IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Before the Honourable Mr Justice J. Jones QC
In Chambers, 5 April 2016

Cause No. FSD 30 OF 2010 (AJJ)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

IN THE MATTER OF THE PRIMEO FUND (IN OFFICIAL LIQUIDATION)

AND

Cause No. FSD 30 of 2013 (AJJ)

PRIMEO FUIND (In Official Liquidation) Plaintiff

and

(1) BANK OF BERMUDA (CAYMAN) LIMITED
(2) HSBC SECURITIES SERVIVES (LUXEMBOURG) SA
Defendants

AND

Cause No. FSD 27 of 2016 (AJJ)

PRIMEO FUND (In Official Liquidation) Plaintiff

and

PIONEER ALTERNATIVE INVESTMENT MANAGEMENT LIMITED
Defendant

Appearances:

Mr. Tom Smith QC instructed by Messrs. Peter Hayden and Jonathan Moffatt of Mourant for the Official Liquidators of Primeo Fund in the Liquidation Proceeding (FSD #30 of 2010); for Primeo Fund as plaintiff in the writ action (FSD #30 of 2013) and for Primeo Fund as plaintiff in the originating summons proceeding (FSD #27 of 2016).

Mr. David Allison QC instructed by Messrs. Paul Smith and Ben Hobden for the Defendant in the originating summons proceeding (FSD #27 of 2016)

Mr. Richard Gillis QC instructed by Messrs. Andrew Pullinger and Hamid Khanbhai of Campbells for Bank of Bermuda (Cayman) Limited and HSBC Securities Services (Luxembourg) SA, as defendants in the writ action (FSD #30 of 2013) and as intervening parties being heard in the liquidation proceeding (FSD #30 of 2010) and the originating summons proceeding (FSD #27 of 2016).

REASONS

Factual Background and Procedural History

1. These matters arise out of an application by the joint official liquidators of Primeo Fund ("the Official Liquidators" and "Primeo") for the issue of a letter of request to the appropriate authority in the Republic of Austria for an order that Primeo's former directors and Unicredit Bank Austria AG ("Bank Austria") be required to deliver up the directors' files. Primeo was promoted by Bank Austria. Throughout Primeo's trading life a number of its directors were employees of Bank Austria. The persons in question were nominated by Bank Austria to serve as directors of Primeo and did so in the ordinary course of their employment with Bank Austria. It follows, in my view, that correspondence and other documents generated or received by these employees in their capacity as directors of Primeo are inherently likely to have been placed on files retained in the possession or custody of Bank Austria. For present purposes I am referring to such documents and information, whether existing in hard copy and/or electronic form, as "the Director Files". The application proceeds on the (undisputed) footing that the Director Files are property belonging to Primeo in the sense that the information contained in paper files and/or stored electronically on Bank Austria's servers belongs to Primeo. (See *Re China Milk Products Group Limited (In Liquidation),* Grand Court, unreported, 20 May 2015).

The need to make this application has its origin in a dispute about discovery in the action (FSD #30 of 2013) between Primeo as plaintiff and Bank of Bermuda (Cayman) Limited and HSBC Securities Services (Luxembourg) SA (collectively "HSBC") as defendants ("the Primeo/HSBC Proceedings") in which Primeo claims

damages for breach of contract and/or negligence. It is not necessary for present purposes to describe the nature and scope of this dispute in any detail. Suffice it to say that there was an issue about the adequacy of the steps taken by the Official Liquidators' to collect in the documents received/generated by Primeo's former directors in the course of their directorships.[1] It was not disputed that such documents are the property of Primeo and that they are discoverable in the Primeo/HSBC Proceedings. The argument centered around the question whether it was reasonable and proportionate to require that further efforts be made to obtain these documents, not from the individuals themselves, but from the service providers who employed them. On 16 December 2015 I made an order that Primeo (acting by its official liquidators) make an application in the liquidation proceeding for the issue of a letter of request to the competent authority of the Republic of Austria seeking assistance to compel the production of documents belonging to Primeo or to which Primeo is otherwise entitled pursuant to its contractual, statutory and/or common law rights (that is to say the Director Files) from Bank Austria and the "Austrian Directors" (that is to say those directors who are or were employees and/or agents of Bank Austria and/or its parent company).[2] It is, in my view, inherently unlikely that any former director would have retained any Director Files belonging to Primeo in his own custody after having ceased to be employed by Bank Austria. This was confirmed to some extent by the fact that some of these people have told the Official Liquidators that they do not now have any such documents in their own personal custody. Nevertheless, I decided that such people should be included as respondents to the proposed Austrian proceedings because it might be said that some Director Files in the possession of Bank Austria are under the control of a former employee and so it may be relevant to compel such people to give instructions to Bank Austria.

