In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: Nos. 490, 492 and 493 & 2019: No. 7

IN THE MATTER OF GROSVENOR BALANCED GROWTH FUND LIMITED (IN LIQUIDATION)

IN THE MATTER OF GROSVENOR PRIVATE RESERVE FUND LIMITED (IN LIQUIDATION)

IN THE MATTER OF GROSVENOR PRIVATE RESERVE FUND (CLASS B) LIMITED (IN LIQUIDATION)

IN THE MATTER OF GROSVENOR INVESTMENT MANAGEMENT LTD. (IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

IRVING PICARD
(Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L Madoff Investment Securities LLC And Bernard L Madoff)

Appellant

and

(1) MICHAEL MORRISON
(2) CHARLES THRESH
(Acting in their capacities as Joint Liquidators of Grosvenor Balanced Growth Fund Limited (In Liquidation) Grosvenor Private Reserve Fund Limited (In Liquidation) Grosvenor Private Reserve Fund (Class B) Limited (In Liquidation) and Grosvenor Investment Management Limited (In Liquidation))

Respondents

Date of Hearing: 7 March 2025 (by Zoom)
Date of Decision: 12 March 2025

Appearances: *Stephen Robins KC*, *Mark Chudleigh* and *Eric Penz* of Kennedys Bermuda for Irving Picard, Trustee of the Bernard L Madoff Investment Securities LLC (In SIPA Liquidation) (BLMIS) ("the Trustee")

Tom Smith KC, Rhys Williams and Mariangela Bucci of Conyers Dill & Pearman Limited for the Liquidators of the Grosvenor companies ("the Liquidators")

RULING
(In Chambers)

Application for leave to appeal against the refusal to grant a stay of the Trustee's appeals against the rejections of the Trustee's proofs of debt in the respective liquidations of the Grosvenor Companies

RULING of Martin J

Introduction

1. This is an application for leave to appeal against the decision of this Court dated 1 November 2024 in which the Court refused an application by the Trustee of BLMIS in each of the liquidations of the Grosvenor companies named above to stay the Trustee's appeals against the Liquidators' rejection of each of the Trustee's proofs of debt in each of the respective liquidations.

Disposition

2. The Court has decided to refuse the application for leave to appeal for the reasons briefly set out below.

Background

3. It is unnecessary to set out the full history of the matter for the purposes of explaining why the Court has refused leave to appeal. It is sufficient to say that the Trustee is suing the various Grosvenor entities in proceedings in the US Bankruptcy Court (the "US Proceedings") to recover property said to have been transferred into the hands of the Liquidators of the Grosvenor companies. Those proceedings have been on foot for several years, but they are not expected to reach a trial for at least another year, and a final determination will not be made until very much longer in the future.

4. In the meantime, the Liquidators have realised property which they are under a duty to distribute to the creditors of the Grosvenor companies. In order to preserve the Trustee's claims to the funds pending the trial of the US Proceedings, the Trustee filed a proof of debt in each of the liquidations of the Grosvenor companies. The Liquidators rejected those proofs on the grounds that there was no evidence that the Grosvenor companies were aware of the Madoff frauds, that there was positive evidence that the Grosvenor companies had acted in good faith and that the proceeds of the redemptions were used for onward investment or repaid to investors.

5. The Trustee appealed against those rejections on the basis (at least on the face of the Notices of Appeal) that the funds were the property of BLMIS. The Trustee applied to this Court for a stay of his own appeals pending the determination of the US Proceedings.

6. In the course of argument in the stay application, the Trustee now says that he is making his claims in the Bermuda liquidations not on the basis of a proprietary right to the property but that the Trustee has an *in personam* claim in damages in relation to the funds[1]. Whatever his ultimate position on the legal basis of the claims may be, the Trustee does not want his appeals against the rejections of his proofs of claim to be determined until the final non-appealable determination of the US Proceedings[2].

[1] This apparent change in position emerged in the course of argument and a very close reading of the affidavit evidence in support of the application for a stay, which was filed after the Notices of Appeal had been lodged. It remains unclear what the legal basis of the Trustee's claim in the liquidations will be.
[2] Mr Robins KC in opening submissions on 15 October 2024 at 9.45 am to 10.45 am.

7. This Court refused the Trustee's application for the reasons set out in a judgment of 1 November 2024. The Court's assessment was that it was not in the interests of justice to grant the Trustee's application for a stay of his appeals against the rejection of his proofs of debt in the liquidations.

