The Court of Appeal for Bermuda

CIVIL APPEAL No. 13 of 2010

Between:

PricewaterhouseCoopers Bermuda (a firm)

Appellant

-v-

Kingate Global Fund Ltd (in Liquidation)
Kingate Euro Fund Ltd. (in Liquidation)

Respondents

Before: Edward Zacca, President
Anthony Evans, JA
Scott Baker, JA

Appearances: Crow, QC; Mr. John Riihiluoma, for Appellant
Beltrami, QC; Mr. Chen Foley for Respondents

JUDGMENT

Date of Hearing:	Tues/Wed, 15-16 March 2011
Date of Judgment:	Friday, 16 March 2011
Reasons for Judgment:	Monday, 9 May 2011

ANTHONY EVANS, JA

1. The Appellants, PricewaterhouseCoopers Bermuda (hereinafter "PWC"), were the auditors of two companies now in liquidation, Kingate Global Fund Ltd. and Kingate Euro Fund Ltd. (hereinafter "the Funds"). The Funds` liquidators are the Respondents to the

appeal. Winding-up Orders were made on 4 June 2009 by the Courts of the British Virgin Islands, where both companies are registered, and on 5 October 2009 by the Courts of Bermuda where they carried on business.

2. Their business was to act as 'Feeder Funds' in Bermuda for the investment business carried on by Bernard Madoff in New York. They attracted investment funds that were forwarded to Bernard L. Madoff Investment Securities LLC ("BLMIS") there. They delegated all investment decisions to BLMIS which affected to use a 'split-strike conversion' investment strategy and reported excellent returns year after year. Those proved illusory after the notorious arrest of Mr. Madoff in December 2008. Total investments through the Funds from inception in 1994 until 2008 were measured in billions of dollars, and as a result of the collapse the Funds have lost "many hundreds of millions of dollars". PWC acted as the Funds` auditors in Bermuda over the whole of this period and issued unqualified audit opinions annually for (at least) the years after 2003 which are now known to have been inaccurate.

3. The Liquidators have issued proceedings against PWC in Bermuda claiming damages for negligence, but they have been made aware that the terms on which PWC was engaged by the Funds included "a contractual right to be indemnified and held harmless for any claims "*except to the extent finally determined to have resulted from the wilful misconduct or fraudulent behaviour of PriceWaterhouseCoopers relatuing to such services"*(Ruling of Kawaley J. dated 20 August 2010). They are aware that the Statement of Claim, if it does not particularise allegations of wilful default or fraud, may be liable to be struck out, with the result that the action would not proceed to the stage where PWC would have to disclose all relevant documents they possess. Therefore, the Liquidators applied for Orders under section 195 of the Companies Act 1981 (corresponding to section 236 of the United Kingdom Companies Act 1948) requiring a representative of PWC "to produce any books and papers in his custody or power

relating to" the Funds. Kawaley J. made the Orders on 20 August 2010 and PWC now appeals.

4. PWC`s objections to the Orders and its grounds of appeal are wide ranging. It contends that the judge was wrong to exercise his discretion in favour of making the Orders under section 195. It further contends that the Bermuda Courts had no jurisdiction to make the winding up Orders in September/October 2009, which ought to be set aside. It submits that it is entitled to raise that issue without appealing against those Orders, but in the alternative it seeks an extension of the time within which to bring an appeal.

5. The question whether the Bermuda Courts have power to make a winding up order in relation to an Overseas Company, which the Funds are for the purposes of the Companies Act 1981, when the company is a Mutual Fund that is exempt under section 133A from the requirement to obtain a permit from the Minister under sections 133 and 134 to carry on business in Bermuda, is an important and much-debated issue before the Supreme Court. In the present case, Kawaley J. described the submissions made by Mr. Riihiluoma on behalf of PWC as a "full-blooded assault on the legal foundations of first-instance un-opposed judgments and academic writings upon which the conventional wisdom on this Court`s winding-up jurisdiction in respect of overseas companies is based", and he reserved judgment accordingly (Ruling dated 20 August 2010 para.8). He rejected the submissions (para.8). He held, first, that PWC "lacks the standing to challenge the validity of the winding-up order made herein save by way of appeal", and secondly, that the Courts had jurisdiction to make the order, in any event (para.108).

