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

CLAIM NO: BVIHCM (COM) 2012/0113, 0116, 0114 and 0115

In the matter of

FuturesOne Diversified Fund SPC Ltd.

And in the matter of

FuturesOne Innovative Fund SPC Ltd.

And in the matter of

Phi R (squared) Investment Fund SPC Ltd.

In the matter of

Anchor Hedge Fund Limited

And in the matter of

The Insolvency Act 2003

Applicants:

(1) John J Greenwood and Hadley J Chilton, as Joint Liquidators of FuturesOne Diversified Fund SPC Ltd, FuturesOne Innovative Fund SPC Ltd, Phi R (squared) Investment Fund SPC Ltd, Anchor Hedge Fund Limited

(2) FuturesOne Diversified Fund SPC Ltd, FuturesOne Innovative Fund SPC Ltd, Phi R (squared) Investment Fund SPC Ltd, Anchor Hedge Fund Limited

Respondents:

(1) FuturesOne Diversified Fund SPC Ltd.
(2) FuturesOne Innovative Fund SPC Ltd.
(3) Phi R (squared) Investment Fund SPC Ltd.
(4) Anchor Hedge Fund Limited

Appearances: Mr Niki Olympitis for the Joint Liquidators
Mr Jonathan Addo for the Receiver

2013: 10, 17 April

JUDGMENT

(Joint Liquidators seeking order that Receiver pay Joint Liquidators' costs of proceedings brought to establish validity of their appointments – Receiver not joined as respondent to the proceedings – Receiver making unsuccessful intervention at the hearing – whether Receiver a party for

the purposes of CPR 64.10(1)(b) – whether fact that applications had been made in response to conduct of the Receiver casting doubt on the validity of the appointments of itself rendered him liable to indemnify the Joint Liquidators against their costs of the applications – whether Receiver liable to pay increased costs of the hearing attributable to his unsuccessful intervention)

[1] **Bannister J [Ag]:** On 20 March 2013 I gave judgment declaring, on their applications, that the appointments of Mr Hadley Chilton and Mr John Greenwood as Joint Liquidators of the above mentioned companies were valid as made.

[2] Those applications had been prompted in substantial part by the stance taken by a Receiver appointed by the United States District Court for the Northern District of Illinois Eastern Division on 27 September 2012 ('the Receiver'), over certain property comprised within a group of companies owned or controlled by a Mr Battoo. It was the Receiver's contention that the assets of the companies of which Mr Chilton and Mr Greenwood are the Joint Liquidators and which are part of Mr Battoo's former empire, are assets in the US Receivership and there is no doubt that the Receiver has been at pains to sow doubts as to the validity of the Joint Liquidators' appointments and, thus, as to their ability to deal with those assets. A fuller account of this background is set out in my judgment herein of 20 March 2013.

[3] The Joint Liquidators' applications were issued on 20 February 2013 and copies of the papers for the applications were delivered to those acting for the Receiver on the following day. Although the Receiver was asked to communicate what were his intentions with regard to the applications, which were returnable on 7 March 2013, he declined to respond. Instead, it transpired, he set about obtaining reports from experts on foreign law with the intention of deploying them (without having obtained the permission required by CPR 32.6) at the hearing and without notifying the Joint Liquidators that he was doing so. On 5 March 2013 the Receiver filed a cross application for various relief aimed at dismantling the liquidations, including an application to be joined as party to the Joint Liquidators' applications. That was served on the Joint Liquidators on the following day. On 7 March 2013, having applied unsuccessfully for an adjournment, the Receiver played an active part, by Counsel, in arguing that the Joint Liquidators had not been validly appointed and in seeking to have their acts to date set aside or declared invalid. The Receiver's opposition was wholly unsuccessful and I refused his application to be joined as a party to the Joint Liquidators' applications on the grounds that he had no standing to intervene in any of the liquidations in any way.

[4] In these circumstances, the Joint Liquidators now ask that the Receiver be ordered to pay all, or at any rate some, of the costs of each of the Joint Liquidators' four applications. It is common ground and the Receiver has very properly accepted that he

must pay the costs of his own failed cross application, and quantum has sensibly been agreed. But the Receiver says that he should not be made liable to pay any of the costs of the Joint Liquidators' applications.

[5] Mr Addo, who has appeared for the Receiver on the Joint Liquidators' costs application, submits that I cannot order the Receiver to pay any part of the costs of the Joint Liquidators' applications, because, he submits, he has never been a party to them (indeed, he stresses that I expressly decided that the Receiver has no status of any sort in relation to the liquidations), so that it follows that any application to make him liable for the costs of those proceedings must fail because I can only order a non party to pay costs of proceedings if the applicant for such an order has complied with CPR 64.10. CPR 64.10 reads as follows:

> 'Costs against person who is not a party
> (1) This rule applies where –
> (a) an application is made for; or
> (b) the court is considering whether to make ;
> an order that a person who is not a party to the proceedings nor the legal practitioner to a party should pay the costs of some other person.
> (2) Any application by a party must be on notice to the person against whom the costs order is sought and must be supported by evidence on affidavit.
> (3) If the court is considering making an order against a person the court must give that person notice of the fact that it is minded to make such an order.
> (4) A notice under paragraph (3) must state the grounds of the application on which the court is minded to make the order.
> (5) A notice under paragraph (2) or (3) must state a date, time and place at which that person may attend to show cause why the order should not be made.
> (6) The person against whom the costs order is sought and all parties to the proceedings must be given 14 days notice of the hearing.'

