

7/11/2006

Lebrary 4/11/07

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

3
4 CAUSE NO: 312 OF 2005

5
6 IN THE MATTER OF THE COMPANIES LAW (2004 REVISION)

7
8 -and-

9
10 IN THE MATTER OF UNIVEST MULTI-STRATEGY FUND II LTD.

11
12 BEFORE: The Honourable Madam Justice Levers

13
14 Appearances:

15 Mr. Richard Snowden QC for the Joint Official Liquidators (MS-II) with
16 Ms. Laura Hatfield and Mr. Dawson

17 Mr. Phillips QC with Mr. Nick Robinson for Uninvest High Yield Fund Ltd.
18 and Uninvest Convertible Arbitrage Ltd.

19 Mr. Peter & Kyle Broadhurst for RSM applicants

20
21 Heard: 16th October 2006

22

JUDGMENT



23
24 Levers, J.

25
26 There are presently two applications before the Court. The first application
27 is by way of Summons dated 2nd May 2006 pursuant to which the following
28 relief is sought:

29
30 (a) That Raymond Massi and Clifford Culmer, the Joint Provisional

31 Liquidators of Mosaic Composite (US) Inc. pursuant to an Order of

1 the Supreme Court of the Commonwealth of the Bahamas be
2 recognised as the Joint Provisional Liquidators of Mosaic Composite
3 (US) Inc., within the Cayman Islands;

4 (b) That the applicants be given complete and unfettered access to, and
5 copies of the documents relating to the liquidation of Uninvest Multi-
6 Strategy Fund II Ltd (MS-II) including any and all information
7 relating to a settlement affecting the sole known asset of the MS-II;
8 and

9 (c) That the Joint Official Liquidators of MS-II should be removed.

10
11 The present Joint Official Liquidators of MS-II were appointed by the
12 Cayman Islands Courts and they are Mr. Simon Whicker and Mr. Theodore
13 Bullmore.

14
15 The second application is made by way of Ordinary Application dated 24th
16 May 2006. The Joint Official Liquidators of MS-II are seeking to settle the
17 list of contributories of MS-II and/or the rectification of register of members
18 of MS-II, and/or adjustment of the rights of the contributories of MS-II
19 amongst themselves pursuant to section 112 and 122 of the Companies Law
20 (2004 Revision).

1

2 I should perhaps state at this stage that the application by the Joint
3 Provisional Liquidators of MC (US) Inc. was heard first by agreement, as
4 the question of recognition was the basis of their ability to take part in these
5 proceedings. Accordingly, the Court heard the application and gave an oral
6 judgment which is now reduced to writing with reasons.

7

8 During the hearing of the second application, in view of my ruling on the
9 first application, the Joint Provisional Liquidators represented in this Court
10 by Mr. Massi, withdrew any objection they may have had to the settlement
11 of the list of contributories in the form proposed by the Joint Official
12 Liquidators.

13

14 Mr. Snowden, QC on behalf of the Joint Official Liquidators (Mr. Whicker
15 and Mr. Bullmore) drew the Court's attention to all the relevant documents
16 in support of the Liquidators' position. At the end of his submissions and
17 those of Mr. Phillips, QC who represented two of the contributories of
18 Uninvest Multi-Strategy Fund II Ltd, the Court concluded that the list of
19 contributories should be as suggested by the Official Liquidators, and that

1 the methodology of distribution was the most appropriate in all the
2 circumstances.

3
4 During the submissions Mr. Phillips, QC on behalf of the “Fund companies”
5 was anxious to ensure that the Court was informed of the commercial
6 viability of these transactions and he took the Court to many documents that
7 supported his submissions. The fact that persons acting or ostensibly acting
8 on behalf of Mosaic may have subsequently diverted funds received from
9 Uninvest Multi-Strategy Fund to other entities was not a matter that reflected
10 badly on his client, he submitted. The Court was entirely in agreement with
11 him. There was no doubt in my mind that the transactions made between
12 Multi Strategy Fund II Ltd and Mosaic were in the best interest of all parties
13 and was a sound commercial investment.