3. I should make it clear that the Court was never asked to make any order in the Primeo/HSBC Proceedings for the issue of a letter of request pursuant to the Hague Convention for the purpose of obtaining evidence for use in that proceeding. The Official Liquidators were directed to make an application in the liquidation proceeding for the issue of a letter of request seeking assistance to obtain documents belonging to Primeo. I was persuaded that the Official Liquidators had not, up to that point, taken sufficient and appropriate steps to collect in the Director Files. The underlying assumption is that the Director Files are discoverable documents in the Primeo/HSBC Proceeding but it seems to me that, in principle, they are also documents of a kind which the Official Liquidators ought to have collected, or at least made a serious attempt to collect, in any event.

[1] Primeo had a total of 25 directors during the period from its incorporation in November 1993 until the commencement of its liquidation in April 2009. This total excludes the two lawyers who served as directors for [illegible] one day in connection with the company's incorporation.

[2] There are nine "Austrian Directors" who are identified in paragraph 6 of the letter of request.

4. The Order was pronounced on 16 December 2015 but various issues arose about its form and content with the result that it was not finally signed and sealed until 15 March 2016.[3] One of these issues was whether the letter of request was intended to relate to the individual Austrian Directors as well as Bank Austria. For the reasons explained in a supplemental ruling made on 4 February 2016, I confirmed my intention to make an order that all the former directors of Primeo, who are resident in Austria, be included as respondents to the proposed Austrian proceedings, whether or not they are still employed by Bank Austria.

5. Whilst considering the application to be made in the liquidation proceeding (FSD #30 of 2010) the Official Liquidators' lawyers became conscious that it might be argued that Primeo was precluded from taking any action against Bank Austria pursuant to the third party release provisions contained in an agreement made for the purpose of settling the action (FSD #134 of 2011) commenced by Primeo as plaintiff against Pioneer Alternative Investment Management Limited ("Pioneer"), as defendant.

6. Pioneer served as Primeo's investment manager for a relatively short period from April 2007 until December 2008 when Primeo's active trading life came to an end as a result of the revelation that Bernard L. Madoff Investment Securities LLC was a *Ponzi* scheme. Pioneer and Bank Austria are both members of the UniCredit Group of companies headquartered in Italy. Pioneer carries on an investment management business in Ireland. Bank Austria carries on a banking and financial services business in Austria. Pursuant to the settlement agreement dated 29 January 2014 and made between Primeo and Pioneer ("the Settlement Agreement"), Pioneer agreed to pay US$100 million, without any admission of liability, in full and final settlement, release and discharge of the claims and potential claims against all UniCredit Group companies, including Bank Austria. By this Settlement Agreement Primeo also agreed to release any claims it might have against those former directors who are or were employees of Bank Austria. The Official Liquidators decided to put Pioneer on notice of the letter of request application because they recognized the possibility that Pioneer might contend that, under the terms of the Settlement Agreement, Primeo had released its right to commence any proceeding against Bank Austria or the Austrian Directors, even for the limited purpose of obtaining possession of the Director Files.

7. In the event, Pioneer's lawyers did raise this argument and the Official Liquidators responded by issuing a summons in the Primeo/HSBC Proceedings on 19 February 2016 by which they sought directions for a hearing to be fixed for the purpose of determining whether, on a true construction of the Settlement Agreement, Primeo's Official Liquidators are precluded from commencing the letter of request application. Pioneer initially declined to participate on the basis that it is not a party to the action with the result that Primeo then issued an originating summons against Pioneer on 3

[3] The Order comprises 31 paragraphs dealing with a variety of matters. Only paragraphs 22 and 23 relate to the issue of the letter of request.

March 2016. Procedurally, both these steps were inappropriate. The matter ought to have taken the form of an application for the issue of the letter of request made by the Official Liquidators in the liquidation proceeding. HSBC, Bank Austria and (possibly) Pioneer should have been put on notice as interested parties. In principle, the Austrian Directors should also have been put on notice but their interest could have been represented by Bank Austria. I say that Pioneer should "possibly" have been put on notice because it does not in fact have any interest in matter apart from being counter-party to the Settlement Agreement. No order is sought against Pioneer. It has presumably delivered up to the Official Liquidators whatever documents it generated in its capacity as investment manager and there is no suggestion that it has in its possession any Director Files. For this reason, it seemed me that the proper party in interest is Bank Austria but Mr. Allison was emphatic that he acts only for Pioneer.

