IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 74 of 2020 (MRHJ)

BETWEEN:

(1) BDO CAYMAN LTD
(2) BDO TRINITY LTD

Plaintiffs

- AND-

ARDENT HARMONY FUND INC.
(IN OFFICIAL LIQUIDATION)

Defendant

CHAMBERS (via Zoom link)

Appearances:	**Mr. Graham Chapman QC instructed by Mr. Andrew Pullinger, Mr. Shaun Tracey and Mr. Harry Shaw of Campbells for the Plaintiffs** **Ms. Clare Stanley QC instructed by Mr. William Jones and Mr. Sam Keogh of Ogier for the Defendant.**
Before:	**Hon. Justice Ramsay-Hale**
Heard:	**15 October 2020**
Draft Judgment Circulated:	**16 November 2020**
Judgment Delivered:	**19 November 2020**

HEADNOTE

Companies Law (2020 Revision) section 97(1) - threshold for grant of leave to commence proceedings against company in liquidation - how discretion to grant leave to be exercised

RULING

1. This is the application by the Plaintiffs, BDO Cayman Ltd ("BDO Cayman") and BDO Trinity ("BDO Trinity"), for leave pursuant to section 97 (1) of the *Companies Law (2020 Revision)* to commence proceedings against the Defendant, Ardent Harmony Fund Inc (In Official Liquidation) ("Ardent") in which they seek, *inter alia*, a permanent injunction restraining Ardent from continuing proceedings commenced by Ardent in New York against BDO Trinity alleged to have been

instituted in breach of agreements made between the parties and damages for breach of such agreements.

2. BDO Cayman and BDO Trinity are members of BDO International, a global network of public accounting, tax consulting and business advisory firms. BDO Cayman provided audit services to Ardent pursuant to the terms of two engagement letters that provided, *inter alia*, that part of the audit work may be assigned to any affiliate of BDO Cayman. BDO Trinity assisted BDO Cayman with the provision of the audit services, including the preparation of audit reports for 2013 and 2014.

3. I do not find it necessary for the purpose of this Ruling to rehearse the facts *in extenso*. Suffice it say that Ardent suffered massive losses as a result of a fraud by third parties in which it invested. These third parties have been referred to in the application as the 'Barrick entities' for convenience. In the New York proceedings which were commenced with the leave of the Court supervising the liquidation, Ardent seeks to recover from BDO Trinity, *inter alia*, the losses sustained by it as a result of the Barrick fraud. In its complaint before the US Court, Ardent alleges that it sustained those losses because of BDO Trinity's professional and gross negligence and its fraudulent concealment of the several indicia of fraudulent conduct by the Barrick entities.

4. In this application, BDO Cayman asserts that Ardent has commenced the proceedings against BDO Trinity in New York in breach of the terms of the Engagement Letters made between BDO Cayman and Ardent for audit services and in breach of a Tolling Agreement made between Ardent, BDO Cayman and BDO Trinity which suspended the limitation period for Ardent's threatened claims against BDO Cayman or its affiliates, pending the resolution of an anti-suit injunction application by BDO Cayman concerning Argyle Funds SPC Inc. (In Official Liquidation) in Cause No. FSD 13 of 2017 (the "Argyle Proceedings") in which similar questions in issue between these parties were litigated.

5. More particularly, BDO Cayman asserts that, pursuant to a Sole Recourse clause in each of the Engagement Letters, Ardent agreed that it would not pursue a claim against any affiliate of BDO Cayman, which includes BDO Trinity, unless the claim was founded on an allegation of fraud or wilful misconduct or other liability that cannot be excluded under applicable laws.

6. If given leave pursuant to section 97, BDO proposes to rely on an expert in US law who will say that Ardent's pleaded case, as a matter of New York law, falls far short of what is required to bring the conduct complained of within the exception carved out of the Sole Recourse clause and that the suit was accordingly commenced in breach of the terms of the Engagement Letters.