[6] Mr Addo accepts that he has had 14 days notice of the application, but he submits that it must fail because it is not supported by evidence on affidavit, as required by CPR 64.10(2). He says that the supporting affidavit is critical to any such application, because the potential liability for costs of a non-party is dependent upon it being shown that his behind the scenes activities have caused[1] costs to have been incurred which otherwise would not have been. Mr Olympitis, who has appeared for the Joint Liquidators on this application, submits that the causation issue has already been dealt with in the second affidavit of Mr Chilton, sworn on 20 February 2013, which explains that the reason for

[1] see **Globe Equities Ltd v Globe Legal Services Ltd** (CA) (unreported) CHANF/ 97/1230/3 (5 March 1999)

making the applications was the conduct of the Receiver in attempting to secure the funds' assets and in challenging the validity of the Joint Liquidators' appointments.

[7] It seems to me that this is a sufficient answer to the objection raised by Mr Addo, but a more general one, in my judgment, is that a person who, as the Receiver did in this case, instructs counsel to contest an application in Court cannot claim that he is not a party to the relevant proceedings. I do not think that the word 'party' in CPR 64.10(1)(b) is restricted to persons whose names actually appear in the title to the proceedings. It is broad enough, in my judgment, to include anyone who actively participates in proceedings under his own name and with the object of procuring an outcome desired by or favourable to himself, whether he is technically joined as a party or is merely permitted, as in the present case, to appear and make submissions.

[8] In my judgment, therefore, it is open to me, irrespective of compliance with CPR 64.10, to make an order that the Receiver pay all the costs attributable to his unsuccessful intervention, notwithstanding that he did not obtain the joinder which he sought.. The real question is whether the Receiver can be ordered to pay any more of the costs incurred by the Joint Liquidators in these applications.

Discussion

[9] Mr Olympitis' primary position is that the Receiver should be ordered to pay the entirety of the Joint Liquidators' costs from the commencement of the proceedings. Mr Olympitis even suggested that the Receiver should pay the pre-commencement preparative costs, but his modified position is that he should be ordered to pay the costs from the issue of the applications on 21 February 2013 down to judgment.

[10] This submission is founded upon the contention that it was the conduct of the Receiver, in particular in relation to the question whether the assets in the Guernsey bank account should be paid over to the Receiver or to the Joint Liquidators and specifically in openly challenging the validity of the Joint Liquidators' appointments, that compelled the Joint Liquidators to bring these proceedings. Had the Receiver not made his challenge, the proceedings would have been unnecessary. Those proceedings have proved successful and the Receiver's objections have failed. It is therefore just, Mr Olympitis argues, that the Receiver, whose conduct required that they be brought in the first place, should pay the costs of the proceedings.

[11] The well known authorities on third party costs orders make clear that a non-party who for selfish reasons maintains the prosecution or defence of a claim, or of an appeal, may, in appropriate circumstances, be ordered to pay the successful party's costs if the claim, defence, or appeal fails. That is not this case. In this case, the Receiver made allegations about the Joint Liquidators' position which prompted them to make their applications. In the ordinary case, where a party brings proceedings as a consequence

of the acts or omissions of another, that other will be the defendant to the proceedings and will be liable for costs if the claim against him succeeds. In this case, however, the Joint Liquidators did not join the Receiver as a respondent to their applications.

[12] I do not think that there is any principle that a person (A) whose conduct causes another (B) to bring proceedings for declaratory or other relief against persons other than A is liable, without more, to indemnify B for the costs of those proceedings and I have been shown no authority to that effect. In order to recover the costs of the proceedings from A, B must show (i) that A's conduct in causing B to bring the proceedings was itself actionable and (ii) that the costs incurred by B are claimable from A as damages. In this case the Receiver was fighting what he no doubt honestly considered to be his corner in relation to the Guernsey assets. It has not been suggested that his conduct in so doing was actionable. I accept that the Joint Liquidators' response was caused by the Receiver's actions, but I am unable to identify any principle which would allow me, *on those facts alone*, to order the Receiver to indemnify the Joint Liquidators generally for the costs of proceedings to which he was not joined, over which he had neither control nor influence and which were not being conducted with his approval or for his benefit. If the Joint Liquidators wish to recover their costs of the applications overall from the Receiver, they will need to identify some cause of action which renders him liable for them and prosecute such claim to judgment or compromise.

[13] I will not, therefore, order the Receiver to pay the Joint Liquidators' costs of the proceedings as a whole.

[14] On the other hand, it is the fact that the Receiver did participate in the hearing on 7 March 2013 and that his intervention was unsuccessful. It seems to me that, on the authority of **Re Professional Computer Group Ltd**,[2] the Receiver should be liable to pay the amount of any increase in the costs of the proceedings which was caused by his unsuccessful intervention. I am uncertain whether the sum of US$9,915 which the Receiver has agreed to pay to the Joint Liquidators in respect of his unsuccessful application is intended between the parties to represent the whole of such additional costs. If that is not the case, then I will hear the parties on the handing down of this judgment as to such additional amount (if any) which the Receiver should be ordered to pay in respect of the 7 March 2013 hearing and will assess any such additional amount summarily by reference to the schedules already before the Court.

[2] [2008] EWHC 1541 (Chan)

Conclusion

[15] Apart from any additional sum which I may order the Receiver to pay in respect of the hearing of 7 March 2013, I therefore make no order against the Receiver on this application.

Commercial Court Judge
17 April 2013