8. In substance, I treated the hearing on 5 April 2016 as an application for the issue of the letter of request made by the Official Liquidators in the liquidation proceeding with the support of HSBC and opposition from Pioneer. Counsel for the Official Liquidators and HSBC agree that the Court has jurisdiction to issue the letter of request and that the power should be exercised. The argument advanced on behalf of Pioneer (which could equally well have been made on behalf of Bank Austria and the Austrian Directors) is that the letter of request application should be dismissed because (a) the Court lacks jurisdiction or, alternatively, (b) the exercise of the jurisdiction is precluded by the terms of the Settlement Agreement. The Official Liquidators' position about the effect of the Settlement Agreement has evolved over time. They now say that, upon its true construction, Primeo has not released its rights to the Director Files or covenanted not to commence any proceeding to compel delivery of them. It follows that there is an issue between the parties to the Settlement Agreement which can and should be resolved by the Court, even though Bank Austria and the Austrian Directors have not been joined in this application.

Does the Court have jurisdiction to issue the Letter of Request ?

9. The Court's jurisdiction to make summary orders on the application of official liquidators for delivery up of a company's books and records arises under sections 138(1) and 103(3)(b) of the Companies Law (2013 Revision).

10. Section 138(1) provides as follows –

Where any person has in his possession any property or documents to which the company appears to be entitled, the Court may require that person to pay, transfer or deliver such property or documents to the official liquidator.

11. Section 103 provides as follows –

(1) This section applies to any person who, whether resident in the Islands or elsewhere-
(a) has made or concurred with the statement of affairs;

(b) is or has been a director or officer of the company;
(c) is or was a professional service provider to the company;
(d) has acted as a controller, advisor or liquidator of the company or receiver or manager of its property;
(e) not being a person falling within paragraphs (a) to (c), is or has been concerned or has taken part in the promotion, or management of the company,
and such person is referred to in this section as the "relevant person".

(2) It is the duty of every relevant person to co-operate with the official liquidator.

(3) While a company is being wound up, the official liquidator may at any time before its dissolution apply to the Court for an order-
(a) for the examination of any relevant person; or
(b) that a relevant person transfer or deliver up to the liquidator any property or documents belonging to the company.

(4) Unless the Court otherwise orders, the official liquidator shall make an application under subsection (3) if he is requested in accordance with the rules to do so by one-half, in value, of the company's creditors or contributories.

(5) On an application made under subsection (3)(a), the Court may order that a relevant person-
(a) swear an affidavit in answer to written interrogatories;
(b) attend for oral examination by the official liquidator at a specified time and place; or
(c) do both things specified in paragraphs (a) and (b).

(6) The Court may direct that any creditor or contributory of the company be permitted by the official liquidator to participate in an oral examination.

(7) The Court shall have jurisdiction –
(a) to make an order under this section against a relevant person resident outside the Islands; and
(b) to issue a letter of request for the purpose of seeking the assistance of a foreign court in obtaining the evidence of a relevant person resident outside the jurisdiction.

12. These two provisions are complementary. Section 138(1) creates a procedure whereby the Court is empowered to make summary orders on the application of official liquidators for the purpose of collecting in a company's assets and books and records. Such orders can be made against "any person". This provision is ultimately derived from the English Companies Acts and has existed in the Cayman Islands Companies Law since it was originally enacted in 1961.

13. Section 103 creates a procedure which empowers the Court to make orders for the purpose of enabling an official liquidator to investigate a company's affairs by examining relevant persons. It includes a power under subsection (3)(b) to make orders for the recovery of documents belonging to the company. The nature and scope of the powers contained in section 103 is wider than section 138(1), but those powers can be exercised only against a "relevant person" which is defined in a way which is limited to those who have been involved in the promotion and/or management of a company.

14. Until 2007 the Court's power to make orders for investigatory purposes was far wider. It could be exercised against *any* person whom the court deemed capable of giving information about the affairs of a company and it included power to order such persons to deliver up any documents *relating* to the company's affairs. It was not limited to documents belonging to the company.

