Judgment 26/2013

In the matter of an application by Robb Evans & Associates LLC, receiver over Battoo et al and Anchor Hedge Fund Ltd
Royal Court
5th September, 2013

Application for an order granting the respondents permission to appear and file evidence in support of the respondents' opposition to the recognition application.

Approved Text
05.09.2013

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

IN THE MATTER OF

AN APPLICATION BY ROBB EVANS & ASSOCIATES LLC IN ITS CAPACITY AS RECEIVER OVER MR NIKOLAI SIMON BATTOO, BC CAPITAL GROUP SA, BC CAPITAL GROUP INTERNATIONAL LIMITED (ALSO KNOWN AS BC CAPITAL GROUP LIMITED ALSO KNOWN AS BC CAPITAL GLOBAL), BC CAPITAL MANAGEMENT LLP AND BC CAPITAL GROUP HOLDINGS SA (the "Entities") FOR AN ORDER RECOGNISING ITS APPOINTMENT AS RECEIVER OVER THE ENTITIES

(the "Recognition Application")

Applicant

-AND-

(1) ANCHOR HEDGE FUND LTD (IN LIQUIDATION)
(2) FUTURESONE DIVERSIFIED FUND SPC LTD (IN LIQUIDATION)
(3) FUTURESONE INNOVATIVE FUND SPC LIMITED (IN LIQUIDATION)
(4) PHI R (SQUARED) INVESTMENT FUND SPC LIMITED (IN LIQUIDATION)
(5) FUTURESONE DIVERSIFIED FUND LIMITED
(6) FUTURESONE F4 INVESTMENT LIMITED (IN LIQUIDATION)
(7) FUTURESONE F1 INVESTMENT LIMITED (IN LIQUIDATION)
(8) FUTURESONE A INVESTMENTS LIMITED (IN LIQUIDATION)
(9) GALAXY FUND, INC (IN LIQUIDATION)
(10) GALAXY PE, LIMITED (IN LIQUIDATION)
(11) SILVER OAK FUND LIMITED (IN LIQUIDATION)
(12) PHI R (SQUARED) MASTER SERIES INVESTMENT LIMITED (IN LIQUIDATION)
(13) JOHN J GREENWOOD AND HADLEY JAMES CHILTON IN THEIR CAPACITY AS JOINT LIQUIDATORS OF THE 1ST TO 4TH AND 6TH TO 12TH

RESPONDENTS AND AS AUTHORISED REPRESENTATIVE OF THE 5TH RESPONDENT
(14) SILVER OAK INVESTMENT MANAGEMENT LIMITED
Respondents

-AND-

AN APPLICATION BY JOHN J GREENWOOD AND HADLEY J CHILTON IN THEIR CAPACITY AS JOINT LIQUIDATORS OF THE 1ST TO 4TH AND 6TH TO 12TH RESPONDENTS AND AS AUTHORISED REPRESENTATIVE OF THE 5TH RESPONDENT AND BY THE 14TH RESPONDENT FOR AN ORDER GRANTING THE RESPONDENTS PERMISSION TO APPEAR AND FILE EVIDENCE IN SUPPORT OF THE RESPONDENTS' OPPOSITION TO THE RECOGNITION APPLICATION

Decision handed down: 5th September 2013

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Applicant: **J P Greenfield**

Advocate for the Respondents: **T W McGuffin**

Cases & legislation referred to:

The Royal Court Civil Rules, 2007
Deloitte & Touche AG v Johnson [1999] 1 WLR 1605
Labrouche v Frey [2012] 1 WLR 3160
R v Kensington Income tax Commissioners [1917] 1 KB 486

Introduction

1. By an application dated 6 June 2013, the Applicants, principally Messrs Greenwood and Chilton in their capacities as the liquidators of various companies, all of which are involved in Interpleader Proceedings brought by EFG Private Bank (Channel Islands) Limited (hereafter referred to as "the Bank"), have sought permission to be heard at the hearing of an application made *ex parte* by Robb Evans & Associates LLC (hereafter referred to as "the Receiver") for recognition of that firm's appointment as receiver and the powers conferred on it by a US Court. The Receiver's application for recognition is in what might be described as "standard form" and is dated 29 May 2013. Because it was made after the Bank's interpleader proceedings had been commenced, if only out of professional courtesy, a copy of the application was forwarded to the Advocates acting on behalf of the other Respondents to the interpleader proceedings. The Receiver and the other first three Respondents to the interpleader proceedings are represented by the firm of Babbé and the remaining fourteen Respondents by Carey Olsen.

2. Following the making of the application to be heard, which was accompanied by a short Skeleton Argument, I directed that Skeleton Arguments in response and reply be filed, after which I proposed to determine the question on the papers, as permitted by rule 50(2)(l) of the Royal Court Civil Rules, 2007. Unfortunately, due to a breakdown in communications, the relevant material was not placed before me until August.

3. I will refrain from rehearsing the history of the interpleader proceedings and the dispute that has arisen, largely between Messrs Greenwood and Chilton as liquidators of those various

companies and the Receiver and/or the joint official liquidators of the first two Respondents, as to the ownership of the assets held by the Bank. That background is well-known to all involved in those proceedings and provides the backcloth against which this application to be heard is now made. Suffice it to say, whilst the Applicants have had some of their appointments as liquidators recognised by the Court, and the joint official liquidators of the first two Respondents have similarly had their appointments recognised, the Receiver did not seek recognition until some time later. However, the absence of recognition has not prevented the Receiver from playing an active role in those interpleader proceedings and I have noted how the Applicants and the Receiver have all robustly advanced their positions in that matter.

