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1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS
3

4 CAUSE NO: 440/2005

5
6 IN THE MATTER OF THE COMPANIES LAW (2007 REVISION)
7
8 AND IN THE MATER OF PHILADELPHIA ALERNATIVE ASSET FUND,
9 LIMITED ("PAAF")

10
11 BETWEEN:

12 UBS FUND SERVICES (CAYMAN) LTD

13 Applicant



14
15 AND:

16 (1) RICHARD FOGERTY
17 (2) JAMES CLEAVER
18 (AS JOINT OFFICIAL LIQUIDATORS OF PAAF)

19 Respondents
20

21 BEFORE: The Honourable Madam Justice Levers
22

23 Appearances:

24 Mr. A. Walters and Mr. G. Manning of Campbells for the Applicant
25 Ms. C. Bridges of Ritch and Conolly for the Respondents
26

27 Heard: 28th August 2007
28

29
30 _____
JUDGMENT



31
32 Levers, J.

33 This is an Application for directions as to a preliminary determination to be
made by the Court in an Administration Agreement between the Applicant

1 and PAAF in Liquidation. The joint official liquidators Richard Fogerty and
2 James Cleaver had rejected the proof of debt in the Liquidation of PAAF
3 submitted by UBS Fund Services (Cayman Ltd) the matter is before the
4 Court in an Appellant capacity. This court now is being asked not to
5 determine the merits of the matter but to determine whether a certain issue
6 should be decided as a preliminary matter. The parties have agreed the
7 following directions:

8

9 (a) That the matter should proceed by way of pleadings as follows:

10 (1) Applicant to file and serve points of claim by 4pm on the 31st
11 August 2007;

12 (2) Respondents to file and serve points of defense by 4pm on the
13 28th September 2007;

14 (3) Applicant to file and serve points of reply if so advised by 4pm by
15 the 19th October 2007.

16

17 (b) Lists of documents to be offered for exchange by 4pm on the 16th
18 November 2007;

19 (c) A further hearing for directions to be listed on the first available date
20 after the 19th October 2007.

21

1 The parties cannot agree on the adducing of expert evidence at this stage
2 and the Court has ruled that it is a little premature to decide that at present.

3

4 Brief Background

5

6 The Applicant submitted a proof of debt to the Respondents on the 31st
7 May 2006 claiming fees under the administration agreement and an
8 indemnity under clause 6B of the administration agreement in respect of its
9 costs and expenses. The Respondents refused to consider the proof of
10 debt and were subsequently on the 16th May 2007 ordered to do so by the
11 Grand Court. The Respondents rejected the proof of debt by a letter dated
12 the 19th June 2007. The letter does not provide any specific reason for the
13 rejection. The Applicant now appeals against that rejection. It is
14 convenient at this stage to look at clause (6) in the administration
15 agreement which provides that:

16

1 "6 (a) [UBS Funds Services] shall not be
2 liable for any damage, loss, costs or
3 expenses whatsoever to or of the Fund
4 at any time from any cause
5 whatsoever except [UBS Fund
6 Services'] gross negligence, fraud or
7 willful default or that of any of its
8 directors, officers, employees or
9 agents as the case may be.

10
11 (b) The Fund agrees to indemnify and
12 hold harmless [UBS Fund Services], its
13 directors, officers and employees and
14 each of them against any liability,
15 actions, proceedings, claims,
16 demands, costs or expenses
17 whatsoever which they or any of them
18 may incur or be subject to in
19 consequence of this Agreement or as
20 a result of the performance of the
21 functions and services provided for
22 hereunder or as a result of the
23 performance of any functions and
24 services delegated or subcontracted in
25 accordance with this Agreement
26 except as a result of the gross
27 negligence, willful default or fraud of
28 [UBS Fund Services] or any of its
29 directors, officers, employees or
30 agents as the case may be and this
31 indemnity shall expressly inure to the
32 benefit of any director, officer or
33 employee existing or future and to the
34 benefit of any successor of [UBS Fund
35 Services] hereunder."
36
37

38 Fraud and wilful default are of course well known concepts as submitted by
39 the Applicant in this case, but "gross negligence" and its implications are far

1 more unsure in the Law. It would appear on a review of all the authorities
2 submitted to the Court that there is very little difference recognised in some
3 of the authorities between negligence and gross negligence, however in
4 *Red Sea Tankers v. Papachristidis* (1997) 2 Lloyd's 547 Mance J, (as he
5 then was), considered the application on an indemnity clause as a pure
6 matter of construction although he was construing a contract governed by
7 New York Law and had to hear evidence from New York expert lawyers to
8 assist. The Applicant relies on this case and submits this matter is purely
9 one of construction and does not depend on any consideration of the
10 allegations of negligent behaviour. The contract must mean the same thing
11 regardless of the allegations made they submit.