6. Jonathan Crow QC presented PWC`s appeal on the basis that it raised a central issue as to the Court`s jurisdiction to make the winding-up orders in the case. If there was no jurisdiction, he submitted that it became necessary decide whether PWC has legal 'standing' to raise the issue, without appealing against the Orders, or if not, whether its time for appealing should be extended until

September 2010 when Notice of Appeal was given. Adrian Beltami QC on the other hand contended for the Liquidators that PWC has no such standing and that its time for appealing should not be extended. If that was correct, any decision on the central jurisdiction issue would be *obiter* unless and until PWC succeeded in an appeal to the Judicial Committee of the Privy Council on the preliminary issues, and he made his submissions on those issues first.

7. Having heard Mr Crow`s reply submission on the preliminary issues, the Court decided to dismiss the appeal on those grounds and not to hear further argument on the central jurisdiction issue. That issue involved questions both of statutory interpretation, which the Judge decided in favour of the Liquidators, and as to whether the Court has common law powers to assist the Liquidators appointed in the BVI liquidation. The Judge decided the common law issue in favour of PWC by a further Ruling dated 17 January 2011 against which the Liquidators appealed.

8. The Court expresses no view on either aspect of the jurisdiction issue. PWC`s appeal was dismissed for the reasons given below.

Does PWC have legal standing to challenge the winding up orders?

9. > "The principle that a winding-up order cannot be impeached in the context of an application made under it is founded on obvious good sense. A winding-up order affects not only the petitioner, the company and the person by or against whom any application is made in the course of the winding-up, but also other creditors and contributories. It could not be acceptable for a court dealing with an application between the liquidator and a particular respondent – whether creditor, debtor, contributory, officer or third party…….- to treat the winding-up order as of no effect while the liquidation continues as between the liquidator and others interested in the winding-up. Either there is a valid liquidation or there is not – the liquidation cannot be effective in relation to some and ineffective in relation to others. If it is to be held ineffective in relation to all that decision must be made

> in proceedings – whether on an application to rescind the winding-up order or on appeal from it – in which all those affected have an opportunity to be heard." (per Chadwick LJ in *Re Mid-East Trading Ltd.* [1998] 1 All ER 577 at 584.)

10. That proposition is challenged by PWC in the present case. It does so primarily on the basis of a nineteenth-century authority that was not cited in the *Mid-East Trading Ltd.* case, namely, the decision of the Court of Appeal in *In re Bowling and Welby`s Contract* [1895] 1 Ch.663. But its submission also relies on the need to reconcile the proposition with the recognised principle that a winding-up order is not an order *in rem*, in other words, it does not create a status that is binding on 'the whole world'. As Lord Hoffman said recently in *Cambridge Corporation v. Unsecured Creditors* [2007] 1 AC 508 (JCPC) –

> "13. Mr. Howe`s submissions as to the rules of private international law concerning the recognition and enforcement of judgments in rem and in personam are of course correct.....But their Lordships consider that bankruptcy proceedings do not fall into either category. Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
> 14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. That mechanism may vary in its details.....
> 15. .....The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them." (page 516)

11. The Judge addressed this issue in section D of his Ruling dated 20 August 2010. It had not been raised by PWC in their challenge to the Orders, but the Liquidators` response began –

> "12. The Applicants` first response to this contention is that it is simply not open to the Respondent on this Application. The Applicants have in fact been appointed under the Winding Up Orders and, given those orders, the jurisdiction under section 195 is necessarily engaged. The Respondent cannot advance by way of defence on this application a collateral attack on extant orders of this Court.....it is an abuse of process to mount an indirect challenge in the course of separate proceedings. Absent any application to appeal or set aside or review the Winding Up Orders, it is inappropriate for this Court to consider the correctness of its earlier orders on this application." (quoted, Rulingpara.23)

12. This submission was accepted, in paragraph 26 of the Ruling-

> "In my judgment, it would be an abuse of the process of this Court to permit the Respondent to an application under section 195 to effectively set aside the final winding-up order made by this Court in circumstances where: (a) the winding-up hearing was duly advertised and the Respondent had actual or constructive notice of the hearing and failed to appear to oppose the making of the order; and (b) the joint liquidators had been in office and carrying out their function in reliance on the validity of their appointment and the winding-up order for over three months before the challenge was first raised."

