In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: Nos. 490, 492 and 493 & 2019: No. 7

IN THE MATTER OF GROSVENOR BALANCED GROWTH FUND LIMITED (IN LIQUIDATION)

IN THE MATTER OF GROSVENOR PRIVATE RESERVE FUND LIMITED (IN LIQUIDATION)

IN THE MATTER OF GROSVENOR PRIVATE RESERVE FUND (CLASS B) LIMITED (IN LIQUIDATION)

IN THE MATTER OF GROSVENOR INVESTMENT MANAGEMENT LTD. (IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

IRVING PICARD
(Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L Madoff Investment Securities LLC And Bernard L Madoff)

Appellant

and

(1) MICHAEL MORRISON
(2) CHARLES THRESH
(Acting in their capacities as Joint Liquidators of Grosvenor Balanced Growth Fund Limited (In Liquidation) Grosvenor Private Reserve Fund Limited (In Liquidation) Grosvenor Private Reserve Fund (Class B) Limited (In Liquidation) and Grosvenor Investment Management Limited (In Liquidation))

Respondents

DECISION AND ORDER

Date of Hearing: 15 and 16 October 2024
Date of Decision: 1 November 2024

Appearances: **Stephen Robins KC, Mark Chudleigh and Eric Penz of Kennedys for the Appellants**
Tom Smith KC, Rhys Williams of Conyers Dill & Pearman Limited for the Respondents

DECISION of Martin, J

Summary and Disposition

1. This is the decision relating to an application made by Irving Picard in his capacity as Trustee of the SIPA Liquidation of Bernard L Madoff Investment Securities LLC (hereafter "BLMIS") and Bernard Madoff (to whom I shall refer as "the Trustee") for a stay of his appeals ("the Appeals") against the rejections of the respective proofs of debt[1] (the "Proofs of Debt") the Trustee has lodged in the liquidations (the "Liquidations") of the following companies:

    a. Grosvenor Balanced Growth Fund Limited (in Liquidation)[2]

    b. Grosvenor Private Reserve Fund Limited (In Liquidation)[3]

    c. Grosvenor Private Fund Reserve Fund (Class B) Limited (In Liquidation)[4]

    d. Grosvenor Investment Management Limited (In Liquidation)[5] (hereafter referred to as "the Grosvenor companies" or "the Grosvenor Defendants")[6].

2. The Respondents to the applications for a stay of the Appeals are the Permanent Joint Liquidators of each of the Grosvenor companies who were appointed by Order of this Court, first as Provisional Liquidators on 15 January 2016[7] and then as Permanent Liquidators on 7 March 2018[8]. I shall refer to them as "the Liquidators".

---

[1] The respective proofs of debt are produced in Hearing Bundle 1. The document references in this judgment will be to the relevant hearing bundle and the tab number and the page number as follows eg: HB1/1/1 is Hearing Bundle 1, tab 1, page 1.
[2] HB1/18/297 in the amount of US$18,921,032
[3] HB1/18/307 in the amount of US$15,282,372
[4] HB1/18/317 in the amount of US$1,914,083.62
[5] HB1/20/328 in the amount of US$36,264293.76
[6] For consistency, I have used the term "Grosvenor companies" in the context of the liquidation proceedings, and the term "Grosvenor Defendants" when referring to matters that relate to or occurred in the Adversary Proceedings in which those entities are defined as "the Grosvenor Defendants".
[7] HB1/10/243
[8] HB1/11/253

3. By a letter dated 19 January 2024 the Liquidators rejected each of the Trustee's Proofs of Debt, the details of which will be considered below[9].

4. By Notices of Appeal dated 7 February 2024 the Trustee appealed against each of those rejections of his Proofs of Debt[10].

5. For the reasons also more fully set out below, by this application the Trustee wishes to stay the progress of those Appeals pending the outcome of a "final and unappealable" decision of the US Court in relation to certain proceedings that the Trustee has brought against the Grosvenor companies (amongst many other defendants) in the United States Bankruptcy Court for the Southern District of New York No. 12-01021 (hereafter referred to as "the Adversary Proceedings"[11]).

6. The Liquidators opposed the Trustee's applications for a stay of the Appeals. At the conclusion of the hearing the Court reserved its decision.

7. For the reasons set out below, the Court has decided to refuse the Trustee's applications for a stay of the Appeals.

Background

8. The long history of the Madoff frauds and the Trustee's actions in the Securities and Investor Protection Act (SIPA) Liquidation of BLMIS is sufficiently well known that it does not need to be set out in any great detail here. It will suffice to say that following the disclosure of the frauds Mr Madoff committed through the largest Ponzi Scheme in history in December 2008, the Trustee has been engaged in the mammoth task of recovering the property of BLMIS in order to repay the investors whose assets were used to fund the payment of fraudulent "profits" to other investors.

9. Many of these investors were within the United States over whom the US Courts have jurisdiction, and who are subject to the US Court's powers to adjust the rights of investors who have been the victims of securities fraud under the SIPA and recover "customer property" for *pro rata* distribution between the creditors of the SIPA Liquidation.

10. However, many investors were mutual fund investment companies and "feeder funds" that were incorporated and operated outside the jurisdiction of the United States. One such feeder fund was Fairfield Sentry Ltd, incorporated in the British Virgin Islands, to which BLMIS made payments in excess of US$3 Billion, for which judgment in was entered in July 2011 in the US Bankruptcy Court.

---

[9] HB1/21/349
[10] HB1/22/365-76
[11] HB2/1/2

11. The Trustee instituted the Adversary Proceedings[12] against the Grosvenor Companies on 1 December 2012 alleging that the Grosvenor Companies had made investments in Fairfield Sentry Ltd which were directed for onward investment in BLMIS, and that because (over time) the Grosvenor Companies made redemptions of those investments, the proceeds that the Grosvenor Companies received from Fairfield Sentry Ltd were "customer property" which represented the proceeds of the Madoff frauds, and accordingly claimed recovery of those monies from the relevant Grosvenor company that had received the respective redemption payments.

