[2010–12 Gib LR 89]

PICARD v. VIZCAYA PARTNERS LIMITED and ZEUS PARTNERS LIMITED

COURT OF APPEAL (Aldous, Parker and Tuckey, JJ.A.): September 17th, 2010

Civil Procedure—payment into court—defendant's legal expenses—court may return part of money paid into court by defendant to help defray his legal expenses if no other funding available—defendant to have good arguable case and balance of justice to favour repayment—alternative sources of funding for investment company include its investors unless unable to fund litigation

Investing companies had paid money into court, pursuant to an order of the Supreme Court, and sought a variation of the order to make available part of the money to cover their past and future legal expenses.

The appellant had been appointed the trustee in bankruptcy of Bernard L. Madoff Investments Securities LLC in the US Bankruptcy Court in New York, following the collapse of Mr. Madoff's fraudulent multi-billion dollar "Ponzi" scheme. Four companies had invested in the scheme and collectively received repayments of US$150m. within three months of the liquidation, which they paid into their respective accounts with a Gibraltar bank. The Gibraltar Financial Intelligence Unit made a "no consent" order, under the Crime (Money Laundering and Proceeds) Act 2007, preventing the investing companies from dealing with the accounts, which effectively froze the funds. The Supreme Court ordered that the investing companies pay US$150m. into court, pending bankruptcy proceedings in New York. At the time of the present proceedings, approximately US$75m. had been paid into court. The rest had been paid into the Swiss bank accounts of investors in the investing companies.

The US Bankruptcy Court gave judgment against the investing companies and sent a letter of request to the Chief Justice, requesting the transfer of the moneys paid into court. At the same time, the respondents successfully applied to the Supreme Court for a variation of the order for payment into court, obtaining the release of US$1m. to finance their past and future legal costs on the basis that they had no other money or assets available to them.

The trustee appealed against this decision, submitting that (a) the respondents had not established that no alternative sources of funding were available to them to cover their legal expenses; although they had demonstrated that they themselves had no assets available, it had not been

shown that investors in the companies could not, or would not, fund the litigation; and (b) as they had failed to establish that alternative sources of funding were not available, it was unnecessary to consider whether the parties had arguable claims or where the balance of justice lay.

The respondents submitted in reply that (a) they had established that no alternative sources of funding were available to them, and the court should not look behind the bank accounts and assets of the investing companies by considering those of their investors; alternatively, any authority to the contrary could be distinguished because the appellant's claim was not proprietary; and (b) the respondents had a good arguable defence and the balance of justice favoured making the money available to them.

Held, allowing the appeal:

(1) In deciding whether to make moneys paid into court by the defendants available to defray their legal expenses, the court would consider whether they had established that no other sources of funding were available to them. If no other sources were available, the court would then consider whether there was an arguable proprietary claim and an arguable defence, and whether the balance of justice lay in making the money available to the defendant (para. 12; para. 27).

(2) The respondents had failed to establish that alternative sources of funding were not available to cover their legal expenses. In appropriate circumstances the court would look through the corporate structure established for investors. Although the investing companies had demonstrated that they had no money or assets available, they had not shown that investors in the companies could not, or would not, fund their legal expenses (paras. 19–26).

(3) As the respondents had failed to establish that alternative sources of funding were not available, it was unnecessary to consider whether the parties had arguable claims or where the balance of justice lay (para. 27).

Cases cited:

(1) *Atlas Maritime Co. S.A.* v. *Avalon Maritime Ltd. (No. 3)*, [1991] 1 W.L.R. 917; [1991] 4 All E.R. 783, followed.

(2) *Fitzgerald* v. *Williams*, [1996] Q.B. 657; [1996] 2 W.L.R. 447; [1996] 2 All E.R. 171, followed.

(3) *Ostrich Farming Corp. Ltd.* v. *Ketchell*, [1997] EWCA Civ 2953, followed.

K. Azopardi, *Ms. S. Sacramento* and *Ms. G. Parody* for the appellant;
M. Driscoll, *Q.C.*, *R. Vasquez* and *J. Acton* for the respondents.

1 **ALDOUS, J.A.:** The Chief Justice ordered that US$1m. be paid out to the respondents, Vizcaya Partners Ltd. ("Vizcaya") and Zeus Partners Ltd.