7. Mr. Chapman QC invites the Court to find that this is sufficient for the Court to hold that BDO Cayman has an arguable case that it is entitled to an anti-suit injunction to restrain the New York proceedings.

8. With respect to the exercise of the Court's discretion, Mr. Chapman submits that leave should be granted as the application cannot be dealt with in the ordinary course of the winding up proceedings and that neither the New York Court nor the arbitral tribunal has the jurisdiction to grant the relief sought. Further and, in any event, BDO Cayman is not a party to the New York Proceedings whereas all the parties are bound by the Cayman arbitration and exclusive jurisdiction clauses in the Engagement Letters, including as to their effect on the New York Proceedings.

9. Ms. Stanley QC says in response that Ardent's New York attorney disputes the suggestion that the pleadings are in any way inadequate and that no admissible evidence has been produced by BDO Cayman to the contrary.

10. Ms. Stanley says further that if leave is granted, expert evidence will be required to resolve the issue of the adequacy of the pleadings. The joint official liquidators of Ardent ("the JOLs") estimate the costs of litigating the issue would require them to call expert evidence, at a cost between US$75,000 and US$150,000 to secure expert reports on New York law and a total estimate of US$200,000 if further work is required in liaising with BDO Cayman's expert to narrow issues, preparing any supplemental reports and attending and giving evidence at a hearing. Ms. Stanley submits further that the pleading point has already been taken by BDO Trinity in the New York proceedings and remains, if not a live issue, an issue that BDO Trinity can raise again and seek summary dismissal of the claim. For that reason, she submits the Court should not grant leave.

11. Mr. Chapman in his reply says Ms. Stanley's suggestion is misconceived because the US Court is not seized of the issues to which this summons gives rise and that the New York proceedings (if continued) will determine the substantive merits of the claims advanced by Ardent but not the question of whether those claims, as a matter of Cayman law, fall within the carve-out of the Sole Recourse clause.

12. Both parties agree on the principles to be applied by the Court in determining an application for leave to commence proceedings against a company in liquidation pursuant to section 97 (1) of the *Companies Law,* which provides:

> *"(1) When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose."*

13. The rationale for requiring leave to bring proceedings is succinctly set out in *Vagrand v Fielding*[1], a decision of the Full Court of the Federal Court of Australia on which BDO relied in this application, where the Court said this:

> *"The reason for imposing a requirement of leave, in the case of litigation against companies in liquidation, was explained a century ago by Manning J, of the New South Wales Supreme Court, in Thompson v Mulgoa Irrigation Co Ltd. (1893) 4 BC (NSW) 33:*
>
> > *'All that s 140 means is that a company in liquidation is not to be harassed and its assets wasted by unnecessary litigation, and the leave of the Court is therefore required as a safeguard. Before any action can be brought or continued against a company, the court must investigate the intended litigation. '"*

14. The unfettered discretion to grant leave provides the Court with a *"free hand to do what is right and fair according to the circumstances of each case"*: *Re Aro Co Ltd* [1980] Ch 196, 209, citing Vaisey J. in *In re Grosvenor Metal Co. Ltd*. [1950] Ch. 63, 65 and applied by Smellie CJ in *AHAB v Saad* [2010] CILR 1 553.

15. In *AHAB*, Smellie CJ also observed that,

> *"71…It must follow that I may not take a singular view of what may be "right and fair" from the point of view only of AHAB in the case. I accept, as Pumfrey J. observed in Enron Metals & Commodity Ltd. v. HIH Casualty & Gen. Ins. Ltd. (11) ([2005] EWHC 485 (Ch), at para. 4) that—*
>
> > *'…fairness in this context is fairness in the context of the provisional liquidation or liquidation as a whole, and the ascertainment of what is fair necessarily involves a consideration of the interests of the creditors as a whole and of the capacity of the provisional liquidators or liquidators to deal with the burden of the proposed litigation.'*
>
> *72. Consideration must be given to what conditions may be imposed upon lifting the stay to mitigate that burden in determining whether the stay should be lifted. The conditions which may appropriately be placed upon the lifting of the stay will also be determined according to the circumstances..."*

16. In the Cayman Islands case of *In the Matter of Wimbledon Fund Spc (In Official Liquidation)* Grand Court Unreported, 8 January 2019, Parker J held:

[1] 113 ALR 128

"66. The threshold question is whether the applicant for leave has shown that he has a claim worth entertaining. This test has been expressed in a number of ways. The rationale is that the company in liquidation and its liquidators should not be burdened by defending a futile claim.