12. The total amount claimed by the Trustee against the Grosvenor Defendants in the Adversary Proceeding amounts to US$36,506,571.00[13].

13. The Grosvenor Defendants entered appearances in the Adversary Proceedings and took preliminary steps in those proceedings, the effect of which is in very much in dispute. I shall come back to this point in more detail below. At this stage, it is sufficient to say that after entering an appearance, the Grosvenor Defendants joined in a motion to move the Adversary Proceedings from the Bankruptcy Court to the District Court and filed a corporate disclosure statement. Subsequently, the Grosvenor Defendants joined in an application to dismiss the Adversary Proceeding on the grounds that the Bankruptcy Court did not have extra-territorial jurisdiction over the Grosvenor Defendants, opposed the Trustee's application to amend his claim, and filed a memorandum of law in support of their opposition. The application to dismiss the Adversary Proceedings succeeded at first instance.

14. In January 2016, the Grosvenor companies went into provisional liquidation in Bermuda, and the Liquidators were appointed as Joint Provisional Liquidators. In early 2017 the Liquidators, acting in their capacities as officeholders over the Grosvenor Defendants, joined in the Joint Request to seek permission to appeal directly to the United States Court of Appeals for the Second Circuit. The Grosvenor Defendants were represented at the appeal, which was ultimately successful, and the extra-territoriality objection (that had succeeded at first instance) was overturned. It is not necessary for present purposes to address the details, but the question turned on whether the US Court had jurisdiction over parties who were outside the US who had received property from

[12] The description of the Adversary Proceedings is given in a summary form and is intended to provide a background understanding of the events that led up to these proceedings. The summary is not intended to be an accurate and exhaustive summary of every step in those proceedings but is intended to put the history of the events into a relevant context. For reasons that are explained later, the exact details do not matter for the purposes of this decision.

[13] The total claimed in the Adversary Proceedings is aggregated against all the Grosvenor Defendants, but the Proofs of Debt have been separated into claims against each one of them. The claim against Grosvenor Investment Management Ltd (in Liquidation) appears to reflect the total of all the claims against the other Grosvenor Defendants. The total amount the Trustee is seeking to recover appears to be the US$36 million figure rather than the total of all the proofs of Debt added together, but this was not explained. However, following the filing of two Stipulation and Orders filed in the Bankruptcy Court in 2022 the Trustee's claim against the Grosvenor Defendants in the Adversary Proceedings has been reduced to US$24,815,102. Exactly how this figure relates to the figures in the Proofs of Debt was also not explained. However, the differences in these figures do not matter for present purposes, because the Court is not yet concerned with the substance of the Trustee's appeals against the rejections of the Proofs of Debt.

a party who was subject to the US Court's jurisdiction, ie a subsequent transferee of the property over which the Trustee had a claim in the US.

15. In March 2018, the Liquidators became the permanent Joint Liquidators of the Grosvenor companies.

16. Following the US Court of Appeals' decision, in 2019 the Liquidators sought leave to appeal to the US Supreme Court against the Second Circuit Court of Appeals' decision, but leave was ultimately refused. The Liquidators made a second motion to dismiss the Adversary Proceeding in April 2022. Following this, the Liquidators also filed an Answer to the Trustee's Complaint and entered into a case management plan for the conduct of the Adversary Proceedings.

17. The effect of the steps that the Liquidators took in the Adversary Proceedings between 2016 and 2022 is hotly disputed.

The Call for Proofs of Debt in the Bermuda Liquidations

18. Although some recoveries had been made by the Liquidators from Fairfield Sentry Ltd in 2017 and 2018, as a result of the obligation to repay the funding they had received from shareholders and the payment of other expenses, as well as to make provision for the likely ongoing costs of the liquidations, the Liquidators did not make any distributions to the creditors of the Grosvenor companies.

19. However, at about the same time as making the second motion to dismiss in the Adversary Proceeding, in March 2022 the Liquidators made recoveries of approximately US$7.3 million from an investment held in a Cayman entity, and they expect to receive a further distribution from this investment later in 2024.[14]

20. As a result, the Liquidators decided it was appropriate to call for proofs of debt from creditors and to make an interim distribution to creditors. Accordingly, notice to all creditors who wished to participate in the proposed first dividend in each of the Grosvenor companies was given in March 2023, requiring them to file their proofs of debt by 28 April 2023[15].

The Proofs of Debt

21. The Trustee duly filed Proofs of Debt on 26 May 2023 (after having received an extension of time to do so) in each of the liquidations of the respective Grosvenor companies. It is relevant to note that each proof of debt filed by the Trustee was in similar

[14] Morrison 1 at HB1/5/93-4
[15] HB1/17/291-6

terms (except for the respective amounts claimed in each). Each proof states that the relevant Grosvenor company

> *"**was**, at the date of the winding-up order made against it, viz., December 11 2015, **and still is**, justly and truly indebted to the above-named creditor [the Trustee] in the amount of the Debt, being the sum of [amount]...as summarised in the attached Particulars of the Madoff Trustee's Proof of Debt in respect of [company]."*[16]

22. The Particulars[17] annexed to the proof of debt then recite the details of the Adversary Proceeding in which the Trustee makes its claims against the Grosvenor Defendants and attaches a copy of the Complaint. The Trustee then explains that he is a court appointed fiduciary charged with recovering money that was stolen as part of Mr Madoff's fraud.

23. It is stated in the Particulars that the Grosvenor Defendants were investors in Fairfield Sentry Ltd which had a direct customer account with BLMIS. The Trustee states that the Trustee's Complaint in the Adversary Proceedings seeks to recover fraudulent transfers that were made to Fairfield Sentry Ltd by BLMIS that were then paid by Fairfield Sentry Ltd to the Grosvenor Defendants. It is also stated that the Grosvenor Defendants have submitted to the jurisdiction of the New York Bankruptcy Court and states that the Trustee has plausibly pleaded that the Grosvenor Defendants have received "customer property", and the Adversary Proceeding will be tried in a US Court of competent jurisdiction.