13. Mr. Crow submits that the Judge`s conclusion was a remarkable one for him to reach because, if the Court had no jurisdiction to make the winding-up orders, it could scarcely be an 'abuse of process' "to present the Court with a correct legal argument in order to challenge an order which *ex hypothesi* the Court had no power to make". But the Judge answered this contention, correctly in our view, by quoting

from the judgment of the Board given by Lord Millett in *Strachan v. Gleaner & Co.* [2005] UKPC 33 –

> "32. The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally…….his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the *Padstow* case) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; no[r] does a judge of co-ordinate jurisdiction have power to correct it."

14. That authority had not been cited to the Judge and so he gave the parties an opportunity to respond to it (Ruling para.28). That led to Mr. Riihiluoma, appearing for PWC, producing the 1895 Court of Appeal decision referred to above, namely *In re Bowling and Welby`s Contract.* As already noted, it had not been cited to the Court of Appeal in *Re Mid East TradingLtd.* in 1997, nor in *In re Padstow Total Loss etc. Association* [1882] 20 Ch.D.137 (the authority referred to by Lord Millett in the passage quoted above). *In re Dowling and Welby* became the mainstay of Mr. Crow`s submissions, it therefore requires a close analysis from us.

15. It was a Summons under the Vendor and Purchaser Act, 1874. Mr. Welby had contracted to purchase certain freehold properties from Mr. Bowling who was the Official Receiver and Liquidator of a Building Society. The order to wind up the Building Society was made by a judge of the Leeds County Court, and on 13 November 1893 (after the date of the sale and purchase agreement) an order was made in the winding-up vesting all the property of the society in the

Official Receiver and Liquidator. Mr. Welby the purchaser objected to the vendor`s title on the ground that the county court judge had no jurisdiction to wind up the society "there not being at the date of the order more than seven members of the society" as required by section 199 of the Companies Act 1882. Mr. Justice Stirling held in the Chancery Division that there were fewer than seven members and that the county court judge had no jurisdiction to make the order for winding-up, and the Official Liquidator appealed. The appeal was dismissed by a Court presided over by Lord Halsbury, sitting with Lindley and A.L. Smith L.JJ.

16. The report of the arguments of counsel shows that Buckley QC for the Appellant submitted that "the order for winding-up made by the judge is conclusive and binding upon all persons until it is set aside on appeal. It is equivalent to a judgment *in rem* [citing *In re Padstow*]." To this, Warrington QC responded "The winding-up order may be binding between the company and its members, but it is a judgment *in personam* and cannot bind outside persons, such as creditors or purchasers." (pages 665/6).

17. The Court held that the county court judge had no jurisdiction to make the winding-up order and that the purchaser was entitled to object to the Liquidator`s title to the property on that ground. Lord Halsbury dealt with the latter question as follows –

> "That leads me to consider what is the effect of the order that has been made for the winding-up, and which in some senses may be said to have been *res judicata*. I should think it probable that the order appealed against is binding on the association as an association, and on everybody claiming under it or taking a title under it, but I cannot agree that it is binding or incapable of being challenged by persons who have rights outside it, and therefore I think it cannot be considered a judgment *in rem* for all time and as against all persons."

He added that he was aware of the practical difficulties. "I should be very sorry to force the title upon an unwilling purchaser. What would

happen if the purchaser wanted to raise money on such a title as this? I know full well the practical answer of a man of business would be that he would not look at property with such a title. Therefore, I am of opinion that the judgment of Mr. Justice Stirling is right…" (page 668).

18. Lindley L.J. agreed. He held that the judge had no jurisdiction to make the winding-up order (page 671). He continued –

> "That raises another question. Is the order a binding order on every one as long as it lasts? ……I cannot find a reason for saying so." (page 671)

He then referred to *In re Padstow* and quoted a passage from the judgment of Jessel MR in that case which he described as "the strongest expression of opinion that can be found in the books to the effect that a winding-up order can only be disputed on appeal". But he distinguished it on the ground that that was an appeal by a contributory. "……what I think [Jessel MR] must have meant was that until the order was set aside on appeal the company could not be prejudiced, nor could any person paying under it. I do not think he could have intended to go the length of saying that any person who was no party to the litigation at all, and was not claiming through the company at all, was to be bound by a winding-up order being made which there was no jurisdiction to make. A purchaser cannot be bound at all unless an erroneous winding-up order is a judgment *in rem*, made by a Court having jurisdiction to make it. I do not think that [the M.R.] thought that a winding-up order was a judgment *in rem*……..in my opinion a purchaser is entitled to look into the order and see whether it was properly made……[if it was not] he cuts away the title of the liquidator who claims under it." (page 671-2).