("Zeus"), from moneys held in court, so as to fund past and future legal costs and other expenses. Against that order, the appellant, Mr. Irving Picard, appeals. He contends that the Chief Justice should not have allowed any money to be paid out from the money he claims as trustee.

The background

2 Vizcaya is a company incorporated in the British Virgin Islands. Between 2002 and 2008 it invested some US$327m. in Bernard L. Madoff Investments Securities LLC ("BLMIS"). Asphalia Funds Ltd., a company incorporated in the Cayman Islands, and Zeus, incorporated in the British Virgin Islands, are shareholders in Vizcaya.

3 The dispute arises out of the collapse of the fraudulent scheme operated by Mr. Bernard Madoff and his business BLMIS. On December 11th, 2008, it was revealed that BLMIS had been defrauding its investors with the result that there was a deficit exceeding US$60bn. by means of a "Ponzi" scheme. The essence of the scheme was that investors were induced to invest on the promise of good returns; in fact the money was stolen by the operators. The scheme was kept going so long as earlier investors were paid by returns from the moneys subscribed by later investors. But if sufficient numbers of investors wished to withdraw their investments, as happened, the fraud was liable to come to light.

4 On December 11th, 2008, insolvency proceedings were filed in New York under provision of the Security Investor Protection Act of 1970 and liquidation of BLMIS began. Subsequently, Mr. Picard was appointed the trustee by the US Bankruptcy Court, Southern District of New York, and took over the liquidation.

5 On August 29th, 2008, BLMIS repaid US$30m. to Vizcaya. On October 31st, 2008, BLMIS transferred US$150m. to Vizcaya. The last transfer was within three months of the liquidation and therefore, under US law, was potentially recoverable. The proceeds of the last transfer were distributed as to US$67m. to Asphalia, US$78m. to Zeus, and the rest was retained by Vizcaya.

6 On December 19th, 2008, the Gibraltar Financial Intelligent Unit issued a "no consent" order under the Crime (Money Laundering and Proceeds) Act 2006, effectively freezing the money in Asphalia, Zeus and Vizcaya's accounts with the Safra Bank in Gibraltar.

7 On April 9th, 2009, the trustee started adversarial proceedings in the US Bankruptcy Court against Safra and Vizcaya seeking the return of the money paid by BLMIS and/or damages on a number of grounds including fraudulent preference and fraudulent conveyance.

8 On June 18th, 2009, the New York judge sent a letter of request to the Acting Chief Justice of the Supreme Court of Gibraltar asking for judicial assistance *inter alia* to ensure the turn over and the transfer of the funds to the US court.

9 On July 9th, 2009, the trustee commenced a Part 8 claim in Gibraltar against Vizcaya, Safra, Zeus, Asphalia, and Siam Capital Management Ltd., seeking a freezing order in relation to the transferred funds, disclosure of where the funds went, and other relief.

10 Approximately half of the US$150m. has been paid into court or is held upon undertakings. The other half is no longer within the jurisdiction of the court. However, a disclosure order made by the Acting Chief Justice, upheld by the Court of Appeal, provided further information as to where these funds had gone. In general terms, the half that left the jurisdiction was paid to banks in Switzerland who acted for investors. In essence, it seems to have been returned to investors.

11 Since that disclosure, there has been further activity in the United States. On August 6th, 2010, the US Bankruptcy Court awarded judgment against Vizcaya, Zeus, Asphalia, and Siam. On July 30th, 2010, a second letter of request was sent to the Chief Justice seeking recovery of the funds held to the court's orders.

The judgment

12 The Chief Justice said that the first matter that he had to consider was whether the applicants had established that they had no funds or assets available to fund the litigation. If that were established, he needed to consider whether the trustee had an arguable claim which was proprietary in nature, and if so, whether the applicants had an arguable case for denying the claim and, if that were established, where the balance of justice lay.

13 As regards the availability of other funds, the Chief Justice said:

> "I accept the premise that it is difficult to prove a negative. On the basis of the witness statement of the forensic accountant engaged by the applicants, I am satisfied that the only funds available to the applicants are those paid into court. Moreover, and whilst not strictly evidence before me, I acknowledge that these companies managed funds of which Safra was custodian and, as far as it is concerned, the applicants have no moneys with it."