24. Although it is not expressly stated, the Particulars are based upon the expectation that following the trial, the Trustee will obtain a judgment for the amount of the Proof of Debt.

The rejection of the Proofs of Debt

25. By a letter dated 19 January 2024, the Liquidators rejected each of the trustee's four Proofs of Debt all on the same grounds[18]. The substance of the rejection was that, assuming the Grosvenor companies had received any transfers of BLMIS property at all, the Liquidators have considered the defences that are available to the Grosvenor companies, and have concluded that it is more likely than not that the Grosvenor companies acted in good faith when they redeemed their respective investments in Fairfield Sentry Ltd. The Liquidators explained their reasoning:

    a. there was no evidence on which it could be asserted that the Grosvenor companies were aware or ought to have been aware of the fraud at BLMIS;

[16] My own emphasis is added: the relevance of these words is that the proof is asserting a present entitlement to the sum claimed: this will be relevant in relation to the submissions later made by the Trustee's counsel.
[17] See for example HB1/18/300
[18] HB1/21/349-51

b. there was positive evidence that the Grosvenor companies acted in good faith; and

c. the proceeds of the redemptions were onward invested or repaid to investors.

The Notices of Appeal against rejection

26. The Trustee filed Notices of Appeal against the rejection of his Proofs of Debt in each of the Grosvenor companies. The Notices of Appeal are all in the same form and they say (so far as is relevant for present purposes) [19]:

> *"...As the Liquidators are well aware, and is self evident from the Trustee's Complaint, the Trustee's Claims are proprietary[20] claims whereby the Trustee seeks recovery from the Company of the proceeds of the Ponzi scheme orchestrated by Bernard L Madoff that have been unlawfully transferred to and retained by the Company. Therefore, the Trustee maintains that the moneys unlawfully transferred to the Company were and remain the exclusive property of the Madoff Estate and do not form any part of the assets of the Company that may be applied for the purposes of paying a dividend to the Company's creditors or for any other purpose, including the payment of the costs of the Liquidation Proceedings.*
>
> *...Accordingly, and notwithstanding that the Trustee's claims are, self evidently and by their very nature, proprietary, it is necessary for the Trustee to appeal the Liquidators' Rejection so as to ensure that the Trustee's position is fully protected* ***("Appeal")****.*
> *Please note that it is the Trustee's intention, subject to the filing of the Appeal, to seek a stay pending the outcome of the US Proceedings, the US Courts being the obvious and appropriate forum for determining the Trustee's claims. As the Company, through the Liquidators, has submitted to the jurisdiction of the US Court, we consider it likely that such a stay would be granted if one cannot be agreed between the parties."*

The Trustee's applications for a stay of the Appeals

27. No agreement was forthcoming to the grant of a stay, and so the Trustee issued Notices of Motion for a stay of each of his appeals against the rejections of the Proofs of Debt. The Notices of Motion are each in the same form and they say[21]:

> *"TAKE NOTICE THAT the Court will be moved...*

---

[19] See for example HB1/22/3/367
[20] Underlining in the original.
[21] See for example HB1/14/264-5

1. For an order staying the Appellant's appeal pending a final and unappealable judgment in proceedings between the Appellant and [Grosvenor]....currently pending before the United States Bankruptcy Court (under court file no. 12-01021).

2. Alternatively, and without prejudice to the relief sought under paragraph i and to the Appellant's position that the claims against the Company are ***proprietary claims***[22] *ranking in priority to all creditor claims, and therefore unsuitable for adjudication under the [winding up] rules, for orders (insofar as the Appellant's claims are determined to be creditor claims).*

2.1 reversing or varying the decision in the Respondent's notice of rejection of proof of debt whereby the Respondents rejected the proof of debt lodged by the Appellant ...and
(2.2) admitting the Proof of Debt in whole, alternatively in part."

The submission to the jurisdiction of the US Court point

28. The Trustee's application was supported by the first and second affidavits[23] of Mr Dean Hunt, a senior attorney at Baker & Hostetler who is instructed by the Trustee in the Adversary Proceedings. The Liquidators also filed two affidavits[24] in opposition by Mr Morrison, one of the Liquidators. Each took opposing positions in relation to the steps that the Grosvenor Defendants had taken in the Adversary Proceedings and whether the effect of those steps was to submit the Grosvenor Defendants to the jurisdiction of the US Courts.

29. The skeleton arguments submitted in advance of the hearing also proceeded on the basis that the question of the Grosvenor Defendants' submission to the US Courts was to be a central argument that would feature in the debate over whether a stay of the Appeals should be granted. In particular, the Trustee's counsel devoted over 100 paragraphs to the point, starting at paragraph 6 with *"..a key issue between the parties is the question of whether or not the Grosvenor Defendants have submitted to the jurisdiction of the US Courts."*

30. In preparing for the hearing, I was concerned about how this Court could discharge its duties with respect to assessing the evidence on this question in the absence of an agreed statement of the position of US law on what amounts to submission to the US jurisdiction, and in the absence of expert evidence being tendered, and without cross-examination. It would have been necessary in my view to have had some basis upon which to assess the numerous statements in the evidence and the voluminous documentation that had been filed ostensibly for the purposes of demonstrating that the Grosvenor Defendants had submitted to the jurisdiction of the US Court. The approach

[22] My own emphasis added.
[23] HB1/3/16 and HB1/6/105
[24] HB1/5/83 and HB1/8/190

that the Court is supposed to take on this question was explained in **Rubin v Eurofinance SA**[25]. That approach includes the Court making an assessment of the position on submission under the foreign court's own laws, but without it being determinative of the issue (in this case) as a matter of Bermuda law. It is therefore necessary for the Court to understand what the position is under the foreign law as to what amounts to submission so that this Court can take that into account when considering what inferences to draw from all the facts. This would normally entail expert evidence or an agreed statement of the position, but in this case there was none.