19. A.L. Smith LJ held –

> "I am of opinion that this order was made by the learned county court judge without jurisdiction…….But then it is said that the winding-up order is a judgment against all the world. It may be

> that it is a judgment binding on all who were members of the company, and the company itself, but it is not a judgment binding on a person who is a stranger and who is now objecting to having a title forced upon him through an order which the Court holds to be invalid and made without jurisdiction. In my opinion, it does not bind the purchaser at all;…." (page 673).

20. These judgments draw a clear distinction between persons who are unable to challenge the order, save by appeal or by having it set aside, and an "outside person" (Lord Halsbury) or "purchaser" (Lindley LJ) or "stranger" (A.L.Smith LJ) who may be entitled to do so. Mr. Crow submits that PWC is in the latter category, with regard to the winding-up orders made in respect of the Funds, and that the judgment in *Re Mid East Trading Ltd.* (where the Court was not referred to its earlier decision in *In re Bowling and Welby*) should be distinguished on that ground.

21. In the present case, Kawaley J. declined to follow *In re Bowling and Welby* on three grounds (Ruling paras. 29-32) First, the winding-up order in that case was made by a judge of the County Courts, which was not a superior court of record nor a court of co-ordinate jurisdiction with the High Court, as envisaged by Lord Millett in *Strachan v. Gleaner & Co. Ltd.* (above). Secondly, the purchaser in *In re Bowling and Welby* was a "stranger" to the liquidation, whereas PWC is both a contingent creditor and a contingent debtor of the Funds. Thirdly, he preferred to categorise winding-up orders as orders *in rem* rather than *in personam*, as Brett LJ (later Jessel MR) had done in the *Padstow* case. It appears that he was not referred to the decisions in *Re Mid East Trading Ltd.* (1997) and *Cambridge Gas Corporation* (2007), both noted above.

22. In our judgment, the Judge was certainly correct to hold that PWC is not a "stranger" to the liquidation as the purchaser was in *In re Bowling and Welby.* In addition to being a contingent creditor and a contingent debtor, the firm was the auditor of the Funds, and therefore was in a statutory relationship with them, for the whole of

the period from 1994 until 2008 during which they carried on their business in Bermuda. On that basis alone, the judgment in *In re Bowling and Welby* does not provide any justification for holding that the rule established in *In re Padstow* and *Re Mid EastTrading Ltd.* does not apply in the present case.

23. Having had the advantage of reading all the authorities referred to above, we prefer to base our conclusion, that PWC is not entitled to question the validity of the winding-up orders in the present case, on a somewhat wider ground. The Liquidators` applications under section 195 are made in the course of the winding-up, and the principle as stated in *Re Mid East Trading Ltd.* with which we respectfully agree is that "a winding-up order cannot be impeached in the context of an application made under it" ([1998] 1 All ER at 584f, quoted above). The proceedings in *In re Bowling and Welby* were not of that kind : they were issued by a third party "stranger" to the liquidation, seeking the Court`s ruling on the validity of the liquidator`s title to the property in question. The issue was not raised as a 'collateral' defence to an application made by the liquidators pursuant to their statutory powers.

24. We are inclined also to agree with the Judge`s first reason for distinguishing *In re Bowling and Welby* from the present case, on the ground that the winding-up order was made in the county court, not the High Court, but in the circumstances it is not necessary for us to express a concluded view on that issue.