4. There is very little by way of legal argument in the parties' Skeleton Arguments. The Applicants have referred to ***Deloitte & Touche AG v Johnson*** [1999] 1 WLR 1605 requiring a party wishing to apply to the court to establish that he has a sufficient interest to make it. However, neither side has addressed whether this is a case which turns on the application of rule 37 of the 2007 Rules dealing with the adding of a party and, although I have tested my conclusion against that rule, I say nothing further about it here. Instead, the Applicants' Skeleton Argument relies on the comments made in ***Labrouche v Frey*** [2012] 1 WLR 3160, emphasising the importance of an oral hearing. That is, of course, recognised and appreciated as a proposition of general application but it does not, in my judgment amount to an absolute entitlement for anyone wishing to be heard. The key question is whether the Applicants should be afforded standing to make representations in respect of the Receiver's application for recognition. If such standing is established and permission to make representations given, a subsidiary issue would be whether such an intervention should extend to being heard orally or be confined to the lodging of written materials and representations.

5. The principal ground advanced on behalf of the Applicants is that recognition will have the effect of granting two opposing protagonists over the same assets a similar status, thereby hindering the Applicants' efforts to perform their statutory duties in the liquidations they are conducting. The problem with that submission is that the Bank's interpleader proceedings have already produced that effect. Because there is already a dispute about ownership of the assets, even if the precise nature of the claim advanced by the Receiver or another entity has yet to be particularised, that dispute has to be resolved before it is known whether any of the assets fall within the liquidations with which the Applicants are concerned. The question of recognition is not, therefore, what is holding up the timely completion of the Applicants' tasks as liquidator, or indeed the timely completion of the Receiver's tasks under the terms of its appointment. Accordingly, I do not regard this as a good basis for affording the Applicants the opportunity to put their opposition to the Receiver's application for recognition.

6. The Applicants also draw attention to their opposition being less about the recognition of the appointment of the Receiver itself but more about the recognition of the powers conferred on the Receiver by para. 42 of the preliminary injunction granted on 27 September 2012 by the United States District Court for the Northern District of Illinois Eastern Division. In effect, the Applicants wish to be heard about the form of order to be made. In particular, the Applicants have identified their concerns that simply recognising the powers of the Receiver found in para. 42 of the preliminary injunction might result in the preliminary injunction being given extra-territorial effect without the Receiver, or the applicant for that preliminary injunction, taking steps to seek a mirror order from this Court. Through correspondence, Carey Olsen has invited Babbé to share a form of draft order on which they might make comments. On the basis that the Receiver's Advocates oppose the Applicants' application to be heard it is perhaps not surprising that they have not responded more expansively than to indicate that the order sought is in the terms of the paragraphs of the application for recognition dated 29 May 2013.

7. I am not persuaded that wishing to address the Court on the extent of the powers of the Receiver to be recognised is a basis for granting the Applicants' application for permission to

be heard. In reaching the conclusion, I have borne in mind that an application by a foreign office-holder such as the Receiver for recognition domestically will generally be a non-contentious matter, pursued ex parte with the Court giving proper scrutiny to the types of issues that the Applicants have outlined in the Skeleton Arguments filed on their behalf. If it transpires that the terms of the recognition of a foreign appointment by this Court are more extensive than they should be, or come into conflict with the recognition given to someone else, then the issues arising can be addressed through an appropriate application at that time.

8. Given the circumstances of the present interpleader proceedings, I have given careful consideration as to whether this takes the position of these parties outside of what I have described as the normal position. If there is a real likelihood of some further proceedings to set aside or modify the terms of any recognition that might in due course be granted to the Receiver, would fairness and justice mean that it is preferable to afford the Applicants the opportunity to be heard before any order is made, rather than leaving them to whatever remedy they might consider pursuing subsequently? I would like to think that the concerns of the Applicants would be matters that the Receiver's Advocate would in any event address when the application for recognition is heard without the need for anyone to make representations on behalf of the Applicants. This is all part and parcel of the duties imposed on a party making an ex parte application (see, eg, the passage in ***R v Kensington Income tax Commissioners*** [1917] 1 KB 486, to which the Receiver's Advocate has referred). Accordingly, I would like to think that there is unlikely to be any need for a subsequent application by the Applicants. However, if the Applicants were genuinely to believe that they have something that needs to be aired because the terms of any order of recognition that might be made are flawed, I take the view that their position will be no worse if they have to make an application at that stage than they would be now. Weighing up the balance of what is the most expeditious and cost-effective way to proceed, I have concluded that it would not be a just solution to permit representations to be made when there may be no need for them. At this stage, the Applicants have not established to my satisfaction sufficient interest to be heard. In reaching that conclusion, I have further borne in mind that it would be putting all the parties, who are acting in official capacities rather than at their own cost, to expense that may not be necessary and so not justified and would, therefore, prejudice the various interested persons who stand to benefit from the assets each of them is obliged to get in and preserve.

9. For these reasons, the Applicants' application to be heard by the Court at the hearing of the Receiver's application to be recognised is dismissed. Given the other proceedings with which the parties are engaged, I believe the most sensible option in relation to the costs occasioned by these proceedings is for them to be reserved, as they can be dealt with more completely in due course, recognising that they would normally be ordered to follow the event.