31. At the outset of the hearing, I raised this with the Trustee's counsel (Mr Robins KC). He said that it was not necessary for the Court to decide the question of whether a submission had been made to the jurisdiction of the US Bankruptcy Court by the Grosvenor Defendants, but that it was enough for this Court simply to register that it was an issue between the parties. He said that the issue of submission to the US Court would be determined only at a later stage, namely after his client had obtained a judgment in the US Court and later came to enforce it here in Bermuda. This represented a significant retreat from the position that had been taken in the affidavits and the skeleton arguments filed on behalf of the Trustee.

32. The Liquidators' counsel (Mr Smith KC) said that this was not the appropriate approach and that the Court must proceed on the basis that there is no evidence before this Court that there has been a submission to the US Court either by the Liquidators or by the Grosvenor Defendants. Furthermore, he submitted that as a matter of Bermuda law, the Liquidators (and the Grosvenor Defendants) have not submitted to the jurisdiction of the US Court.

33. Mr Robins KC responded by saying that he positively did not wish the Court to make any decision on the submission to the US Court point at all.

34. I have explained this in detail because it seems to me that the Trustee's position on submission to the US Court undermines one of the most essential factors that he must establish in order to invoke the Court's discretion to grant a stay of the Appeals pending the outcome of the Adversary Proceedings successfully.

35. According to the relevant case law discussed below, in order to prevail in persuading the Court to grant a stay of the Appeals pending the outcome of the Adversary Proceedings the Trustee must (among other things) show that when the Adversary Proceedings have concluded in his favour, the Trustee will have a decision that will be binding upon the Grosvenor Defendants. Without addressing this question by some evidence (and probably only after cross-examination of expert witnesses) the Trustee has (in my judgment) fundamentally undermined his own position in relation to the application for a stay of the Appeals.

---

[25] [2013] 1 AC 236 per Lord Collins at para 161.

36. As a result, the Court is left in the position that, for the purposes of the applications for a stay of the Appeals, there is no evidence that either (i) the Grosvenor companies or (ii) the Liquidators have submitted to the jurisdiction of the US Court. Therefore, it follows that there is no evidence that any judgment that the Trustee obtains in the US Court will be binding on the Grosvenor Defendants.

37. That is not the only point in relation to submission. The Trustee's participation in the Bermuda liquidation proceedings, as well as his Appeals to this Court, and his applications for a stay of those Appeals, raises a question as to his own submission to the jurisdiction of this Court, and what effect that has on his application for a stay of the Appeals. This aspect of the matter will be considered in more detail below.

The nature of the Trustee's claims in the Bermuda Liquidations

38. As described above, in the Adversary Proceedings the Trustee's claims are proprietary in nature.

39. The Proofs of Debt that were filed in each of the Bermuda Liquidations describe the Trustee's claims in the US Proceedings and annex copies of the Complaint to each of them.

40. The Notices of Appeal that were filed after the Proofs of Debt had been rejected clearly say that the nature of the Trustee's claims are proprietary in nature, namely that the assets in the Liquidators' hands do not fall within the estate of each of the Grosvenor companies and must be returned to the Trustee as "customer property" in the SIPA liquidation of BLMIS.

41. The Notices of Motion seeking the stay of the Appeals make it plain that the primary basis of the application for the stay is that the claim is proprietary, and in the alternative that the Court should vary or reverse the Liquidators' rejections of the Proofs of Debt and admit them in whole or in part (although on what basis is not made clear).

42. It was therefore with some surprise that the Court received the submission that the Trustee's claims in the Liquidations were not proprietary but were *in personam* claims against the Grosvenor Defendants. It was submitted that because there was no property belonging to the Grosvenor Defendants in the United States, the Trustee was proceeding on the alternative ground under section 550 of US Code Title 11 which allows the Trustee to recover the property fraudulently transferred "*or, if the court so orders, the value thereof*"[26].

[26] The text is set out in the Authorities Bundle at tab 64.

43. The argument advanced by the Trustee was to the effect that the claim in the Bermuda Liquidation proceedings was "parasitic" upon the claims made in the Complaint in the Adversary Proceedings because there could be no claim in the Liquidation until the Adversary Proceedings had been concluded. It was therefore submitted that the claims in the Liquidations were contingent claims dependent on the outcome of those proceedings, and therefore the appropriate course for the Court to take was to "wait and see" what happened in those proceedings, ie to allow the Trustee's contingent claims to mature into ascertainable claims.

44. It was said that the Proof of Debt claims were therefore different to the claims made in the Adversary Proceedings. However, confusingly, Mr Hunt said in his second affidavit that the claims made by the Trustee in the Adversary Proceedings were *in personam* claims[27]. This was (he said) because the US Court would ignore the tracing rules that might be applied by the Bermuda court, and simply impose liability on the Grosvenor Defendants in the amount of the subsequent transfers using the statutory machinery under the Bankruptcy regime available in the United States[28].

45. Leaving aside the question whether the correct thing for the Court to do was to adopt a "wait and see" approach (considered below), I have difficulty with the notion that the claims are not in reality parallel claims made by the same party (ie the Trustee) against the same defendants (ie the Grosvenor companies) in two jurisdictions at the same time[29].

46. It seems perfectly obvious to me that the Trustee has made the very same claim he is making in the Adversary Proceedings in the Liquidations (he attached the Complaint as the "evidence" that supported his Proofs of Debt). Indeed, the reason that the Trustee says that the Proofs of Debt were submitted at all was to preserve the Trustee's rights in the Adversary Proceedings[30].

47. The fact that the relief sought in the Bermuda Liquidations may differ[31] (namely a claim to be admitted as an unsecured creditor in the insolvent winding up of the Grosvenor companies instead of a claim to ownership of the funds) does not alter the basis of the underlying claim. But the fact that the Trustee has surrendered his proprietary claims in the Bermuda Liquidations does have definite legal consequences for the treatment of the Trustee's claims in the Liquidation proceedings.