14

15 THE MATTER OF RECOGNITION

16

17 Mosaic is an American administrating company, which was at some point
18 registered in the Bahamas. Mr. Massi and Mr. Culmer have been appointed
19 Joint Provisional Liquidators by the Bahamian Court. That appointment is
20 the subject of a challenge in the Bahamian Court. They await judgment on

1 the application challenging the appointment. Counsel have submitted that
2 the challenge may be based on the fact that the Bahamas is not the place of
3 incorporation of Mosaic and that Mosaic does not in fact conduct any active
4 business in the Bahamas at present. At the material time, the place of
5 incorporation was Minnesota. Mr. Massi and Mr. Culmer were appointed
6 Receivers of Mosaic by the Bahamian Court. That order was recognised by
7 the Cayman Courts on 21st March 2006. On the same day while the ex-parte
8 Order was made in these Courts asking the Court to recognise them as
9 Receivers for a limited purpose (equitable execution of a judgment), they
10 were also appointed Provisional Liquidators in the Bahamas of Mosaic. The
11 two Orders cannot coexist under Bahamian Law and as Mr. Snowden, QC
12 on behalf of the Joint Liquidators submits, it must inevitably mean that the
13 previous order appointing them as Receivers is automatically stayed.
14 Therefore, the Cayman Courts cannot go beyond the jurisdiction of their
15 appointment in the Bahamas and the order recognising them as Receivers of
16 Mosaic must inevitably be stayed in this jurisdiction too.

17

18 They now come before this Court and ask for recognition for the following
19 reasons:

20

1 1. That these are very serious allegations of a massive fraud and that this
2 Court should view the matter very seriously and ensure that Mosaic is
3 represented in any hearing and partake in any distribution or settling
4 of contributories;

5 2. The fact that they are Provisional Liquidators matters not and despite
6 the challenge, this Court should recognise them as finally appointed
7 and enable them to act as if they were liquidators. The fact that there
8 is a challenge to their appointment as Provisional Liquidators Mr.
9 Broadhurst submits is fairly irrelevant and that this Court should
10 recognise them.

11 3. That, even if he was wrong as to the appointment of a provisional
12 liquidator being recognized, the fact that they were appointed as
13 Receivers and recognised by this Court should be sufficient to enable
14 them to act and be recognised in this case.

15
16 Mr. Broadhurst submits that it matters not that the receivership order was
17 stayed and it was only for a limited purpose. He relies on Smart on Cross-
18 Border Insolvencies and submits that the recognition of a liquidator albeit
19 provisional is not exclusive where he's appointed in the place of
20 incorporation. That in fact if he is appointed in other jurisdictions where the

1 company conducts business recognition may also be accorded to a liquidator
2 or provisional liquidator. He makes a further point that the owner of this
3 company Mr. Maloney who is aware of all of these applications has made no
4 challenge to the application. He further submits that Mosaic has a
5 proprietary claim to assets of Uninvest Multi-Strategy Fund II. His
6 submissions on the question of the removal of the Joint Official Liquidators
7 were not in any great detail but as a result of reference being made to Mr.
8 Massi's affidavit Mr. Broadhurst submits that there was nothing untowards
9 about the contents therein. During the course of the hearing of the
10 application counsel for the Joint Official Liquidators and Uninvest made
11 several complaints about the language used in the affidavit. It did in fact
12 seem to be a personal attack on Mr. Whicker the Cayman appointed
13 liquidator. Mr. Massi's language was unfortunate and it is perhaps a
14 reflection of this that Mr. Massi at the end of the hearing which inevitably
15 touched on the language used in his affidavit gave instructions to his counsel
16 to withdraw the allegations, to apologise and to agree to certain matters
17 being settled. I will therefore not go into the Court's view of the contents of
18 the affidavit, save and except to say that the court's view was reflected in the
19 order for costs which will be dealt with later on in this judgment.