25. Mr. Crow also raised an argument "based on analogy" (Skeleton Argument para.81) that it is well established that when a public authority seeks to enforce a bye-law in criminal proceedings, the defendant is entitled to question the validity of the bye-law, by way of defence. *Boddington v. British Transport Police* [1999] 2 AC 143 was cited as an example of this. In our judgment, no true analogy can be drawn. The issue considered and ruled upon by the House of Lords was whether the defendant in criminal proceedings could put forward public law arguments that he could have raised on an application for

judicial review, and it was held that he could. Fundamental principles as to promotion of the rule of law and fairness to defendants in criminal proceedings were involved: see per Lord Steyn [1999] 2 AC at 152G. The issue raised in the present case is whether a party who could have opposed or appealed against the winding-up order can question its validity in proceedings brought by liquidators duly appointed under it in the exercise of their statutory powers; no true parallel can be drawn. Moreover, we note that in *R v. Robinson* [1990] BCC 656 the Court of Appeal (Criminal Division) rejected a defence submission that the prosecution had to prove, in relation to a winding-up offence, not merely that the winding-up order was valid and subsisting, but that it was validly made. "The winding-up order was valid unless or until it was set aside in regular proceedings" (headnote para. 1). To the limited extent that either of these decisions may be relevant in the present case, they do not affect the conclusions we have reached.

26. We hold, therefore, that PWC is not entitled to attack the validity of the winding-up orders made by the Supreme Court in respect of the Funds, save by way of appeal (for which an extension of time is required: see below). PWC`s appeal on the 'standing' issue is dismissed.

(2) Extension of time for appeal

27. The application is made by a Notice of Motion dated 13 September 2010. That was one year after the Bermuda Court made winding-up orders and appointed joint provisional liquidators on 4 September 2009, who were confirmed as Joint Liquidators by a further Order dated 5 October 2009. The Funds` Petitions were dated 7 August 2009 and they were advertised on 21 August 2009, followed by a hearing that took place, as advertised, on 4 September 2009. The appointments were advertised on 18 September 2009.

28. PWC was informed of these developments by letter from Mr. McKenna dated 13 November 2009 when the Liquidators` request for the

production of documents, previously made by Messrs. Tacon and Fogerty as Liquidators appointed by the BVI Court in May/June 2008, was renewed. The letter made it clear that the reason why winding-up orders had been obtained in Bermuda was because PWC`s lawyers had previously raised a jurisdictional objection to the requests made by the BVI Liquidators in May/June 2009. (Some, but only a limited number of documents had been produced in response to that earlier request.) The letter read, in part, as follows –

> "I refer to the letter from your lawyers, Appleby, to Sedgwick Chudleigh dated 24 June 2009, effectively in response to Mr. Tacon`s letter to you of 11 May 2009. In that, Appleby made the point on your behalf that the Joint Liquidators had no power in Bermuda to compel the production of documents under s.284 of the BVI Insolvency Act. In the absence of an order of the Bermuda Court that may have been the case, however, on 4 September 2009 the Funds were also the subject of winding up Orders in the Supreme Court of Bermuda. You will see from the enclosed copies that I have been appointed as Joint Liquidator together with Messrs. Fogerty and Tacon for the purposes of the Bermuda winding up.
>
> In spite of your jurisdictional objection, you nonetheless produced copies of some documents, which was helpful. In order that we as Joint Liquidators may fulfil our duties to investigate the affairs of the Funds, I now write to ask you to provide additional documents, and some information, as follows:
>
> ……
>
> …we expect your full co-operation; you will be well aware of our powers of compulsion under the Companies Act 1981."

29. There was no response to that letter, and Mr. Mckenna wrote again on November 30, 2009, requesting a response by December 14. On that date, PWC`s lawyers (Appleby) replied, raising the issue as to the Bermuda Court`s jurisdiction, and concluding –

> "If you follow through with the threat contained in your letter of 30 November 2009 to apply to the court to obtain the requested information by compulsion, our client shall apply to set aside any order that you might obtain on the grounds that you appointment as Liquidator is invalid."

30. In their reply to this letter, dated 18 December 2009, the Liquidators` lawyers, Sedgwick Chudleigh, specifically drew attention to the 'standing' issue –

> "Your letter.....also fails to take account of your client`s lack of standing to challenge the Bermuda winding-up orders over the Funds."