---

[27] See Hunt 2 paras 45-6 HB1/6/115. Mr Hunt seems to be saying that the claims were both proprietary and *in personam*, but it is not very clear. Normally one would expect them to be one or the other. It is not clear what the Trustee's position is in relation to this in the Adversary Proceedings. This appears to be a very recent development, and it was not confirmed that the Complaint will be amended to reflect this change of position.

[28] I note that the Trustee's Proofs of Debt, Notices of Appeal and the Applications for stays of the Appeals all predated Mr Hunt's second affidavit.

[29] This was the submission by the Trustee's counsel in his supplemental skeleton argument at paragraph 12.

[30] Para 60 of Hunt 1 HB1/2/29 and para 56 of Hunt 2 HB15/116 and Trustee's oral submissions.

[31] If Mr Hunt is to be understood as meaning that the claims in the Adversary Proceedings are now also exclusively *in personam* claims, then the claims in both sets of proceedings are exactly the same (see footnote 27 above).

48. The Trustee could have applied to the Bermuda court to lift the automatic stay of proceedings on the legal theory that the Trustee was entitled to assert a proprietary claim to the monies that the Liquidators had received from the Cayman investment referred to above. If the stay had been granted, the Trustee could also have applied for an interim injunction to preserve the funds until the Trustee's claims in the Adversary Proceedings had been determined in his favour[32].

49. This would have mirrored the legal claims in the Adversary Proceedings, and the Court would have been faced with a different question: namely, whether it was appropriate to allow the Trustee to assert his proprietary claims in the US so that the title to the assets held by the Liquidators could be established before the Liquidators proceeded to distribute those assets to the persons entitled to receive them in the ordinary course of the Liquidations.

50. But the Trustee has disavowed[33] the proprietary claims altogether in the Bermuda Liquidations. This means that his claims in the Bermuda Liquidations are only as an ordinary unsecured creditor, and it seems to me that the legal consequence of taking that position must also mean that the Trustee is limited to proving his claims in the normal way in the Liquidations by submitting his Proofs of Debt and being subject to the normal processes of adjudication and appeal.

51. The change of the legal basis on which the Trustee is now seeking to advance his claims is by way of *participation* in the administration of the insolvent estates of each of the Grosvenor companies *pari passu* with the other creditors entitled to distributions, as opposed to claiming that the assets available to be so divided *belong* to the Trustee exclusively as "customer property".

52. It should be recorded that the Trustee submitted that his claims would be dealt with in priority to the other claimants because the other claimants derive their entitlement in right of being former shareholders or as redemption creditors who would be subordinated to the claims of the Trustee as an ordinary general creditor.

53. That of course depends on the admission of the Trustee's contingent claims, and in what amount, in each of the Liquidations, which will be the subject of the Trustee's Appeals when they are determined by the Court in the future[34].

---

[32] I express no view on the merits of taking that course.

[33] The Trustee's strategic reasons for doing so are not relevant to the Court's assessment. It is only pertinent to note that the decision was made with the benefit of legal advice and consideration of the consequences.

[34] It is relevant to recall that the Proofs of Debt state that the debt was due at the time of the making of the winding-up Order and *"is presently still due"* at the date of the filing of the Proof of Debt[34]. This is plainly not so. The nature of the claim is entirely contingent, and inchoate. It may never come into being at all.

Trustee's submission to the jurisdiction of the Bermuda Court

54. The law is well-settled that a foreign party who submits a proof of debt in the liquidation of a company in this jurisdiction also submits (a) to the jurisdiction of the liquidator's powers in the liquidation under the Companies Act 1981 and the Companies Winding Up Rules 1982, and (b) to the jurisdiction of the Bermuda Court in the adjudication of those claims on appeal[35].

55. Moreover, the Trustee has invoked the Court's jurisdiction to grant a stay of his Appeals against the Liquidator's rejections of the Proofs of Debt.

56. It is therefore beyond doubt, in my judgment, that as a matter of Bermuda law (i) the Trustee has submitted to the jurisdiction of the Bermuda Court on appeal from the rejections of the Proofs of Debt for the purposes of the Liquidations and (ii) the decisions of the Bermuda Courts on the admission or rejection (in whole or in part) of the Trustee's Proofs of Debt will be binding upon him both as a matter of (a) Bermuda law and (b) the private international law of obligations[36].

The Trustee's application to stay of the Bermuda Appeals against the rejections of the Proofs of Debt

57. I turn now to the basis on which the Trustee has sought to persuade the Court to grant a stay of his Appeals against rejection of the Proofs of Debt in the Liquidations. I will not rehearse exhaustively all of the submissions that were made but I will summarise the main points as briefly as I can. This should not be taken as an indication that I have not considered each of the submissions (and all the authorities referred to in support thereof) carefully and completely. There was quite a lot of cross-referencing between each of the arguments, but I have separated the main "themes"[37].

Wait and see

58. The first main ground of the Trustee's application was founded on the submission that the Trustee's contingent claim had to be allowed to mature into an ascertained claim represented by an *in personam* judgment of the US Bankruptcy Court, which would then be capable of being admitted in the Bermuda Liquidations[38]. This was it was said would

---

[35] Per Lord Sumption JSC in **Stichting Shell Pensioenfonds v Krys** [2015] AC616 at para 31 *"By submitting a proof the creditor obtains an immediate benefit consisting in the right to have his claim considered by the liquidator and ultimately by the court according to its merits and satisfied according to the rules of distribution if it is admitted...he has submitted to the statutory scheme for the distribution of those assets pari passu in satisfaction of his claim and those of other claimants."* See also **Bundeszentralamt Fur Stuern v Heis** [2019] EWHC 705 (Ch) per Hildyard J at para 102.

[36] See *Dicey, Morris & Collins on the Conflict of Laws* (16 Ed) Rule 47 at para 14-073.