20

1 Mr. Snowden QC on behalf of the Joint Official Liquidators responded to
2 Mr. Broadhurst's submissions as follows:

3

- 4 1. That this Court has no jurisdiction to recognise a Provisional
5 Liquidator, more so in this case as the appointment had been
6 challenged in the Bahamian Courts;
- 7 2. That it is wrong to suggest that Mosaic will not be represented
8 properly and its interest protected in this application. The Joint
9 Official Liquidators are officers of this Court and accordingly, they
10 must act professionally and with integrity protecting all parties;
- 11 3. That the fact that the receivership order cannot coexist with the order
12 appointing a liquidator in the Bahamas must mean that the
13 receivership order here is limited to the Bahamian order and that this
14 court cannot go beyond the scope of the Bahamian Order. Therefore,
15 the argument that because he was appointed Receiver previously
16 makes him recognisable in this proceeding has no validity;
- 17 4. That the Liquidator can be recognised by Cayman law, if in fact he is
18 appointed in the place of incorporation. If he was not appointed in the
19 place of incorporation but in another jurisdiction then at least this
20 Court must have some evidence that he would be recognised in the

1 place of incorporation i.e. Minnesota. He submits that there is no
2 such evidence in this particular matter;

3 5. That it may well be that he was appointed a provisional liquidator in
4 the Bahamas over the assets within the jurisdiction of the Bahamian
5 Courts but that does not necessarily mean it is a basis for recognition
6 by these courts;

7 6. That the circumstances of this case dictate against recognition because
8 he does not come within any circumstance that is recognised by the
9 law to enable this Court to accept him as a liquidator;

10 7. That Mr. Massi is about to embark upon hostile litigation against MS-
11 II in relation to its assets which are the subject of this liquidation.

12 This litigation would not be brought as a creditor or contributory, and
13 is therefore not a matter which gives Mr. Massi any interest in the
14 liquidation entitling him to seek the removal of the Joint Official
15 Liquidators. Indeed, it would give rise to a direct conflict were Mr.
16 Massi to seek his own appointment as Official Liquidator of MS-II;

17 8. That the Letter of Request does not mention the subject matter of this
18 particular liquidation and therefore it does not really apply to any of
19 these companies;

1 9. That the Order of the Ontario Court does not mention these companies
2 either; and

3 10. That recognition is a matter of discretion and that this Court should
4 not exercise its discretion in favour of Mr. Massi or Mr. Culmer in
5 view of the above.

6

7 Mr. Phillips' QC on behalf of the Uninvest High Yield Fund II and Uninvest
8 Convertible Arbitrage Ltd. submits that it is:

9

10 (1) Totally irrelevant and misleading to suggest that nobody will
11 represent the interest of Mosaic if there is no recognition of Mr.
12 Massi;

13 (2) He says that the word "massive fraud" is bandied around but
14 that it has no relation to these companies;

15 (3) He submits that Mosaic got value and it was a good
16 commercial deal;

17 (4) That Merrill Lynch were investors in a structured Hedge Fund;

18 (5) That the companies that Mr. Massi represents do not have any
19 interest in MSII and that NAM may be the only one that has

1 some interest albeit very minimal. That it may have a hundred
2 management shares at one cent per share;

3 (6) He further submits that if I exercise my discretion judicially
4 there really is insufficient interest in this liquidation to have
5 NAM represented and that NAM should in fact be dismissed as
6 a real party to these proceedings; and

7 (7) He further submits that all the deals were commercially viable;
8 that they were beneficial to the company; that in fact the option
9 agreement which was gone into between the parties involved in
10 these proceedings was at the time exceptionally beneficial and
11 that Mosaic got value for money.