31. The Liquidators` Summonses for orders under section 195 of the Companies Act 1981 were issued on 12 Aril 2010, supported by Mr. Mckenna`s Affidavit dated 7 April 2010, stating *inter alia* that "what has been produced by PwC Bermuda has not significantly advanced the Applicant`s investigation into PwC`s conduct of the audits of the Funds…The Applicants accordingly make the present applications…." (paras. 22 and 22.1).
32. The Applications were heard on July 12-13 2010 and as stated above the Judge`s Ruling is dated 20 August 2010. PWC`s ability to question the validity of the winding-up orders, unless by appealing against them, was fully argued, as the Ruling makes clear. PWC gave no indication that it would seek leave to extend the time for an appeal, before serving the Notices of Motion dated 13 September 2010.
33. There can be no doubt, therefore, but that PWC and its lawyers knew about the winding-up orders that were made in September 2009 from the time when they received Mr. McKenna`s letter dated 13 November 2009. When they first became aware of them is unclear from the evidence filed on their behalf. Mr. Riihiluoma`s Affidavit dated 13 September 2010 states –

> "12. As a matter of fact, [PWC] was unaware of the.....winding-up petitions. It is accepted that notice

> of the petitions appeared in the Royal Gazette. [PWC] had no reason to be searching the Royal Gazette for notice of [the Funds`] petitions because they were overseas companies and it was believed fell outside the jurisdiction of the Supreme Court to wind-up companies under the Companies Act……
> 13. Even if [PWC] knew of [the Funds`] petition, it is questionable whether they could have properly appeared to challenge the jurisdiction of the Supreme Court to grant the petition…….
> 14. It is for these reasons that [PWC] did not appear on the hearing of the winding-up petition."

34. There is no explanation why PWC, the Bermuda office of an international firm, did not read the advertisements, both when the petitions were lodged and liquidators were appointed, nor why they remained unaware of the winding-up orders, if that is suggested, until they received the letter dated 13 November 2009. But it is clear that from November 2009 onwards they were focused on the issue whether the Bermuda Courts had jurisdiction to make the orders and on the need for them to appeal if, as the Liquidators alleged, they had no standing to raise the issue in these proceedings.
35. The application to extend time for appealing against the winding-up orders was not made to the Judge; it is made in the context of the present appeals ("In the event that [PWC] is unsuccessful on its appeal in respect of its standing to challenge the jurisdiction of the Court on the section 195 Summons,…": Mr. Riihiluoma`s Affidavit para.11). The Court therefore is invited to exercise its own discretion, apparently with the consent of both parties.
36. The Court`s approach to an application to extend time for appealing against a winding-up order was considered recently in *In re Metrocab* [2010] EWHC 1317 (Ch.) by Philip Marshall QC (Deputy Judge). We gratefully adopt his summary, as follows-

> "Factor (a): The interests of the administration of justice require
> any application for rescission of a winding-up order to be made promptly……a winding-up order affect all

> creditors of the company and gives the Official Receiver authority to act immediately. Without the requirement for a prompt application a considerable degree of uncertainty would arise for creditors and the Official Receiver and any liquidator thereafter appointed. The importance of complying with the time scale set down by rule 7.47 therefore has a particular importance and led Mr. Justice Lightman in *Leicester v. Stevenson* [2003] 2 BCLC 97 at 100f to conclude that any extension of time must bejustified and strictly justified if the extension is to cover any substantial period."(para.17)

37. We take account of the facts that the Funds already were being wound up by order of the BVI Courts, when the Bermuda winding-up orders were made, and that the immediate reason for obtaining the orders in Bermuda was to seek section 195 orders against PWC. But the Funds carried on business in Bermuda and their assets are likely to be situated in Bermuda, so far as we are aware, notwithstanding their formal connection with the BVI. In our view the considerations referred to above are nonetheless relevant in the present case.
38. The time limited for appealing was six weeks from, at latest, 5 October 2009. PWC was aware of the legal issues which, if decided adversely to them, might make it necessary for them to seek leave to appeal. It is unclear from the evidence whether their failure to do so was intentional or due to oversight. If an application had been made timeously, or at any time before the Liquidators` section 195 Applications were heard in July 2010, it could have been considered and ruled upon by the Judge. It was not made until after the Judge ruled, in accordance with what he called the 'conventional wisdom', that the Liquidators` contentions on the 'standing' issue were correct.
39. If the time was extended, and PWC was able to proceed with an appeal against the winding-up orders, it would become necessary to involve all other parties who might claim that they were interested in the winding-up, and if an appeal was successful, the work done by the Liquidators would be negatived. PWC submits that there is no

evidence that the Liquidators have done work or incurred expense, except in relation to these section 195 orders. But if that is correct, the only practical consequence of a successful appeal would be to release PWC from an obligation to give the Liquidators assistance which *ex hypothesi* (apart from the quirk of statutory interpretation upon which PWC seeks to rely) they are entitled to expect.