"67. Mervyn Davies J expressed the test as "an arguable case" in Re Exchange Securities [1983] BCLC 186..."

17. Parker J went on to hold:

"71. It is only if the Court satisfied that the threshold test is met that it moves to consider whether to grant leave … and in this regard the Court's discretion is broad and unfettered."

18. In undertaking this initial threshold inquiry, the Court *"is not required to investigate the merits of the underlying dispute, beyond satisfying itself that there is a genuine arguable claim*": see *Cosco Bulk Carrier Co Ltd. v Armada Shipping SA* [2011] EWHC 216 Ch, para [48].

19. One of the factors to be taken into account is whether the relief sought can be obtained in the liquidation. In *Gardner v Lemma Europe Insurance* [2016] EWCA Civ 484 at [2]: Patten LJ observed that,

"[t]he imposition of an automatic stay is designed to avoid the unnecessary expenditure of assets otherwise available for distribution amongst creditors and to support the replacement of a creditor's right to establish a claim by judgment in an action with a right to lodge a proof of debt...Consistently with this, leave to commence proceedings will only be granted by the court when it is right and fair to do so in all the circumstances and is unlikely to be granted where the issue in the action could be dealt with as conveniently in the liquidation as in other proceedings: see Re Exchange Securities & Commodities Limited [1983] BCLC 186 at 196..."

20. As the injunctive relief sought by BDO Cayman is only available in this Court, Mr. Chapman relies on the dicta from the judgment in *Vagrand* that:

"We do not suggest that, in a case where the desired relief is otherwise unavailable, an applicant is automatically entitled to leave … The question of leave is always a matter of discretion. But the circumstance that relief is not otherwise available to an applicant must always be a significant factor in favour of leave."

21. Ms. Stanley for Ardent cautions that the fact that relief would not be available, while a factor, should not be elevated to a dominant factor. Her submission is supported by the treatment of *Vagrand* by the authors of the Australian textbook, Law of Company Liquidation, McPherson & Keay[2] who treat the case as deciding no more than that the unavailability of injunctive relief except through a successful application to the court, is a factor to be taken into account.

22. Ms. Stanley submits that the question, in the end, is what is fair using the formulation of Pumfrey J in *Enron* relied on by the Chief Justice in *AHAB*.[3]

23. Referring to *Lemma Europe*, which was concerned with a dispute as to the terms of an insurance policy which, under the policy, was subject to arbitration in London, Ms. Stanley makes the point that the case exemplifies that section 97 may override contractual rights. She relies in particular on the observation of Patten LJ who stated at para 15 of the judgment that,

> *"the need to preserve the estate for the benefit of the creditors outweighs the contractual right of the insured in this case to have his claim determined in England."*

24. The principles to be extracted from the case law governing section 97 leave are that:

(1) The applicant for leave must first establish an arguable case to be litigated;

(2) If it establishes an arguable case, the Court then has to consider whether it would be fair, in the context of the liquidation as a whole, for the JOLs to have to deal with the burden of that litigation. The Court's discretion is wide and unfettered - there is no presumption in favour of or against giving leave - and each case turns on its own facts;

(3) In deciding what would be fair, the Court can give s. 97 leave subject to conditions subject to a consideration of what would be fair, in the context of the liquidation as a whole.