[37] See paragraphs 142 to 164 of the Trustee's main skeleton argument.

[38] It is not explained how the revised amount of US$24 million now claimed in the Adversary Proceedings is broken down between the various liquidations, but it is assumed for present purposes that this will be possible.

avoid the cost and complication of valuing the contingency in the Liquidations, because the Liquidators could apply hindsight. This was the "wait and see" ground.

Comparative speed

59. In conjunction with the "wait and see" submission, it was said that the Adversary Proceedings had been on foot since 2012 and that Discovery and evidence would be concluded by the end of 2025 so that a trial in 2026 was likely. It was said that this did not represent a long delay, and that in comparison to the speed at which the Trustee's Appeals would likely progress, the Adversary Proceedings would be faster. It was said that the Court could then know with certainty what the value of the Trustee's claim was. It was said that this would avoid this Court having to undergo the difficult and lengthy process of trying to value the contingency, based on an assessment of the likelihood of success, the strengths and weaknesses of the Trustee's case, based on an evaluation of experts on US law, and cross examination of experts. It was said that full pleadings and extensive discovery would be required of the type that would normally be seen in commercial litigation. In the end, it was said that it would take just as long (if not longer) to achieve a result in the Bermuda Court than it would just to allow the Adversary Proceedings to run their course.

Risk of conflicting judgments

60. The second ground was related to the first, in that it was said that it would be obviously unsatisfactory for the Bermuda Court to have to try issues of complex and uncertain points of US law based on expert evidence, and it would be far preferable to allow the US Court to make the determination of the position on its own laws. The prospect of the Bermuda Court engaging in the exercise ran an obvious risk of conflicting judgments.

Duplication of Costs

61. The third ground was that because the Adversary Proceeding would continue unabated in any event (the same claims are being asserted against 50 other defendants) it was said there would necessarily be a duplication of costs. It was said that therefore there would be duplication of discovery, evidence, witnesses and arguments in two jurisdictions simultaneously. It was also said that the Bermuda Appeals would necessarily be more expensive because of the additional costs of US law experts, which would not be required if the matter proceeded in the US alone.

Centralisation of claims in the Adversary Proceedings

62. Lastly, it was said that it was likely to be conducive to judicial economy and efficiency to allow all the claims that were based on the same theory of liability to proceed to conclusion in the Adversary Proceedings.

The Liquidators' position on the stay applications

63. Against this the Liquidators submitted (again here I summarise the main points) that the Appeal process in the Liquidations is intended to be a summary process, allowing for special directions to be made where necessary for the admission of evidence of foreign law if need be, and giving disclosure to the extent it is required.

64. In particular, the Liquidators said that they would give disclosure of the records of payment so that the Trustee could review the tracing exercise the Liquidators had undertaken to determine the sources of the receipts by each of the Grosvenor companies[39].

65. However, it was submitted that there was nothing unusual in the Court adjudicating on rival claims based on foreign law, and valuing the contingent claims made by the Trustee.

66. It was submitted that, once engaged, the process under the Companies Winding-Up Rules is mandatory[40], and the Liquidators are obliged to proceed with the adjudication of claims and that there is in law no room to adopt a "wait and see" approach with the benefit of hindsight. This is the regime that the Trustee had subjected himself to by filing the Proofs of Debt and it was said that it is not possible for him to resile from that election now.

67. As to duplication of costs and delay, the Liquidators submitted that they would take no further part in the Adversary Proceedings if the stays were not granted and they would proceed with the determination of the Trustee's claims in the Appeals against the Proofs of Debt, which would produce a binding result on both the Liquidators and the Trustee, unlike the Adversary Proceedings (for the reasons explained in the Submission to the US Court point above).

Critical evaluation of the factors for and against granting a stay of the Appeals

68. The first point to note is that none of the Trustee's submissions as to timing and relative costs in the US were grounded in any evidence but were put forward as informed guesswork on the part of the Trustee's counsel and his legal team. Clearly the accumulated knowledge and experience of senior lawyers engaged in serious international commercial litigation is not to be dismissed out of hand, and I take it all into account.

---

[39] This is described at paragraphs 57-72 of Morrison1 HB1/5/98-101. Here I note that the tracing exercise was not included as part of the reasons given for rejecting the Proofs of Debt.

[40] See the provisions in sections 234 and 236 of the Companies Act 1981, section 36 (4) of the Bankruptcy Act 1989 and the Winding-Up Rules 1982 Rules 64, 74, 75, 80 and 81.

69. But when it comes to making a determination of how long a case will take and how much it will cost, there is always a wide margin for error. Complications may (and often do) arise, and delays may (and often do) occur. There is no way to guarantee or even make an accurate prediction if the trial of the Adversary Proceedings will take place in 2026, and because the Trustee needs to have a final and unappealable determination of his claims, there is simply no way to tell how long it will take (or how much it will cost) if there is an appeal. The scale of the trial also suggests that it will take a long time before a final and unappealable judgment is finally arrived at. The elements of time and cost of the Adversary Proceedings are therefore (in my view) "imponderable" factors[41].

70. The point as to whether there will be a duplication of costs is unpersuasive because, having elected to submit to the Bermuda Court's jurisdiction, it is entirely open to the Trustee to bring the Adversary Proceedings to an early close against the Grosvenor Defendants and incur no further costs, at least insofar as the Grosvenor Defendants are concerned. As there are numerous others against whom the Trustee will continue to proceed, the suggestion that there will be 'duplication' of costs in the Adversary Proceedings is really illusory. Those costs will be incurred in those proceedings in any event against all the other 50 or so Defendants, whether or not the Grosvenor Defendants are involved.

71. On the other hand, the availability of a more summary procedure to determine the Trustee's specific claims against the Grosvenor companies, to which he has subjected himself voluntarily and which will necessarily be binding upon all parties, has many obvious advantages.