15. The Court has power under section 138(1) to make orders against Bank Austria and the Austrian Directors for the delivery up of the Director Files because they are "documents to which the company appears to be entitled". It also has power under section 103(3)(b) because the Director Files are "documents belonging to the company". The Austrian Directors are "relevant persons" under section 103(1)(b). In the absence of any evidence to the contrary, I accept that Bank Austria was concerned in or took part in the promotion of Primeo and is therefore a "relevant person" under section 103(1)(e). It also provided directorship services to Primeo for which it was presumably paid fees. By agreeing that its employees should serve as directors of Primeo, there is a powerful argument for saying that Bank Austria itself was concerned in or took part in the management of Primeo. For these reasons I am satisfied that there is power to make orders against Bank Austria and the Austrian Directors under both sections. Even if Bank Austria was not a "relevant person" under section 103(1)(e), it would still be caught by section 138(1).

16. When exercising a statutory power, the Court must have regard to the purposes for which the power exists and any applicable limitations upon its exercise. The decision of Smellie CJ in *Re Basis Yields Alpha Fund* [2008] CILR 50 is authority for the proposition that the Court's investigatory powers under section 103 should be used for the purposes of the liquidation and should not be exercised for the purpose of giving official liquidators a special advantage over their opponents in actual or contemplated litigation.

17. The *Basis Yields* case concerned an application by the official liquidators of an investment fund for the issue of a letter of request to the Australian High Court, requesting that two Morgan Stanley Group companies be compelled to disclose documents which were relevant to a contractual dispute arising in connection with a global securities repurchase agreement. Morgan Stanley Australia Ltd ("MSAL") was a party to the repurchase agreement. Morgan Stanley International Inc. was not itself a party to the agreement, but it had an involvement in the transaction as one of the fund's investment bankers. The fund had commenced an arbitration against MSAL under the terms of the repurchase agreement in which the issue was whether or not an event of default had occurred. The application for the issue of this letter of request was made under sections 127 and 128 of the Companies Law (2007 Revision) which have now been repealed and replaced by the much narrower provisions of section 103. On its facts, this case could not arise today for two reasons. First, the nature of the contractual relationships were such that neither of the Morgan Stanley companies would be "relevant persons". Second, there does not appear to have been any basis

upon which it could be said that the documentary information sought by the official liquidators belonged to the fund. Nevertheless, I think that the observations made by Smellie CJ at paragraph 73 about the purpose and proper use of the statutory power are still applicable to section 103.

73. The special statutory powers given by s.127 and s.128 of the Companies Law were never intended to be used merely to provide liquidators with a strategic advantage over persons against whom they may seek to litigate or arbitrate about disputed claims. Those sections are rather intended and designed (at least primarily) to protect the interests of creditors of a company in insolvent liquidation by the court's being able to compel persons who have information about the company's affairs to disclose it. It would therefore be an exceptional use of the court's powers to allow liquidators of a solvent company, placed upon its own application into liquidation, to require persons not involved in the affairs of a company but against whom disputed claims may be prosecuted (or presented against others related to them) to give what would be tantamount to compulsory early discovery of information.

18. The same point has been made by the English courts in relation to the power under section 236 of the Insolvency Act 1985 and its predecessor, section 268 of the Companies Act 1948 which were substantially the same as sections 127 and 128 of the (now repealed) Cayman Islands statute. In *Re Esal (Commodities) Ltd (no.2)* [1990] BCC 708 at page 722 Millet J. (as he then was) said –

The Court has always been astute to prevent the liquidator making use of the s.268 procedure in order to gain an unfair advantage in litigation which he has already brought or which he has already decided to bring against the proposed examinee, even where the litigation is brought for the benefit of the insolvent estate.

The mischief addressed by Smellie CJ in *Basis* Yields and Millet J. in *Re Esal* does not arise in the present case for two reasons. First, the possibility of using the power to obtain documentary discovery, which used to exist under sections 127, has been abolished. Second, in the circumstances of this case there is no possibility of using the power for the purpose of obtaining any strategic or unfair advantage in litigation contemplated against Bank Austria and the Austrian Directors. No litigation is comtemplated.