Leave to appeal

8. The Court's decision was an interlocutory case management decision as to the most appropriate way to determine the questions pending in litigation before this Court and was therefore based on the exercise of the Court's broad discretion against the background facts of this particular case.

9. The rules regarding the grant of leave to appeal against an interlocutory decision of the court when a discretion of this kind is involved are well established. Although the threshold is a low one, the applicant for leave must show that the appeal is arguable, in the sense that, on proper analysis, it is not "doomed to fail"[3].

10. The grounds for appeal against an interlocutory decision must therefore demonstrate an arguable case that the judge (i) made an error of law or disregarded a relevant legal principle (ii) misunderstood the facts (iii) took into account irrelevant facts (or failed to take into account relevant facts) (iv) failed to exercise the discretion at all or (v) came to a conclusion that is outside the generous ambit with which reasonable disagreement is possible—i.e. it was plainly wrong[4].

11. These well-known principles were reviewed and applied by Mrs. Subair Williams J in **Apex Fund Services Ltd v Clingerman and Silk Roads Funds**[5] and her review was approved subsequently by the Bermuda Court of Appeal in **Templar Capital Ltd v Griffin Line Trading LLC**[6].

[3] It is not necessary on this occasion to address the submission that the expression "*doomed to fail*" differs in meaning from the expression "*has no realistic prospect of success*" which the Court leaves for another day. The Court has approached the application on the basis of the "*doomed to fail*" test.
[4] This is a summary of the common formulation of the test based on the cases commonly cited.
[5] [2020] Bda LR 12.
[6] BM 2023 CA 20.

No arguable error of law

12. The draft grounds of appeal are largely based[7] upon the central point that the Court concluded that, in the absence of any evidence of foreign law as to the Liquidators' submission to the foreign court and whether a judgment would be binding on the Grosvenor companies and/or the Liquidators, for the purposes of the stay application there was no evidential basis to support a finding that the foreign proceedings will have an impact on the Bermuda proceedings.

13. It is well established that it is generally not appropriate to grant a stay of proceedings in favour of foreign proceedings where the foreign proceedings *will not* result in a binding judgment[8] on the parties to the domestic proceedings.

14. The Trustee's argument in the proposed grounds of appeal rests primarily on the contention that there is a legal significance to the Court's use of the words "will be binding" as opposed to "may have a significant impact". This is a distinction sought to be drawn from some of the cases relied upon by the Trustee in which the English court has held that a stay may be appropriate where one set of proceedings "*may have an important effect on the other*" or "*might well determine the matter once and for all*"[9].

15. In my view, there is no relevant distinction to be drawn between these expressions on the facts of this case. If there is no evidence that an eventual foreign judgment will (or might) be binding on the Grosvenor companies, it follows that there is no evidence that the foreign proceedings will (or might) have a material impact on the Bermuda proceedings. Put another way, the foreign proceedings *may* or *might* have a material impact on the Bermuda proceedings only if they *will* result in a binding judgment.

---

[7] Grounds 3.2, 3.3, and 3.4

[8] **Klockner Holdings GmbH v Klockner Beteilgungs GmbH** [2005] EWHC 1453 at paragraph 21 iv cited with approval by the Bermuda court in **Griffin Line General Trading LLC v Centaur Ventures Ltd** [2023] Bda LR 30 per Hargun CJ at paragraphs 32-4.

[9] **Reichhold Norway ASA v Golman Sachs International** [1999] 1 All ER (Comm) 40 at 47 per Moore-Bick LJ; **Athena Capital Fund SICAV-FIS SCA v Secretariat for the Holy See** [2022] 1 WLR 4570 ("*will or may render the proceedings unnecessary*") per Males LJ at paragraph 49 and **NTT Ltd v Goodall** [2024] EWHC 445 (Comm) applying Males LJ's test per Dame Clare Moulder DBE at 106.

16. Thus, on the evidence before the Court, it cannot be argued that the Court ought to have approached the matter on the basis that the foreign proceedings "*might* have a significant impact" on the Bermuda proceedings justifying the grant of a stay.

17. Further, as a related but independent point, the state of the evidence is a matter of fact—that is to say, it is not a conclusion of law that the Court has applied to the facts. It is therefore not susceptible to an appeal as an error on a point of law. Therefore, these proposed grounds of appeal are bound to fail.