72. Although they too are imponderables, the likely cost and timeframe of the conduct of the Appeals is likely (in my judgment) to be less than the US Adversary Proceedings on both counts. It seems to me that the universe of material is likely to be limited (unlike the Adversary Proceedings which include 50 or so other Defendants), there will be few if any live witnesses, and the main task will involve documentary analysis and expert evidence on the valuation of the contingent claims.

73. The Trustee says that the process in the Appeals will be akin to full blown commercial litigation with detailed pleadings, comprehensive disclosure and extensive evidence. It will be for the Court to decide at the appropriate time what directions ought to be given for the determination of the issues in the Appeals, and I do not trespass on that territory here. I would expect, however, that the directions on an appeal against a rejection of a proof of debt will normally be aimed at achieving the efficient dispatch of the issues within a relatively narrow compass. I am therefore unmoved by the Trustee's counsel's aggressive posture of threatening lengthy and complex proceedings which he says will be subject to the risk of numerous interlocutory appeals and other diversions.

---

[41] An expression borrowed from Hildyard J in **Bundeszentralamt v Heis** (supra) at para 111.

74. In relation to "wait and see" and hindsight, it is relevant to note that in the context of the Liquidations, the Liquidators must value the Trustee's contingent claims in the Liquidations as at the date of the Winding-Up Order[42].

75. As to the unsatisfactory position of the Bermuda Court being called upon to assess matters of US law instead of the US Court, I agree that it is undesirable but seems to me that this is a predicament of the Trustee's own making.

76. The Trustee's submission that it is better for the US Bankruptcy Court to determine all the cases at the same time in the interests of judicial economy has been undermined by the Trustee's own decision to submit his Proofs of Debt in the Liquidations.

The Court's approach to granting or refusing a case management stay

77. There was extensive argument about what the appropriate test is when the Court is asked to grant a case management stay. Cases dealing with 'burden' and 'rare and compelling circumstances' were cited, which I will not repeat or analyse here. It is unnecessary for me to do so because a recent decision of the Bermuda Court has set out the relevant test, summarising the effect of the previous cases on the point.

78. The starting point is that the exercise of the power to grant a case management stay will always be guided and governed by the interests of justice[43]. The analysis is how the Court goes about making its assessment of the interests of justice in any given case will depend on a wide range of different factors, viewed in the light of the facts of each individual case.

79. In **Griffin Line General trading LLC v Centaur Ventures Ltd**[44] Hargun CJ summarised the Bermuda law position (adopting the relevant English law principles) as follows:

> *"The applicable principles governing the Court's discretionary power to order a case management stay are summarised by Butcher J in Banca Intesa Sanpaola SpA v Commiune di Venezia [2020] EWHC1014(Comm) at 82 as follows:*
> *The principles relevant to the exercise of this discretion can be summarised as follows:*
>
> *1. The Court has a discretion to stay an action pending the resolution of a claim pending in another forum, but a stay should only be granted "in rare and compelling circumstances": Reichold Norway ASA v Goldman Sachs [2001] 1 WLR 173 at 186 (CA).*

[42] Section 36 (4) of the Bankruptcy Act 1989 (which is incorporated into the Companies Act 1981 for this purpose).
[43] See **Athena Capital Fund Ltd v Secretariat for the Holy See** [2022] 1 WLR 4570 (CA) per Males LJ at page 4586 E.
[44] [2023] Bda LR 30 at paragraphs 32 to 34, applying **Re Celestial Nutrifoods Limited (In Liquidation)** [2017] Bda LR 11

2. "Exceptionally strong grounds" are required to justify a stay on a case management grounds where the parties have conferred exclusive jurisdiction on the English Court [omitting parts not relevant to this case].

3. The court's power to stay proceedings cannot be used in a manner which is inconsistent with the Judgments Regulation [omitting parts not relevant to this case].

4. A stay will not, at least in general, be appropriate if the other proceedings will not bind the parties to the action stayed or finally resolve all the issues in the case not stayed, or the parties are not the same: KlocknerHoldings GmbH v Klockner Beteiligungs GmbH [2005] EWHC 1453 (Comm) at 21 (Gloster J".

The Court accepts Mr Diel's submission that the authorities also demonstrate that the court should be slow to order case management stays of bona fide claims based on properly pleaded causes of action. Thus, in Athena Capital Fund v Secretariat of State for the Holy See [2022] EWCA Civ 1051 Males LJ held at [59]:

"There is, as it seems to me, no reason to doubt that it is only in rare and compelling cases that it will be in the interest of justice to grant a stay on case management grounds in order to await the outcome of cases abroad. After all the usual function of the court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and Article 6 ECHR . The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be rare and exceptional. In my judgment all of the guidance in the cases which I have cited is valuable and instructive, but the single test remains whether in the particular circumstances it is in the interests of justice for a case management stay to be granted. There is not a separate test in "parallel proceedings" cases..."

80. It can therefore be seen that there is no special test for cases where there are parallel sets of proceedings between the same claimant against the same defendants in two different jurisdictions at the same time. It is also clear that it will only rarely be in the interests of justice to stay proceedings in this jurisdiction to await the outcome of proceedings abroad. The Court's job is to decide cases brought before it. It is required to do so in as cost effective and efficient a manner as the circumstances of the case allow, taking into account all the factors set out in the Overriding Objective in exercising its case management powers.

81. I bear in mind the guidance of Moses JA[45] that the question to which I must apply my mind is the order of events, and to evaluate the consequences of giving precedence to

[45] **Re Nanfong International Investments Limited** [2018(2) CILR 321] at para 34.

the conduct of the Trustee's claims in the Adversary Proceedings over the progress of the Trustee's and the other creditors' claims in the Liquidations.

82. In the present case, the most powerful factor militating against granting a stay of the Appeals is the fact that, on the evidence before this Court at the hearing of the Trustee's applications, the Adversary Proceedings will not result in a judgment that will be binding on the Grosvenor Defendants[46]. This means that a deferral of the Appeals to abide the outcome of the Adversary Proceedings will not achieve the result the Trustee seeks, namely he will not get a judgment that justifies the admission of the his Proofs of Debt in the Liquidations as of right, nor as a crystallised liquidated debt which would be provable in the Liquidations.