25. I do not propose to consider at any length Mr. Chapman's further submissions that in the instant case the Plaintiffs ought not to be subject to the statutory moratorium at all as the proceedings are essentially defensive, nor the authorities he relies on to support that contention, in the circumstances where BDO Cayman is not a party to the New York proceedings and is not appealing a judgment in favour of the liquidators (*Humber v John Griffiths Cycle*[4]), making an application for security for costs as a defendant in proceedings instituted by the company in liquidation (*BPM v*

[2] At page 393 and footnote 650

[3] Supra para 13

[4] (1901) 85 Lt 141

HPM[5]) or bringing a counterclaim in a suit brought by the company in liquidation (*Langley Construction v Wells*[6]) or seeking costs against the company (*Cook v Mortgage Debenture Ltd*[7]*).*

26. Rather, BDO has launched originating proceedings against Ardent seeking adverse orders against the company, and patently requires leave.

27. The question for the Court is whether BDO Cayman has met the threshold and shown an arguable case that the pleaded case of wilful negligence and fraudulent concealment against BDO Trinity does not fall within the carve out of the letter agreement and is a breach of the Sole Recourse clause and, if so, is it right and fair in all the circumstances to grant BDO Cayman leave to commence the proceedings to restrain the alleged breach by injuncting Ardent from pursuing its claim against BDO Trinity for damages.

28. I think perhaps the best place to start is the Court of Appeal decision in the Argyle Proceedings on which the Tolling Agreement, to which I will turn next, pended. Argyle was described by Ms. Stanley as Ardent's sister fund and was similarly a victim of fraud by the Barrick entities. BDO Cayman was its statutory auditor and the agreements between BDO Cayman and Argyle were in similar terms, including the Sole Recourse clause. The bulk of the work done for Argyle was, as in Ardent's case, carried out by other BDO affiliates. Argyle instituted proceedings in New York against BDO Cayman and BDO Trinity and other affiliated entities in which it made similar allegations of gross negligence and fraudulent concealment. Parker J granted an anti-suit injunction restraining Argyle from continuing the New York proceedings.

29. The learned Judge's decision was, in part, reversed on appeal. No appeal was brought against the learned Judge's decision to injunct Argyle from continuing the New York proceedings brought against BDO Cayman. However, the Court of Appeal held that claims against the BDO affiliates falling within the carve-out were not subject either to arbitration or to the exclusive jurisdiction clause in the agreements made between BDO Cayman and Argyle.

30. The Court of Appeal described Argyle's proceedings, so far as is relevant to this application, as follows:

> *"8. In the New York proceedings, Argyle claims compensatory damages of US$ 86,416,916.21 and punitive damages of not less than US$260 million on the basis that the New York Defendants ought to have but did not alert Argyle in the course of each of the relevant four audits that Argyle was or might be the victim of the Barrick and NSF frauds. Argyle pleads four causes of action…* ***The***

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[5] (1996) 14 ACLC 857

[6] [1969] 1 WLR 503

[7] [2016] EWCA Civ 103, [2016] 1 WLR 3048

> ***first cause of action (paras 221-234 of the Amended Complaint) pleads professional and gross negligence*** *alleging a tortious failure to exercise ordinary and reasonable skill in a way that grossly deviated from the degree of care commonly possessed and exercised by auditors in performance of their duties* ***to such an egregious extent as to render the New York Defendants' conduct wilful and/or intentional****.* ***The second cause of action (paras 235 – 242) pleads fraudulent conscious concealment of "red flags"*** *signifying the indicia of fraud in order to avoid the loss of fees collectable from Argyle…"* (emphasis mine)

31. As I have noted before, similar allegations of professional and gross negligence and fraudulent concealment have been made by Ardent in their proceedings against BDO Trinity and damages and punitive damages sought.

