underlying real property.

[Holdings] could thus have mitigated its own damages, perhaps reducing its claim against the [Company]. In causing Ventures to confess judgment on its mortgage loan, it is possible the [Liquidator] breached his fiduciary duty to the [Company's] creditors.'

[12] Finally, the bankruptcy judge in his ruling given on 10 January 2011 held that the fact that the Liquidator signed and caused to be filed in the Holdings action for foreclosure on the Ventures shares an affidavit not based on his personal knowledge was 'a further example of the [Liquidator's] lack of good faith in his dealings with Holdings'.

Estoppel

[13] The first question which I have to decide is whether this Court is (in effect) bound by the observations of the bankruptcy judge or whether I am entitled to form my own view of the Liquidator's conduct.

[14] There is no doubt, provided that there is identity of parties and identity of subject matter, that a party is precluded from denying any matter of fact or law necessarily decided in a decision of a foreign court which is not of itself impeachable.[1] The decision of the bankruptcy judge of 10 January 2011 is plainly not impeachable as that term is used in this context. The Liquidator was a party to the Chapter 15 application because he made it, but in my judgment the issue estoppel component of the *res judicata* doctrine has no application in the present circumstances. In supervising the liquidation of the Company in this jurisdiction and on those occasions upon which it

[1] Dicey, Morris & Collins, The Conflict of Laws, 14th Ed, para 14-112, 14-113

has to form a view about the conduct of its officers, the Court must form its own opinions. While it will take notice of the opinions of foreign judges in this regard, it cannot, in carrying out its functions and exercising its discretions under the Insolvency Act,2003, be bound by them. Otherwise it would be improperly surrendering the exercise of its discretion to the foreign court.

[15] Issue estoppel prevents parties from denying issues of facts and law decided in previous proceedings between them. While a foreign court is bound, in proceedings between the same parties which raise the same issues, to accede to the application of one party that his opponent be not permitted to reargue facts or holdings decided between them in earlier proceedings, the principle cannot fetter the exercise by a foreign court of its own powers and discretions, which is what I am exercising when I consider the Liquidator's application for the fixing of his interim remuneration.

[16] I am therefore free to consider for myself the matters upon which the Judge relied in forming his view that the Liquidator has acted in bad faith and to form my own conclusions upon them.

The conflict of interest point

[17] My difficulty with the observations of the Judge on this point is that I have not seen any evidence to show that the Liquidator's appointment as judicial manager of the Montserrat branch of BAICO involved him in any conflict of interest as Liquidator of the Company. If it were shown that his duties as judicial manager of the Montserrat branch required him to take steps to maximize the claims of BAICO in the liquidation of the Company to the prejudice of the Company's two other creditors, then I would accept that there would be evidence of conflict. But I have been shown no such evidence and it cannot be seen from the material which I have been shown that there was any such evidence before the Judge. I was satisfied when I appointed the Liquidator as provisional liquidator that the Montserrat appointment was not an impediment to his appointment in these proceedings and I see no reason to change that opinion.

The stripping out of the value of Ventures

[18] The Judge is, of course, as entitled to his opinions in exercising his discretions as I am to mine, but I have to say that I cannot find anything in the account which he gives of these dealings to justify a finding of bad faith – or anything remotely approaching it. Holdings, which had sold Ventures to the

Company with the property subject to the mortgage, knew or was in a position to know precisely what the situation was. By consenting to the foreclosure order the Liquidator had not 'stripped' Ventures of its value. That was the result not of any action on the part of the Liquidator but of the imbalance between the value of the property and the amount of the debt secured upon it, which had nothing to do with the Liquidator and everything to do with the manner in which Holdings had exercised its control over Ventures while it still owned it. As for the suggestion that Holdings could have injected capital into Ventures to stave off foreclosure, it was open at all times until after the land was sold some time after 1 September 2010 for Holdings to do precisely that. Holdings could have purchased the land at the foreclosure sale, had it thought it a good idea to do so. The implication that the Liquidator in some way inveigled Holdings into buying a pig in a poke by first consenting to the land foreclosure order and then consenting to Holdings foreclosing on the shares in Ventures seems to me to lack any commercial ratio. What advantage could that provide either to the estate or to particular creditors of the estate or to the Liquidator personally? I can identify none and nor did the Judge.

[19] In fact, the evidence before me is that on 12 July 2010 (before compromising Holdings' relief from stay application) the Liquidator informed Holdings of the terms of his settlement with the mortgagees of the Ventures land. I am told that the Judge declined to admit this evidence when an attempt was made after his decision of 10 January 2011 to persuade him to do so, on the grounds that it was too late. He held that the evidence should have been put in at the evidentiary hearing on 16 November 2010, despite the fact that Holdings had not, so far as the evidence before me goes, raised the point as a public policy ground for refusing recognition. In my view, it does not matter whether that evidence was before the Judge on 10 January 2011 or not. Nothing that was before him on that occasion would have justified me in making a finding of bad faith if invited to do so.

The affidavit point

[20] The Judge does not suggest that the affidavit was erroneous or misleading or prejudiced Holdings in any way. In those circumstances I cannot find that the fact that some of the material which it contained was not based upon personal knowledge can support a charge of bad faith.

Conclusion

[21] It may be that there is some differential nuance of meaning between bad faith when alleged or found in United States proceedings and bad faith when alleged or found in proceedings in this jurisdiction. If, however, the expression is intended to connote want of probity or sharp practice, then in my judgment the materials which I have been told were before the Judge on 10 January 2011 and which I have considered in this judgment do not justify such a finding in respect of the transactions and dealings to which he referred. So far as the knowledge of this Court goes, the conduct of the Liquidator has been impeccable throughout. There is therefore no need for me to consider whether to reduce or disallow the Liquidator's remuneration.

[22] The Liquidator is entitled to the costs of this element of his application out of the estate, to be fixed.

Commercial Court Judge
15 April 2011