40. In our judgment, the request to extend time must be refused.

(3) Discretion under section 195

41. The remaining issue is whether the Judge exercised his discretion under section 195 correctly when making the orders that he did. PWC contends that no orders should have been made, alternatively, that they are exorbitant in their scope.

42. The Courts` approach was defined by Lord Slynn`s speech in *In re British and Commonwealth Plc. (Nos.1&2)* [1993] AC 426. He held, first, that –

> "….the power of the court to make an order under section 236 is not limited to documents which can be said to be needed "to reconstitute the state of the company`s knowledge [as it was before the liquidation] .." (page 439).

That is relevant here, because the Liquidators avowedly seek further information that will enable them to determine whether or not they should continue proceedings against PWC in which they may be required to prove either wilful misconduct or fraudulent behaviour, in the light of the exemption clause in its engagement letters on which PWC relies. The proper test, not disputed by PWC, is whether the information is needed "for the proper conduct of the winding up" (per Megarry J. in In re Rolls Razor Ltd. (No.2) [1970] Ch.576 at 592, quoted by Lord Slynn (above)).

43. Lord Slynn continued –

> "At the same time it is plain that this is an extraordinary power and that the discretion must be exercised after a careful balancing of the fators involved – on the one hand the reasonable

> requirements of the administrator to carry out his task, on the other the need to avoid making an order which is wholly unreasonable, unnecessary or "oppressive" to the person concerned." (p.439D)

44. In the Court of Appeal in the *British and Commo wealth* case, Ralph Gibson LJ listed matters that may be relevant to the balancing of the requirements of the office-holder against the risk of oppression to the person against whom the order is sought. These include "(a) the case for making an order against an officer or former officer of the company will usually be stronger than it would be against a third party because officers owe a fiduciary duty to the company and are under a statutory duty.....to assist the office-holder;.....(d) if someone is suspected of wrong-doing, and in particular fraud, it is oppressive to require him to prove the case against himself on oath before any proceedings are brought:..." (p.372). But the first priority is not to confuse the purpose of the order with its possible results (p.372E).

45. The Judge directed himself correctly in line with these authorities and noted that the legal principles and the application of section 195 were not in dispute (Ruling para.10). He addressed first the question "have the Joint Liquidators made out a reasonable requirement for an Order under section 195" (Ruling para.12) and concluded that they had, noting that the Affidavit evidence filed on behalf of PWC "does little to undermine the opposing assertions that the requested information is reasonably required for section 195 purposes" (para.16).

46. His next question was, "Does the risk of oppression outweigh the Joint Liquidators' reasonable requirements?" (section C para.17). PWC claimed that the request was oppressive because the Liquidators required the information "in connection with their efforts to pursue claims against PwC Bermuda", and they were seeking to gain an advantage in the litigation that would not exist, but for the insolvency. That is to say, they were relying upon section 195 to

obtain sight of internal PWC papers that would not be disclosed in the course of civil litigation until after the pleadings were closed (and in the present case, until after PWC as defendants could apply to have the claim struck out). The Judge rejected this contention "on legal and factual grounds" (para.17). He held, first, that it was not oppressive for the liquidators to ascertain whether they have a viable claim before expending the resources of the estate on potentially costly litigation; and secondly, that the information requested concerns the "property of the company" as specified in section 195, namely, the chose in action consisting of the potential claims.

47. The first point taken by PWC as Appellant is that the Judge "muddled" two entirely separate issues", first, the legal limits of the power, and secondly, the criteria which should be applied in deciding whether or not it should be exercised. The argument is that the power cannot be exercised unless the disclosure is reasonably required by the Liquidators, but they are also required to prove that its exercise is not "oppressive" in the circumstances of the particular case. The judgment reveals, it is contended, a "misunderstanding of the law" (Skeleton Argument para.91).

48. This argument stems, apparently, from the words used by the Judge in paragraph 18 of his ruling "It cannot be oppressive for the Joint Liquidators to invoke a statutory power which is designed to give them a "leg up"…" followed by "It would only be oppressive and a misuse of their investigative powers if [they] do not objectively require the information sought…". The suggestion is that the Judge accepted the "reasonable requirement" as "conclusive evidence" that the power should be exercised. The fault may be ours, but we cannot see any substance in this objection. The Judge considered "reasonable requirement" and "risk of oppression" separately and weighed them against each other. In our judgment, he carried out the balancing exercise called for by the House of Lords in *In re British and Commonwealth*, and we add, by way of comment, that it would be

wrong to interpret Lord Slynn`s words as if they formed part of the statute.