Bermuda has not departed from English law

18. It was suggested that there is a difference between the statement of principle by Hargun CJ in the Bermuda case **Griffin Line Trading LLC v Centaur Ventures Ltd** and the other examples of English case law cited but, in my view, there is no basis for asserting that there has been a departure from the English principle. The reference made by Hargun CJ to **Klockner** (cited above) is just one example of a circumstance where the court will not generally grant a stay. This is because it would be pointless to order a stay in the domestic proceedings if the foreign proceedings will not bind the domestic parties to the result of the foreign proceedings. However, the other judicial statements that a stay may be granted where the foreign proceedings might have a significant impact on the domestic proceedings are not inconsistent with **Klockner** or the general position stated by Hargun CJ. This point does not give rise to an arguable ground of appeal, either of itself, or in the light of the earlier analysis as to the effect of the absence of any evidence of foreign law.

The Trustee's position on adjournment of the stay application

19. At the outset of the stay application the Court indicated that in the absence of evidence of foreign law, the Court was concerned that it would be unable to apply the relevant test in relation to submission to the US Court's jurisdiction described in **Rubin v Eurofinance SA**[10]**.** This issue related directly to the exercise of the Court's discretion

[10] [2013] 1 AC 236 at 283 at paragraphs 161-5.

to grant a stay in weighing the competing interests of justice—i.e. in considering what would be the effect of the foreign judgment (if one is obtained).

20. The Court indicated that it would not force an adjournment of the stay application on the Trustee against his wishes but invited him to reconsider his position in relation to the evidence on this point. Mr. Robins KC took instructions from his client and decided to proceed with the application without making an application for an adjournment to adduce expert evidence as to foreign law[11]. It is therefore not open to the Trustee to complain on appeal after taking this position that it was "unfair" that the Court proceeded to deal with the application on the evidence as it stood[12].

21. Mr Robins KC also submitted that it was not necessary for the Court to address the question of whether the liquidators had submitted to the jurisdiction of the US Court for the purposes of determining his application for a stay[13]. He said that this question should be deferred until after the Trustee had obtained a final non-appealable determination of his claims in the US Proceedings. In the light of that position, i.e. that the Court should **not** determine the question of the Grosvenor's companies' submission to the jurisdiction of the US Court, it is not open to the Trustee to complain on appeal that the Court did not determine that question[14].

The other grounds

22. The Trustee has listed several other grounds of proposed appeal which I shall address briefly. In my view, none of them raises an error of law that impinges on the decision to refuse a stay[15].

[11] Mr. Robins KC at approximately 9.54 am 10.40 am 15 October 2024.
[12] Ground 3.5: this was the "*can't have your cake and eat it*" point.
[13] Mr. Robins KC at approximately10.15 to 10.30 am 15 October 2024
[14] Ground 3.3 at paragraph 29 of the Trustee's opening skeleton argument. Mr. Robins KC decided not to argue the submission point at this stage of the proceedings. See in particular oral submissions on 16 October 2024 between 3.00 pm and 3.25 pm "*we are not arguing the point*" and "*the Court is not invited to determine*" [i.e. whether the Grosvenor companies had submitted to the jurisdiction of the US Court for the purposes of the stay application].
[15] Ground 3.1 is a general ground which depends on establishing an arguable case on the grounds that follow.

23. It is said that the Court should have held that the Trustee's submission to the jurisdiction in Bermuda was not relevant to the Court's assessment[16]. The case law put forward in relation to this ground supports the proposition that it is not a bar to a party (a) commencing proceedings in another jurisdiction[17] or (b) invoking the purely adjudicatory jurisdiction of a foreign court[18].

24. These cases do not stand for the proposition that a party's submission to the jurisdiction of the domestic court (i.e. Bermuda in this case) is not a relevant consideration to the grant or refusal of a stay. Moreover, the Court has not made a determination of the issue of submission to the foreign court's jurisdiction but has simply refused the Trustee's application for a stay of the Trustee's appeal against the rejection of his proofs of debt in the liquidation proceedings. The Court's refusal to grant a stay of the Trustee's appeals in the Bermuda liquidations does not impinge on the Trustee's rights to pursue the US Proceedings.