19. Section 103(7) confers upon the Court jurisdiction to issue a letter of request "for the purpose of seeking the assistance of a foreign court in obtaining the evidence of a relevant person resident outside the jurisdiction". Whether this power extends to issuing a letter of request solely for the purpose of collecting documents belonging to the company, when there is no intention of obtaining any evidence by examining anyone, is not a point which has to be decided for present purposes because the common law power to issue a letter of request for the purposes of section 138(1) has not been repealed. See *Re China Milk Products Group Ltd* (Grand Court, unreported, 20 May 2015). I accept Mr. Allison's argument that the common law jurisdiction is limited in that there is no power to request a foreign court to do that which this Court would have no jurisdiction to do under the domestic law. See the decision of the Privy

Council in *Singularis Holdings Ltd v. PwC* [2015] AC 1675, in particular Lord Sumption's analysis at paragraph 25.

20. Mr. Allison rightly says that the powers under sections 138(1) and 103 should be exercised for the purposes of the liquidation, but this does not mean that the section 138(1) power should *never* be used for collecting in a company's documents when the purpose, or principal purpose, of obtaining them is to enable the company to fulfill its discovery obligations in pending litigation. Conducting litigation for the purpose of enforcing causes of action belonging to a company is an important function of official liquidators. In order to perform this function, the official liquidator of an investment fund such as Primeo, which never had any premises or employees of its own, must take steps to collect in its books and records from the various service providers who have custody of them.

21. Mr. Allison argues that the issue of this letter of request has nothing to do with the Official Liquidators' statutory functions. He says that its purpose is simply to enable HSBC to obtain extra-territorial non-party discovery from Bank Austria and the Austrian Directors. In my view this submission is misconceived and wholly wrong. They are *not* being asked to give evidence. Nor are they being asked to disclose their *own* documents by way of discovery. If they were being asked to do so, then I agree that the proper course would be to invoke the machinery of the Hague Convention. They are simply being asked to deliver up documents belonging to Primeo. It is not an abuse for the Official Liquidators to use the machinery of a letter of request based upon section 138(1) and/or section 103 against Bank Austria and the Austrian Directors, merely because the reason for collecting in the documents in question is to comply with Primeo's discovery obligations in litigation pending against an unrelated party. Nor would it be an abuse of the process for the Official Liquidators to have issued a writ in the name of Primeo seeking an order for specific delivery. I am not suggesting that the mischief identified by Smellie CJ in *Basis Yields* can no longer arise following the repeal of sections 127 and 128, but it cannot possibly arise in the circumstances of this case. The Official Liquidators are not contemplating the commencement of any litigation against Bank Austria or the Austrian Directors. To the extent that Primeo had any causes of action against any of them for damages for breach of duty, those causes of action have been released by the Settlement Agreement.

Are the Official Liquidators precluded by the Settlement Agreement from obtaining the Director Files from Bank Austria and the Austrian Directors ?

22. Clause 3 of the Settlement Agreement constitutes a release of substantive legal rights expressed in the widest possible language. Primeo agreed to grant a "full and final settlement, release and discharge" of all "Claims" against, amongst others, Bank Austria and the Austrian Directors. The definition of a "Claim" contained in the Clause 1.1 is as follows -

Claim *means each and every claim, counter–claim, cause or right of action or proceeding, whether at law or in equity, of whatsoever nature and howsoever arising, in any jurisdiction whatsoever, whether secured, proprietary, by way of tracing, priority or otherwise, whether made in the Action or otherwise, whether known or unknown to the Parties, whether or not presently known to the law and whether arising before on or after the date of this Agreement, provided that, for the avoidance of doubt, this definition does not include any such claims, counter-claims, causes or rights of action for breach of this Agreement or any action taken to enforce the terms of this Agreement;*

23. Clause 17 of the Settlement Agreement constitutes a covenant not to sue. It provides as follows –

17.2 Subject to Clause 8 Primeo irrevocably and separately covenants with each of Pioneer] each other Associated Person and each Primeo Director not to sue, commence, prosecute, file or assert, nor Voluntarily Aid any other person to sue, commence, prosecute, file or assert against that particular entity or person any Claim, action, suit or other proceeding (save for the purposes of exercising or enforcing its rights under this Agreement).

17.3 Primeo shall procure that the [Official Liquidators] do not sue, commence, prosecute, file or assert, nor Voluntarily Aid any other person to sue, commence, prosecute, file or assert any Claim, action, suit or other proceeding which Primeo is restricted by clause from pursuing or Voluntarily Aiding any other persons to pursue (save for the purposes of exercising or enforcing their respective rights under this Agreement).

Again, the parties have used the widest possible language and it is not disputed that Bank Austria and the Austrian Directors respectively fall within the definitions of *Associated Person* and *Primeo Director* .