14 The judge went on to consider the strength of the parties' cases. He made no specific finding as to the strength of the trustee's claim. He proceeded on the basis that both sides had substantial grounds to be argued. He then turned to the balance of justice and said:

> "This is not a dispute which should stand or fall on the basis of lack of funding. That said, whilst the court should not scrutinize payments as if it were undertaking a taxation of the payments to be made, they need to be reasonable, given that ultimately it may turn out not to be the applicant's moneys."

15 He went on to order US$1m. to be paid to Vizcaya and Zeus for the purposes of their past and future legal costs and associated expenses and disbursements.

The appeal

16 Mr. Azopardi, who appeared for the trustee appellant, did not dispute that the Chief Justice had asked himself the correct questions. He submitted, however, that he had never answered the first properly because he failed to consider whether other funds were available—only looking at funds held by the parties. He went on to submit that in any case there was no cogent evidence to support the conclusion reached. In support of these submissions he drew to our attention three cases.

17 In *Fitzgerald* v. *Williams* (2) it was contended that funds should not be released which might belong to the plaintiff. Bingham, M.R. said ([1996] Q.B. at 669–670):

> "The plaintiffs are in my view right to contend that unless and until the first defendant can establish on proper evidence that there are no funds or assets available to him to be utilised for payment of his legal fees and other legitimate expenses other than assets to which the plaintiffs maintain an arguable proprietary claim he should not be allowed to draw on the latter type of assets."

Waite and Otton, L.JJ. agreed.

18 In *Atlas Maritime Co. S.A.* v. *Avalon Maritime Ltd. (No. 3)* (1), there was an application by Avalon to release funds to pay for legal expenses. The principle applied by Lord Donaldson, M.R., was the same as in the *Fitzgerald* case. He said ([1991] 1 W.L.R. at 927):

> "As I am satisfied that Phillips J. misdirected himself in failing to look behind the corporate veil . . . it becomes the right and duty of this court to exercise that discretion afresh. Avalon has never had any funds which it controlled independently of Marc Rich. If it needed any money, however small the sum, it was provided by Marc Rich and debited to the Marc Rich Avalon account. If it received any sum, however small, it was at once credited to that account and so repaid to Marc Rich . . . [I]n the absence of any denial by Marc Rich that funds will continue to be made available to meet Avalon's legal costs, I consider that it would not be 'right or just' to vary the injunction

and accordingly would allow the appeal and set aside the order of Phillips J."

19 The case of *Ostrich Farming Corp. Ltd.* v. *Ketchell* (3), was decided on December 10th, 1997, in the Court of Appeal. In that case, the plaintiff had encouraged members of the public, with extravagant promises, to purchase live ostriches as an investment. The whole scheme was fraudulent. The plaintiff was wound up and proceedings were taken against directors and certain individuals to try to recover in excess of £3m. A worldwide *Mareva* injunction was granted. Two of the individuals sought release of sums from bank accounts in the Cayman Islands for legal costs. Millett, L.J. cited the passage from the *Fitzgerald* case set out above and continued:

"Sir Thomas Bingham was there laying down the rule that proper evidence must be submitted to establish that the defendant has no other funds beyond those to which the plaintiff lays a proprietary claim which are available to him for the payment of his legal fees and other legitimate expenses. But he was not saying that this was sufficient. It was only the first step."

20 The judge came to his conclusion on the basis of the witness statement of the forensic accountant, a Mr. Floyd, made on August 31st, 2009. As he said, he was engaged to provide a full accounting of the US$150m. payment. Mr. Azopardi rightly pointed out it was not Mr. Floyd's task to provide evidence as to whether the respondents had access to funds for legal expenses and he did not do so.

21 The only evidence that purported to deal with the availability of funds was the statement of Mr. Vila. He said that "neither Vizcaya nor Zeus have any other moneys from which either of them are able to fund any of the matters for which the application for release of moneys is made." That evidence was not relied upon by the judge.