25. On the facts of this case, the Trustee had commenced proceedings in the US Court and subsequently filed his proofs of debt in the Bermuda liquidations. This latter step indisputably amounts to a submission to the Bermuda court's jurisdiction in respect of the claims in the liquidations[19]. The Trustee's submission to the Bermuda jurisdiction is obviously a relevant matter to be taken into account by the Court in the assessment of where the interests of justice lay on the stay application[20]. The weight to attach to that factor is for the Court to assess.

26. The proposition that it is "irrelevant" that the Trustee's submitted to the jurisdiction of the Bermuda court for the purposes of his appeals against the rejections of the proofs of debt is unarguable.

27. It is also said that the Court held that the Trustee could "abandon" the US Proceedings[21]. This was not a holding, but an observation in relation to the Trustee's submission on

[16] Ground 3.6
[17] **Nuoxi Capital Ltd v Peking University Founders Group Ltd** [2022] 2 HKC 1
[18] **Stichting Shell Pensionenfonds v Krys** [2015] AC 616
[19] **Stichting Shell** at paragraph 31 per Lord Sumption JSC.
[20] See **Re NanFong International Investments Ltd** [2018 (2) CILR 321]
[21] Ground 3.7

the potential duplication of costs. In any event, it was not a ground for refusing the stay, and no appeal lies from it.

28. It is said that the Court held that the "predicament was of the Trustee's own making"[22]. This was not a holding but an observation that was made in relation to the Trustee's submission that it would be undesirable for the Bermuda court to have the burden of deciding questions of foreign law. Again, this observation was not a ground for refusing the stay, and no appeal lies from it.

29. It was also submitted that there have been several other decisions of the Bermuda court on the question of stay of proceedings and that it would be to the public advantage to have the Court of Appeal provide guidance on the proper approach for the court to take. The principles are well-established. It is a matter for the court in each case to apply those principles to the facts. In my view this ground on its own does not justify the grant of leave to appeal in this case[23].

Benefit of the doubt?

30. The Court has carefully considered whether the present case is one in which the "benefit of the doubt"[24] can be granted to the applicant on the basis that, despite the Court's scepticism as to their merits, the points are "arguable". I have concluded that it is not such a case because:

a. The essential error of law alleged in the main draft grounds of appeal does not arise at all because the Court's conclusion was based on a finding of fact that for the purposes of the stay application (in the absence of foreign law evidence) the result of the foreign proceedings will not be binding on the Grosvenor companies.

b. To the extent that the main points are "mixed" law and fact, in the absence of evidence of foreign law that an (eventual) foreign judgment will (or might) be

[22] Ground 3.8
[23] Ground 3.9
[24] **First Tokyo Index Trust -v- Morgan Stanley Trust Co** [1995] Lexis 1288

binding on the Grosvenor companies, the appeal on the main grounds cannot succeed. This position cannot be remedied by argument.

c. The position the Trustee took in relation to (a) evidence of foreign law (b) the adjournment and (c) asking the Court not to make a finding on the Grosvenor companies' submission to the foreign court are all matters about which the Trustee cannot complain by way of appeal because they were his own strategic decisions.

d. The remaining matters in the draft Notice of Appeal are not grounds on which the Court came to its conclusions and so no appeal lies from them.

The interests of justice

31. In the absence of evidence that a judgment of the US Court in the US proceedings will be binding on the Liquidators, the Court had to proceed on the footing that the Trustee's claim will not be admissible as of right in the liquidation[25]. The Court weighed the competing considerations of the interests of justice in the light of that position[26].

32. The Court did not determine any questions in relation to the substantive rights of the parties. The Court simply decided that the Trustee had not made out a sufficient case for a stay of his appeals from the Liquidators' rejections of his proofs of debt.

Conclusion

33. For the reasons explained above, in my judgment the Trustee has not identified an arguable error of law. Nor has the Trustee shown that it is arguable that the decision was plainly wrong in the sense that no judge could reasonably have arrived at the same decision in similar circumstances.

[25] *Dicey, Morris & Collins'* Rule 43.
[26] See paragraph 90 of the judgment.

34. In my view the appeal is, therefore, "doomed to fail". Accordingly, it is my duty to refuse leave to appeal. I do so and award the costs of the application to the Liquidators.

Dated this 12th March 2025

THE HON. JUSTICE MR. ANDREW MARTIN

PUISNE JUDGE