32. The Court of Appeal then identified the issue before the Court to be whether the pleaded allegations fell within the carve-out in the Sole Recourse clause and said this:

> *"36. It is regrettably rather unclear whether the judge held that the claims against the Affiliates in the New York proceedings did fall within the carve-out…*
> *"37. In my opinion, if the judge did indeed hold that the claims of wilful misconduct and fraudulent conscious concealment set out in paragraphs 221 – 242 of the Amended Complaint were not covered by the carve-out, he was in error. I say this because it is manifest that these claims are founded on an allegation of fraud or wilful misconduct within the wording of the carve-out. They may not comply with the pleading requirements in England and the Cayman Islands, but Mr. Laffey deposed in his affidavit that they complied with New York's pleading requirements and there was no admissible evidence to the contrary."*

33. The anti-suit injunction granted by the learned Judge was set aside as the Court of Appeal found that:

> "*the intended effect of the carve-out was that Argyle should be free to bring claims that fall within the carve-out in judicial rather than arbitration proceedings"*

and also that the exclusive jurisdiction clause did not apply to such judicial claims: see para 52.

34. I do not understand Mr. Chapman's submission that, although the Court of Appeal ruled that claims pleaded in fraud could in principle fall within the carve-out, the Court "*did not consider in terms, whether claims in professional/gross negligence as are pleaded here fell within the carve-*

out."[8] As I read the judgment, the Court did consider the claim in professional and gross negligence made at paragraphs 221-234 of Argyle's New York complaint to be a claim of wilful misconduct falling within the carve-out, whatever the deficiencies in the pleadings might be as a matter of Cayman law. As Ardent makes similar allegations of professional and gross negligence against BDO Trinity, I see no reason for this Court to give the question any new consideration.

35. In its attempt to get around the effect of the decision of the Court of Appeal in the Argyle Proceedings, BDO Cayman has plainly seized on the Court's observation that the opinion of Argyle's attorney was uncontradicted by now proffering, in these proceedings, expert evidence on New York law to the contrary.

36. In my view, the mere fact that BDO Cayman has a lawyer who will say that Ardent's claims do not, in fact, comply with New York pleading requirements, does not mean they have a case which is 'worth entertaining'. Even if I were wrong, and the fact that there would be dueling opinions on New York law is a basis for holding BDO Cayman has an arguable case that the pleadings are inadequate, then I would also hold that the inadequacy of the pleadings has already been raised in the New York proceedings by BDO Trinity, that the New York Court is best suited to determine a question of New York law and that I should not grant leave.

37. I agree with Ms. Stanley that it would not be either right or fair to Ardent's creditors if the Court were to lift the statutory stay and require the JOLs to deal with a challenge to the adequacy of the pleadings of the New York complaint on two fronts. The costs of so doing would be an undue burden on the liquidation estate given Ardent's limited funding.

38. I, therefore, dismiss BDO Cayman's application for leave to commence proceedings against Ardent for an injunction to restrain them from continuing the New York proceedings.

39. I now turn to consider whether BDO Cayman and BDO Trinity (together "BDO") should be granted section 97 leave to issue proceedings to injunct Ardent from continuing the New York proceedings as being commenced in breach of the Tolling Agreement.

40. The Tolling Agreement recites, *inter alia*;

> *WHEREAS, Ardent believes that it has actionable claims against BDO for, inter alia, negligence, gross, negligence, fraudulent concealment and unjust enrichment relating to all or part of the time period January 1, 2013 to December 31, 2016 ("Ardent's Potential Claims")*
>
> *…*

[8] Plaintiffs' Skelton Argument at para 23

WHEREAS, an antisuit injunction proceeding between BDO Cayman and non-party Argyle Funds SPC, Inc is pending before the Grand Court of the Cayman Islands, Financial Services Division, captioned In the Matter of the Grand Court Law (2015) Revision) and In the Matter of an Application by BDO Cayman Ltd. Concerning Argyle Funds SPC Inc (In Official Liquidation), and bearing Cause No. FSD 163 of 2017, concerning claims brought by Argyle against BDO..."]

