



16 December 2019

PRESS SUMMARY

In the matter of Stanford International Bank Ltd (In Liquidation) (Acting by and through its Joint Liquidators Mark McDonald and Hugh Dickson) (Antigua and Barbuda)

[2019] UKPC 45

On appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda)

JUSTICES: Lord Wilson, Lord Carnwath, Lord Briggs, Lady Arden, Sir Andrew Longmore

BACKGROUND TO THE APPEAL

Robert Allen Stanford ran a Ponzi scheme between 1990 and 2008 through Stanford International Bank (“SIB”), a company registered in Antigua and Barbuda. SIB operated by selling certificates of deposit promising repayment with interest at a later date. In fact, throughout SIB’s history, Mr Stanford misappropriated many of the incoming payments rather than investing them in appropriate securities.

From September 2008, there was a run on SIB during which investors withdrew \$1.3 billion. Antigua and Barbuda’s Financial Services Regulatory Commission suspended SIB’s operations in February 2009 and the High Court placed it into liquidation in April 2009. Mr Stanford was subsequently convicted of fraud-related offences and is now serving a 110-year prison sentence in the United States.

The liquidators of SIB saw it as unfair that some investors had left the scheme with substantial profits at the expense of other investors who had not withdrawn any money. They wanted to achieve what they considered to be a fairer outcome by (a) clawing back past payouts of interest (totalling \$200 million); (b) clawing back payouts of capital and interest made during the run on the bank from September 2008 (totalling \$1.3 billion); and (c) readjusting the creditors’ claims within the liquidation to require investors who had received partial payouts to give credit for those payouts, thereby increasing the amount available for distribution to investors who had not withdrawn any funds at all.

The problem for the liquidators was finding a proper legal basis for this. Primarily, they hoped to rely on section 204 of Antigua and Barbuda’s International Business Corporations Act (“the IBC Act”) which allows the courts to grant relief for oppressive or unfairly prejudicial conduct (“**section 204 relief**”). This would be a novel approach and so the liquidators asked the High Court in Antigua and Barbuda to sanction their proposals. At first instance, acting High Court Judge Gerard Wallbank declined to authorise the clawback claims (see (a) and (b) above) but permitted the liquidators to pursue the readjustment claims (see (c) above.) On appeal, the Court of Appeal held that there was no lawful basis for any of the liquidators’ proposals because section 204 was unavailable in principle during a liquidation. The liquidators appealed to the Judicial Committee of the Privy Council.

JUDGMENT

The Board will humbly advise Her Majesty that the liquidators’ appeal should be dismissed. Lord Briggs, for the majority, holds that section 204 relief is unavailable during a liquidation. Lady Arden and Lord Carnwath consider that section 204 relief may be available in principle in a liquidation, but they agree that the appeal should be dismissed.

REASONS FOR THE JUDGMENT

The majority place weight on the characteristics of the insolvency scheme in Antigua and Barbuda. Following entry into liquidation, a company's affairs are taken out of the hands of its officers and shareholders and entrusted to a court-appointed office-holder, the liquidator, whose duties are laid down by statute. The distribution of the company's property is governed by an insolvency scheme which requires a distribution on an equal footing within each class of stakeholders (known as a *pari passu* distribution) out of available resources. It is constrained by the fact that the liquidators only have access to the assets and claims which the company still enjoyed at the start of the liquidation, subject to the possibility of using specific powers to re-open prior transactions [18]; [54]-[55].

By contrast, section 204 was designed to achieve fairness between stakeholders in solvent companies, and should not be used in the context of an insolvency. Section 204 relies on broad discretionary and equitable principles to adjust the rights of stakeholders in a manner which is incompatible with the insolvency scheme. The two frameworks of unfair prejudice and insolvency are like chalk and cheese [56]-[57].

Even if section 204 had been available in principle, it would plainly be inappropriate in the present case. The liquidators' plan amounts to a bespoke regime for the liquidation of SIB, contrary to what the law otherwise provides. It represents an unprincipled invasion by equity into the business and banking sphere against which the court should set its face [61]. It would deprive creditors of their entitlements under the general insolvency scheme and would lead to unfairness between the partly-paid and fully-paid investors [74]. Moreover, relief from oppressive or unfairly prejudicial conduct is equitable in origin, and does not invade the rights of purchasers in good faith for value and without notice (known as equity's darlings.) Both the clawback claims and the adjustment claims would violate that principle. The investors who received payouts before February 2009 acted in good faith, on the basis of contractual entitlement and without notice of the Ponzi scheme, and it is accepted that their payments were not unlawful preferences [69]-[71]. Similarly, the proposed readjustment would require the partly-paid investors to give a form of credit for what they have already received in good faith, for value and without notice [72]-[73].

Lady Arden (with whom Lord Carnwath agrees) agrees that the appeal should be dismissed. However, she disagrees with the majority in considering that section 204 is available in principle in a liquidation. Section 204 confers very wide powers to grant relief [91] and it is available to enforce a cause of action which already exists under the general law [91]; [98]. There is nothing in the wording of section 204 which requires the company to be solvent [100]. In the circumstances, a liquidator should be able to obtain the court's approval to act as a complainant under section 200(b)(iv), for instance, in order to obtain a remedy for the benefit of unfairly prejudiced unsecured creditors [99]; [102]. However, Lady Arden agrees with the majority that section 204 cannot be used as the springboard for clawback claims in favour of the losers in a Ponzi scheme where there is no existing cause of action for disgorgement (e.g. a wrongful preference claim). That would be incompatible with the mandatory statutory scheme for the distribution of assets in a company's liquidation [108]-[109].

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for the decision. The full judgment of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html