83. The Court has already noted that the Trustee's decision to surrender his proprietary claims and file Proofs of Debt in the liquidations as *in personam* claims makes a significant difference to the approach the Court is required to take. The decision to pursue *in personam* claims in this jurisdiction in the Liquidations is, in my judgment, an election from which the Trustee is not entitled to resile[47].

84. As I have explained above, in my view, the various elements that the Trustee relied upon to justify a stay are, when examined, either unpersuasive or "imponderable". Furthermore, none of those factors displace the Court's duty to proceed to determine the Appeals on their merits, nor do they justify the indefinite postponement of the performance of the Liquidators' fiduciary duties to proceed to administer all the other claims in the Liquidations. An indefinite postponement of the administration of the claims of the other creditors in the Liquidations will plainly be unjust, particularly where the Trustee has submitted himself to the very same process.

85. I am fortified by the decision of Hildyard J in **Bundeszentralamt v Heis**[48] where the learned judge said

> *"...in a case where the seeking a stay has sought by proof to participate in a fund which is being administered in this jurisdiction, the burden is on that person to persuade the Court that the interests of justice are likely to be better served by a stay, notwithstanding any additional burden to which the Administrators may be subject in having to litigate abroad, rather than as part of the administration here...."*

---

[46] See **Klockner Holdings GmbH v Klockner Beteiligungs GmbH** [2005] EWHC Civ 1453 per Gloster J

[47] It matters not that the Trustee felt compelled to do so to preserve his claims: See **Bundeszentralamt v Heis** (supra) at para 102.

[48] (Supra) at paragraph 63 of that judgment.

86. In my view, for the reasons I have explained in paragraphs 68 to 76 and 82 to 84 above, the Trustee has not shown that the interests of justice are likely to be better served by a stay of his Appeals.

87. In a context more closely aligned to the facts of this case, balancing the interests of justice in relation to a stay of an appeal against a rejection of a proof of debt to allow the creditor to pursue proceedings in the United States Courts, Segal J said[49]:

> *"...the right approach is to consider what procedure is best suited to deal with the issue in dispute so as to dispose of the claim in the liquidation fairly, justly and expeditiously, taking into account the fact that the appeal process is conducted by the Court within its jurisdiction over the insolvent estate and therefore the need for the cost effective and timely administration of the estate and the interests of the creditors as a whole need to be taken into account..."*
> and
> *"...Once the creditor has lodged an appeal within the liquidation proceeding the Court will require a clear demonstration that proceedings in this Court* ***could not*** *dispose of the claim or that there* ***would be*** *substantial costs and timing benefits to be derived from the foreign proceedings (and the Court's control of the appeal process* ***would not*** *be compromised)."*[50]

88. I respectfully adopt and apply the same reasoning and hold that the Trustee has not demonstrated the factors that would be required to meet these tests. On the contrary, it seems to me that the benefits in terms of time, cost and parity between all the creditors of the Grosvenor companies mean that the interests of justice fall squarely against granting a stay of the Trustee's Appeals.

89. In so concluding, this Court's decision does not imply or reflect any disregard of the processes of the US Bankruptcy Court and its control over the Adversary Proceedings which are pending before it, for which this Court accords the greatest respect.

Summary of Conclusions

90. As a result of the factors set out above, weighing all the competing arguments and applying the relevant principles of law[51], I have come to the following conclusions:

(1) The Trustee has irrevocably submitted to the jurisdiction of the Bermuda Court for the purposes of the Liquidations and the adjudication of his claims on appeal to this Court.

---

[50] **Re Wimbledon Financing Master Fund Ltd (In Liquidation)** (unreported Cayman Grand Court 9 July 2018) at para 9 (b) on page 20 and para 9 (j) at page 28. My own emphasis has been added in bold.
[51] These were all comprehensively canvassed by counsel, but I have only referred to the very small number of those cited which seemed to me to be the most relevant and dispositive.

(2) A decision of this Court on the admission of the Trustee's contingent claims and their valuation will therefore be binding upon the Trustee.

(3) This Court can make a valuation of those claims based on evidence both as to the factual basis upon which those claims are made as a matter of fact, as well as to their value for the purposes of admission to proof in the Liquidations based upon expert evidence adduced by the parties.

(4) The Grosvenor Defendants and the Liquidators have not submitted to the jurisdiction of the US Court and in the absence of any evidence before this Court to the contrary, this Court cannot conclude otherwise. There is therefore no basis upon which this Court can hold that a judgment of the US Court in the Adversary Proceedings will be binding upon the Grosvenor Defendants, ie the Grosvenor companies in the Liquidations.

(5) There is therefore no compelling reason to postpone the conduct of the Liquidations in Bermuda indefinitely until the Trustee has attempted to establish his claims in the Adversary Proceedings because even if he does, those judgments will not be enforceable or admissible to proof in the Liquidations in this jurisdiction.

(6) The Liquidators are under a duty to proceed to conduct the Liquidations without undue delay in the normal course of the responsibilities expected of their office.

(7) The creditors of the Grosvenor companies are entitled to have their claims admitted and dealt with according to the normal processes of the Liquidations, and the indefinite delay that would result from granting the stays requested by the Trustee would amount to serious prejudice and (therefore) injustice to them.

(8) This Court is under a duty to proceed to decide the Appeals in the ordinary course of business lawfully brought before the Court without undue delay.

91. Accordingly, I have determined that it is not in the interests of justice to grant the stays sought by the Notices of Motion, and those applications are hereby dismissed.

92. I will hear the parties on costs.

Dated 1 November 2024

THE SEAL OF THE SUPREME COURT OF BERMUDA

THE HON. ANDREW MARTIN
PUISNE JUDGE