12

13 In response to Mr. Broadhurst Mr. Snowden QC on behalf of the Joint
14 Official Liquidators does not oppose the recognition of other liquidators in
15 principle. However what he does say is that in this particular case, they have
16 not come properly before the Court to be recognised and as officers of the
17 Court, the Joint Official Liquidators have a duty to question the validity of
18 the application and ask the Court to exercise its discretion based purely on
19 the law. He submits that Mr. Broadhurst did not at anytime explain to the
20 Court precisely for what purpose, Mr. Massi wished to be accepted (whether

1 generally for this hearing or otherwise). He says that it is important to know
2 this prior to the Court exercising its discretion. He also submits that these are
3 provisional liquidations and that as such there is no authority to recognise
4 them under our law. He adopts the point that is made by Mr. Phillips, QC
5 that if they were not appointed in the place of incorporation there should be
6 some evidence before me that having been appointed in another jurisdiction,
7 they would be accepted in the country of incorporation. These are not
8 simultaneous incorporations and the company does not have two domiciles.
9 At any given time it had separate domiciles and at the material time when
10 the liquidators were appointed their domicile was Minnesota. There is not a
11 scintilla of evidence, he submits that Minnesota would accept these
12 liquidators in that jurisdiction. In any event, he reminds the Court that the
13 provisional liquidators' appointment is challenged and a judgment is awaited
14 in the Bahamas.

15

16 Mr. Snowden QC submits that Mr. Massi's affidavit and contents are very
17 hostile in nature and that allegations against Mr. Whicker such as acting
18 improperly are serious in nature and should not go without investigation.

19 He says that any proprietary claim that may be advanced by Mr. Massi and
20 on which he is relying is important for recognition. He submits that as he

1 understands it, the only company that can conceivably bring that proprietary
2 claim is Mosaic, and it is the one company which is excluded from the order
3 of the Ontario Courts. It is referred to, he said in the Letter of Request but
4 only in the recitals. The point he makes in any event is that the Letter of
5 Request does not comply with the Evidence Act in Cayman. Further it is not
6 even issued in proceedings in the jurisdiction of the requesting court
7 concerning these two companies, the subject matter of this liquidation.

8

9 THE COURT'S FINDINGS

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11 The Court found that in fact it could not recognise Mr. Massi for the
12 following reasons:

13

- 14 1. He is only a provisional Liquidator and further he has been challenged
15 in the jurisdiction in which he was appointed;
- 16 2. That he was not appointed by the Court of the incorporating country
17 and that there is no evidence before this Court that the place of
18 incorporation Minesotta would accept him as a liquidator (which is a
19 pre-requirement for recognition);

1 3. That the Letter of Request does not refer to the subject matter of these
2 proceeding;

3 4. Nor does the Order except in the recital;

4 5. That the court disagrees with Mr. Broadhurst's submission that the
5 prior receivership order would extend itself to Mr. Massi being
6 recognized in these proceedings;

7 6. That the Receivership Order and the Provisional Liquidators Order
8 cannot coexist.

9

10 A receiver appointed by way of execution of a judgment has a different
11 mandate to that of the liquidator or provisional liquidator and that in fact the
12 Receivership Order must inevitably be stayed in the Bahamas. Accordingly
13 the recognition afforded by this Court must be a mirror reflection of the
14 Bahamian jurisdiction. The Court disagrees with Mr. Broadhurst's
15 submissions. The Court is of the view that Mr. Massi cannot be recognised.

16

17 The question of costs was argued by the parties and both Mr. Snowden, QC
18 and Mr. Phillips, QC argued for costs on an indemnity basis. Mr.
19 Broadhurst submitted that there had been an unfortunate use of language but
20 it had not been meant to be a personal attack on Mr. Whicker. During the

1 course of these submissions Mr. Broadhurst informed the Court that he was
2 instructed to withdraw the allegations, apologise to Mr. Whicker and to
3 agree to pay costs on an indemnity basis. Accordingly costs on an
4 indemnity basis of the application by Mr. Massi and Mr. Culmer were
5 awarded to Uninvest High Yield Fund Ltd and Uninvest Convertible Arbitrage
6 Ltd and the Joint Official Liquidators.

7

8 Finally, the Court ordered that, all applications by the Joint Provisional
9 Liquidators Mr. Massi and Mr. Culmer stand dismissed and the question of
10 contributories be settled as the next step in these proceedings as outlined by
11 the Caymanian liquidators.

12

13 Dated this 7th day of November 2006

14

15 Judge of the Grand Court