WHEREAS, the Parties wish to enter into an agreement tolling any and all statutes of limitation with respect to Ardent's Potential Claims;"

And provides at paragraph 1:

> *"1. Any and all statutory, contractual or other periods of limitation or repose, and any other defense (sic), legal or equitable, which is based, in whole or upon the passage of time, is tolled as of the Tolling Date, with respect to Ardent's Potential Claims (the "Tolled Claims"). No such period of limitation or repose or other defense based in whole or in part, on the passage of time for the Tolling Date, through the expiration of the tolling period under this Agreement, will be interposed, asserted, pled (sic) or raised in any fashion or in any forum whatsoever by BDO against Ardent with respect to the Tolled Claims is hereby waived."*

41. The agreement is to "*toll*" or stop the running of all and any limitation periods for Ardent's intended claim against the BDO entities who are parties to the agreement, from the Tolling Date to the date of expiry of the agreement. As I understand it, any period of limitation or repose which remained at the Tolling Date would start to run on the date the agreement expired.

42. It was plainly considered by the parties that the litigation Ardent proposed to bring against the BDO entities in New York might be avoided if they were to wait for the Argyle Proceedings to be resolved. The purpose of the agreement was to toll all and any limitation periods in order to preserve Ardent's right to pursue its intended claims. The original agreement provided that the tolling period would accrue from the Tolling Date until 30 days after final resolution of the Argyle Proceedings. This period was extended on three occasions, the final extension providing for the agreement to end 14 days after the final resolution of any appeal in the Argyle Proceedings.

43. BDO Cayman did not pursue its appeal to the Privy Council from the decision of the Court of Appeal dismissing the anti-suit injunction granted by the Grand Court against Argyle. The parties signed a Consent Order that the Appeal be dismissed on 4 November 2019. BDO Cayman thereafter advised the Registry of the Privy Council that it wished to withdraw its Notice of Appeal. The Registrar advised in turn that a formal application to withdraw the appeal had to be made. This application was made on 7 November 2019 and, on 25 November 2019, the Registrar dismissed the appeal on the terms agreed by the parties.

44. Ardent commenced proceedings against BDO Trinity in New York on 18 November 2019.

45. Mr. Chapman submits that there is no question that this was a clear breach of the Tolling Agreement and that BDO is entitled to strictly enforce the terms of their agreement and ask this Court to restrain the New York proceedings.

46. Ms. Stanley concedes that Ardent breached the Tolling Agreement but says that the agreement was not to commence the proceedings before a particular day, not that there should be no proceedings or that the proceedings should not continue. She submits further that, in the circumstances where BDO has not suffered any loss by reason of the proceedings being commenced 5 days before the date of expiry of the agreement, BDO should not have leave to commence proceedings seeking damages against Ardent.

47. In answer to the Court, Mr. Chapman said that BDO has lost the limitation defence that would otherwise have been otherwise open to them and are now put to the costs of defending the suit, but in my judgment, BDO has lost nothing. BDO Cayman is not a defendant to the New York proceedings and, were it not for the Tolling Agreement, Ardent would have filed their suit in 2017 to preserve their position and BDO Trinity would be defending it.

48. The breach was a technical breach. The fact is the Argyle proceedings were effectively at an end the moment BDO Cayman agreed with Argyle on terms not to pursue its appeal to the Privy Council, whatever formalities remained. The purpose of the Tolling Agreement was to stop Ardent from commencing proceedings until the Argyle Proceedings were concluded, and Ardent's agreement was secured on the basis that all periods of limitation and repose would be suspended. The purpose of the agreement was achieved. For that reason I hold BDO has not established that it has a case worth entertaining. If I were wrong in so holding, and the mere fact of the breach meets the threshold of "*an arguable case*," then I would refuse the application on the ground that BDO has suffered no loss.

49. BDO's application for leave is refused. I will hear the parties on the form of Order and on costs.

50. It only remains for me to thank Counsel for their patience.

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Hon Mme. Justice Ramsay-Hale
JUDGE OF THE GRAND COURT