12

13 Mr. Walker for the Applicant relies on the case of *Steel v. Steel* (Times 5th
14 June 2001) Neuberger J (as he then was) gave some guidelines to be
15 taken into consideration when ordering a preliminary issue which can be
16 summarised as follows:

17 (1) Will this dispose of the case;

18 (2) Will it cut down the costs significantly;

1 (3) Will this be an issue of law and if so how much effort will have to be
2 put into determining the facts for the purposes of determining the
3 preliminary issue;

4 (4) To what extent can the facts be agreed if this is a point of law alone;

5 (5) Whether the determination of the preliminary issue could
6 unreasonably fetter either or both of the parties or the Court in
7 achieving a just result;

8 (6) To what extent was there a risk of the determination of the
9 preliminary issue increasing costs and/or delaying the trial;

10 (7) Was it relevant;

11 (8) To what extent was there a risk that the determination of the
12 preliminary issue could lead to an application for the pleadings to be
13 amended to avoid the consequences of the determination;

14 (9) Was it just and right to order preliminary issue.
15

16 The Applicants of course submits that it is. Ms Bridges' basic argument on
17 behalf of the respondents is that a judicial determination of whether the
18 conduct of UBS on the facts of this case amount to gross negligence and or
19 wilful default is highly fact sensitive. It will depend she submits on full
20 discovery and in particular cross examination of relevant UBS Cayman
21 personnel. With respect to Ms Bridges, the question before this Court, is
22 should this be determined as a preliminary issue, is not whether a judicial
23 determination should be made at this stage on whether the conduct

1 amounted to gross negligence and also wilful default. I would agree with
2 her entirely if I was determining the question of the conduct of the UBS
3 Cayman. Then of course it would be highly fact sensitive, but I am not
4 doing that, all I am determining at this stage is whether it is worthy of a
5 preliminary argument.

6 As a general rule it is in the interests of the parties and the administration of
7 justice that all issues arising in a dispute are tried at the same time.

8 However particularly in complex actions costs and time can be sometimes
9 saved if decisive or potentially decisive issues can be identified and
10 ordered to be tried before or separately from the main trial. In my view
11 there are three types of orders that can be made:

12 (1) For the trial of a preliminary issue on a point of law;

13 (2) For the separate trial of a preliminary issue or questions of
14 fact;

15 (3) For separate trials of liability and quantum.

16 As I indicated to counsel where an order for a preliminary trial of an issue of
17 law or fact is made the formulation of the issue to be tried is extremely
18 important; it is imperative that the issue is defined with precision so as to
19 avoid future difficulties of interpretation. If it is impossible to define the

1 issue then no order should be made. If in my view it is one of law alone the
2 Court must further order the issue to be tried, either on an agreed
3 statement of facts on a case stated or on the statement of case. A good
4 example of this is issues raised in personal injuries cases as to the
5 Claimant's date of knowledge under the Limitation Act 1980 Section 14
6 which will be suitable for trial as a preliminary issue. In *Keays v. Murdoch*
7 *Magazines UK Ltd* [1991] 1 W.L.R. 1184 the issue whether the words
8 published were capable of bearing a defamatory meaning were determined
9 as a preliminary issue. Having reviewed all the authorities I am of the view
10 that the Application must succeed. The Applicant is entitled to know
11 whether the proof was proper rejected for gross negligence as the ordinary
12 meaning of the contract conveys. The Court can then adjudicate on the
13 facts and decide whether this conduct amounts to gross negligence. In my
14 view it is a simple interpretation of the clause contained in the agreement.
15 If in fact it is determined that negligence is the same as gross negligence
16 then counsel would not be appealing on the basis that the conduct was not
17 grossly negligent and waste two days leading evidence on that point. It
18 may well be that if the Court rules at the determining stage that the
19 negligence referred to as gross negligence is the same as negligence
20 counsel may not pursue the appeal. I do not think therefore that this would

1 be as Ms Bridges suggests, a waste of costs. Ms. Bridges suggested that
2 it would be a waste of costs also because the Appellants can appeal the
3 decision but that applies to every preliminary issue that is to be tried in
4 these courts and it will mean therefore that if that is an argument that is
5 taken cognisance of then the court will never order a preliminary issue to
6 be tried.

7 I therefore order that the interpretation of gross negligence in Clause 6 of
8 the administration agreement be determined as a preliminary issue and
9 that counsel formulate the issue with precision and bring it before the Court
10 for approval of the wording.

11 Cost of the application to the applicant (UBS).

12

13 Dated this day 5th September 2007

14



15 Judge of the Grand Court

16