22 Mr. Driscoll, Q.C., who appeared for the respondents, reminded us that the respondents had been victims of the fraud and there was no suggestion that they had been involved in it. He took us to the company structure demonstrating how money was invested through Zeus, Asphalia, and Vizcaya. He pointed out that the money went to Vizcaya to be invested by BLMIS. The returned money was either held to the order of the court or had been returned to the investors. It followed, he submitted, that the respondents did not have funds or assets to pay for legal and other expenses. The judge had been right to decide as he did. He submitted that it was wrong for this court to consider whether the investors have assets to fund the litigation. If the respondents did not have the money they satisfied the first element required.

23 In my view, the judge was right to conclude that the respondents had to establish that they had no funds or assets available to fund the litigation. That was made clear in the cases cited above. However, the evidence he relied on did no more than establish that they did not have funds in their bank account or assets available. Further, the evidence of Mr. Vila did not go any further.

24 This is a case where investors used Swiss banks and other companies to invest with BLMIS. No doubt there were good reasons for passing the investments through the respondents. US$150m. was returned: about half went to Swiss banks and the rest is held in Gibraltar. There is no evidence that the investors or the Swiss banks used to make the investments could not and would not provide money to fund this litigation. They assert that they have a good defence and if it were to succeed they would recover about £70m. Although the Chief Justice asked himself the right question, he based his decision upon evidence that did not purport to answer it and, in fact, did not do so. I conclude that this court should therefore look again at the issue.

25 I cannot accept Mr. Driscoll's submission that we should not look further than the bank accounts and assets of the respondents. The cases cited above indicate that in appropriate circumstances the court should look through the corporate structure. This is such a case. The respondents are companies used to invest money of customers of Swiss banks. Half of the money claimed by the trustee has been returned and it may be available to pay the legal costs.

26 There is no evidence directed to the right question. At most, the court can conclude that the money paid out by BLMIS is either held to the court's order or has been paid to Swiss banks or held on behalf of investors. It is not for the court to try to see whether funds might or might not be made available. It is up to the respondents to establish, on proper evidence, that sufficient funds are not available to them. For that reason I would allow this appeal.

27 Mr. Driscoll sought to distinguish the cases cited. He submitted that the cases concerned proprietary claims whereas the present one did not. He took us to the pleadings and the judgment of the US Bankruptcy Court to show that there was no mention of the claim being proprietary. It may be that the documents do not use that word, but that is clearly the basis of the claim in the US proceedings. The trustee by reason of US law claims to be able to recover the sums in dispute. In essence, he claims that the money is his to hold on behalf of the creditors.

28 As the respondents failed to establish that funds were not available, there is no need for this court to go on and decide whether the claims of the parties have strength. Certainly the claim of the appellant is properly arguable. No doubt it will in due course be necessary to decide whether

the respondents have a good defence based upon their claim that they are *bona fide* purchasers for value. Further, it is not necessary to look at the balance of justice.

29 For the reasons I have given, I would allow the appeal.

30 **PARKER** and **TUCKEY, JJ.A.** concurred.

Appeal allowed.

[2010–12 Gib LR 96]

PRATTS v. PRATTS

SUPREME COURT (Dudley, C.J.): October 6th, 2010

Family Law—financial provision—costs—costs normally follow event—presumption more easily displaced than in non-matrimonial proceedings—affected by conduct during litigation—costs order may be stayed pending determination of ancillaries if child maintenance burden mainly falls on party ordered to pay

Jurisprudence—reception of English law—incorporation of English law—costs in family proceedings—English Family Proceedings Rules 1991 inapplicable in Gibraltar—by Supreme Court Rules 2000, r.7, English practice and procedure incorporated only until 1967 cut-off point

A husband and wife were engaged in matrimonial proceedings in the Supreme Court.

The wife obtained an order for the sale of the matrimonial home and the division of the proceeds. The issue of costs was adjourned and now fell to be determined.

The husband submitted that (a) the costs provisions of the English Family Proceedings Rules 1991 were incorporated into Gibraltar law by the Supreme Court Rules 2000, r.50 and the Matrimonial Causes Act 1962, s.9, such that, by the 1991 Rules, no costs order should be made in matrimonial proceedings in which both parties had acted reasonably; and (b) costs should not, therefore, follow the event.

The wife replied that (a) the English Family Proceedings Rules 1991 had no application in Gibraltar, having been made after the cut-off period in the Supreme Court Rules, s.7 for the incorporation of English practice