



# In The Supreme Court of Bermuda

CIVIL JURISDICTION  
COMMERCIAL LIST  
2010: No. 454

**BETWEEN:-**

- (1) KINGATE GLOBAL FUND LIMITED (In Liquidation)
- (2) KINGATE EURO FUND LIMITED (In Liquidation)

**Plaintiffs**

**-and-**

- (1) KINGATE MANAGEMENT LIMITED
- (2) FIM LIMITED
- (3) FIM ADVISERS LLP
- (4) FIRST PENINSULA TRUSTEES LIMITED  
(as Trustee of the Ashby Trust)
- (5) PORT OF HERCULES TRUSTEES LIMITED  
(as Trustee of the El Prela Trust)
- (6) ASHBY HOLDING SERVICES LIMITED
- (7) EL PRELA GROUP HOLDING SERVICES LIMITED
- (8) MR CARLO GROSSO
- (9) MR FEDERICO CERETTI
- (10) ASHBY INVESTMENT SERVICES LIMITED
- (11) EL PRELA TRADING INVESTMENTS LIMITED
- (12) ALPINE TRUSTEES LIMITED

**Defendants**

**INTERIM RULING ON PLAINTIFF'S SUMMONS OF 13<sup>TH</sup> NOVEMBER 2015**

**(In Chambers)**

Date of hearing: 17<sup>th</sup> March 2016

Date of ruling: 17<sup>th</sup> March 2016

Mr Alex Potts, Sedgwick Chudleigh Ltd, for the Plaintiffs

Mr Saul Froomkin QC for the First Defendant

Ms Sarah-Jane Hurrion, Ms Lilla Zuill and Mr Mark Burrows, Harneys Bermuda Limited, for the Second, Third, Eighth and Ninth Defendants

Mr Mark Diel and Ms Katie Tornari, Marshall Diel & Myers Limited, for the Fourth to Seventh and Tenth to Twelfth Defendants

### **Introduction**

1. All parties have given extensive discovery in these proceedings, which involve claims arising from the *Ponzi* fraud carried out by Bernard L Madoff (“Mr Madoff”). Documents produced on discovery are produced on the implied undertaking that the party to whom they are disclosed will not use them for any ulterior or collateral purpose. However the court has a residual discretion to grant leave for such a purpose, eg to deploy the material in other litigation. When exercising that discretion the court will balance competing interests such as the public interest in preserving confidentiality and the litigant’s right to participate effectively in the other litigation, including his compliance with any duties to which his participation in such litigation may give rise.
2. The Plaintiffs and the Defendants are also defendants to a complaint in the US Bankruptcy Court for the Southern District of New York (“The New York Action”) brought by Irving H Picard, the Trustee for the liquidation estate of Bernard L Madoff Investment Securities LLC (“the Trustee”). By a summons dated 13<sup>th</sup> November 2015 (“the Plaintiffs’ Summons”) the Plaintiffs seek an order releasing them from the implied undertakings relating to the documents produced on discovery by the Defendants insofar as necessary to comply with their discovery obligations to the Trustee in the

New York Action. The Defendants resist such an order. They contend that the Plaintiffs should remain subject to the implied undertakings.

3. When seeking to do justice on the Plaintiffs' Summons, a material consideration will be what justice requires with respect to discovery in the New York Action. The arbiter of that question is the US Bankruptcy Court. I am helpfully informed that at a discovery conference in the New York Action on 7<sup>th</sup> March 2016 Judge Bernstein directed the Trustee to file a motion to compel production of documents which would seek production of documents from both the Plaintiffs and the Defendants. I shall therefore adjourn the Plaintiffs' Summons pending Judge Bernstein's ruling on that motion, with liberty to restore once the ruling has been given.
4. Having heard the parties as to costs, I order that costs be in the application.

Dated this 17<sup>th</sup> day of March, 2016

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Hellman J