



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

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

DECISION

Date of Hearing:
Date of Decision

Friday, 17 June 2011

ZACCA, PRESIDENT

1. This is an application by PricewaterhouseCoopers Bermuda [PWC] for Leave to Appeal to the Privy Council against a decision of the Court of Appeal dismissing an appeal against Orders made by Kawaley J. on 20 August 2010.
2. At the conclusion of the hearing of the appeal, it was indicated to the Court that an application for Leave to Appeal to the Privy Council was being considered.
3. It was agreed that if the appeal was filed whilst the Court was not in session, (in fact the application was filed on April 4, 2011, on a date

when the court of Appeal was not in session), written submissions should be forwarded to the Justices of Appeal by the applicant and the respondent. This they did.

4. The Court has reached its decision having considered the written submissions.
5. The Orders against PWC were made under section 195 of the Companies Act 1981 (corresponding to section 236 of the United Kingdom Companies Act 1948). The Funds operated in Bermuda as 'Feeder Funds' for Bernard L. Madoff Investment Securities LLC in New York from their inception in 1994 until 2008 when the New York Fund collapsed. Throughout that period, PWC were auditors of the Funds, duly appointed under section 89 of the Companies Act 1981.
6. The Respondent Liquidators applied for Orders against PWC under section 195 on 12 April 2010. The applications were heard on 12-13 July 2010. Among their objections, PWC contended that the Bermuda Court had no jurisdiction to make the Winding-Up Orders in September/October 2009.
7. The Liquidators countered that PWC had no legal standing to raise the jurisdiction issue in these proceedings. They contended that PWC could only do so by becoming a party to the winding-up proceedings, which it could only do by obtaining leave to extend its time for appeal against the winding-up orders; such leave was applied for, but has been refused.
8. Kawaley J. upheld the Liquidator's contention and PWC's appeal against his Ruling was dismissed by this Court, which adopted and applied the reasoning of the English Court of Appeal in *Re Mid-East Trading Ltd.* [1998] 1 All E R 577. PWC submitted *inter alia* that the Court of Appeal's judgment should not be followed or should be distinguished by reference to the earlier Court of Appeal decision in *In re Bowling and Welby's Contract* [1895] 1 Ch.663. which was not cited in the later case.
9. The judgments in *In re Bowling and Welby's Contract* were concerned with a third party to the winding-up proceedings variously described

as an “outside person” or “purchaser” or “stranger” (see this Court’s Judgment paragraph 20). In the view of this Court, none of those descriptions could possibly or sensibly be applied to PWC as regards its relationship with the Funds.

10. This Court further agrees with the observation of Chadwick LJ in *Re Mid-East Trading Ltd.* that “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” ([1998] 1 All E R 557 at 584). In our judgment, PWC’s attempt to challenge the proposition by its proposed appeal does not raise any question of great general or public importance within section 2(c) of the Appeals Act 1911.
11. On this ground, together with the detailed reasons set out in the Respondent’s Written Response to Notice of Motion for Leave to Appeal dated 15 April 2011, the application for leave to appeal is dismissed.

Zacca, President

I agree

Anthony Evans, JA

I agree

JA Scott Baker, JA