49. We should note here PWC`s contention, in connection with the 'standing' issue, that the Court`s exercise of its discretionary powers under section 195 should take account of the allegation that the winding-up orders were not properly made (Skeleton Argument para. 73.2). We reject that submission in any event, for the reason given by Chadwick LJ in *Re Mid East Trading Ltd.* [1998] 1 All ER 577 –

> "So long as the winding-up order remains the court must treat it as valid for all purposes."

That is certainly correct, in our judgment, when the only challenge comes from a person who is clearly not a "stranger" to the liquidation process, as PWC is not.

50. PWC next contends that the Judge failed to take account of certain matters that were relevant to the exercise of his discretion, as listed in paragraph 92 of its Skeleton Argument on the Appeal. First, that its working papers remain its private property. That was in fact referred to by him in para.14 of his Ruling. It is not likely to have escaped him, in any event. Second, and Third, that the whole purpose of the Orders was to interrogate PWC as to what they did as auditors in relation to the conduct of successive audits. That may be the main purpose, but the Liquidators have explained that PWC`s audit papers are likely to provide evidence of, in general, the operations of the Funds and of BLMIS that resulted in massive losses caused by "notorious and large scale frauds". The Liquidators also make the point that their request is limited to the production of documents. It does not extend to oral discovery or interrogation that might be permitted under section 195. Fourth and Fifth, that the Liquidators already have access to material disclosed by PWC as defendants to proceedings in other jurisdictions, and "it behoved the liquidators to give the court a full explanation of exactly what documents they already held" (para.92.5). This point was not referred to in the Ruling and we were told that it was not taken before the Judge. But he was aware that some disclosure had been made

voluntarily and that the request was made because the Liquidators needed further information before they could decide whether or not to proceed with fraud allegations. He considered that issue carefully in paragraphs 12-16 of the Ruling, and in our judgment this additional factor has no significant weight.

51. Finally (para.92.6), PWC relies upon the warning given by Sir Richard Scott V-C (as he then was) in *Re Sasea Finance Ltd.* [1998] BCLC 559 against the possible tactic that section [195] powers might be used to gain a procedural advantage (in that case, with regard to the expiry of limitation periods) when liquidators "know what happened, know what was done and what was not done, and simply want to improve upon an intended negligence case against auditors by extracting from them damaging admissions or unconvincing justifications". In the present case, the Liquidators have issued protective writs, and the Judge tackled expressly and head-on the dilemma with which the Liquidators say they are faced: negligence claims may be met by the exemption/indemnity clause in the engagement letters, and without further information they are not confident that fraud claims can be pursued. The situation is far removed from that described by Lord Scott.

52. PWC`s remaining submissions are concerned with the scope of the Orders made. Not all of the objections were raised before the Judge. The first is that the Orders are unlimited in time. They cover the whole period during which PWC acted as auditors, back to 1994, and it is submitted that claims against PWC in respect of the earlier years would be time-barred in any event. (That assumes a six-year limitation period, that may not be relevant, in any event.) Second, that certain of the correspondence was confidential and with third parties. Third, that two of the third party correspondents named in the Orders were not identified by the Liquidators in their affidavits (this was disputed by the Liquidators). Finally, that the Liquidators already should have copies of PWC`s invoices and other documents

that were sent to the Companies, making their production unnecessary.

53. The Judge gave careful consideration to the scope and terms of the Orders, insofar as objections were raised before him, and in our judgment the matters now relied upon by PWC, singly or cumulatively, do not justify interfering with the terms of the Orders that he made. We decline to do so. We add by way of comment only that PWC`s contentions appear to ignore the fact that it was, throughout the relevant period, the auditor and therefore an officer of the Funds, and that recourse to the Court`s section 195 powers has only become necessary as the result of the minimal amount of co-operation with the Liquidators that has been forthcoming from it.

Conclusion

54. PWC`s appeal therefore is dismissed, for the reasons given above.

Signed

Anthony Evans, JA

Signed

I agree Zacca, President

Signed

I agree JA Scott Baker, JA