24. Pioneer's case is that, even if the Court has jurisdiction to issue the letter of request, it should not do so because Primeo has (by Clause 3) released all of its proprietary, contractual and common law rights in respect of the Director Files and the information contained in them and has covenanted (by Clauses 17.2 and 17.3) not to apply for any letter of request or commence any consequential proceeding in Austria for the purpose of collecting in the Director Files. Both these arguments essentially turn on the true meaning and effect of Claim as defined in Clause 1.1.

25. The Settlement Agreement is expressed to be governed by English law. The relevant principles applicable to the construction of commercial contracts under English and Cayman Islands Law are well established and were recently re-stated by the Supreme Court in *Arnold v. Britton* [2015] 2 WLR 1593. Lord Neuberger stated (at paragraph 15) –

When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual

and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

26. It is also well established that there are no special rules of interpretation applicable to general release clauses contained in commercial contracts. See the decision of the House of Lords in *Bank of Credit and Commerce International SA v. Ali* [2002] 1 AC 251. The whole point of general release clauses of the kind contained in Clause 3 of the Settlement Agreement is to achieve finality by releasing both known claims and those which were unknown or unconsidered by the parties at the time the contract was made. In *BCCI v. Ali* Lord Nicholls explained the point in the following way (at paragraph 27-28) –

27. (Letter H) *The mere fact that the parties unaware of a particular claim is not a reason for excluding it from the scope of the release. The risk that further claims might later emerge was a risk the person giving the release was intended to protect the person in whose favour the release was made. For instance, a mutual general release on a settlement of final partnership accounts might well preclude an erstwhile partner from bringing a claim if it subsequently came to light that inadvertently his share of profits had been understated in the agreed accounts.*

28. The court has to consider, therefore, what was the type of claims at which the release was directed. For instance, depending on the circumstances, a mutual general release on a settlement of final partnership accounts might properly be interpreted as confined to claims arising in connection with the partnership business. It could not reasonably be taken to prelude a claim if it later came to light that encroaching tree roots from one partner's property had undermined the foundations of his neighbouring partner's house. Echoing judicial language used in the past, that would be regarded as outside the "contemplation" of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not "under consideration".

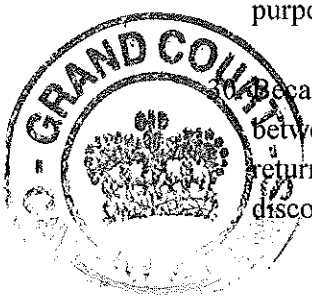
27. The same point is made in *Re Lehman Brothers International (Europe) (In Administration*) [2015] EWHC 2270. This case involved a series of agreements made in the course of administration proceedings by which creditor claims were agreed. The agreements included a release in the following terms -

.....the Creditor and (i) the Company and (ii) the Administrators, are hereby each irrevocably and unconditionally released and forever discharged from any and all losses, costs, charges, expenses, Claims (including all claims for interest, costs and orders for cost and any and all Trust Asset Claims and Client Money Claims (if any)), demands, actions, causes of action, liabilities, rights and obligations (including those which arise hereafter upon a change in the relevant law) to or against each other and howsoever arising, whether known or unknown, whether arising in equity or under common law or statute or by reason of breach of contract or in respect of any tortious or negligent act or omission (whether or not loss or damage caused thereby has yet been suffered) or otherwise, whether arising under the Creditor Agreement the Other Agreements, or not, whether in existence now or coming into existence at some time in the future, and whether or not in the Company and/or the Administrators on the date hereof.

28. After the agreements were made, a surplus arose in the estate unexpectedly such that the creditors would (but for the release clause) be entitled to statutory interest and the availability of "currency conversion claims" was established under English insolvency law. In determining whether the clause was effective to release the creditors' right to statutory interest and currency conversion claims, the court took into account the following factors as part of the relevant factual context. First, the administrators, when entering into the agreements, were acting not in their own commercial interest but as officeholders having a duty to act fairly as regards the creditors. Second, it would have been incompatible with their functions for the administrators to require the creditors to give up their right under the insolvency law. Third, the principle purpose of the agreements was to simplify and accelerate the ascertainment of provable debts and a release of statutory interest and currency conversion claims was wholly irrelevant to that objective. It was held that the intention of the parties, objectively ascertained, was not to release such claims, since their release was irrelevant to the main purpose for which the agreements were concluded. This was so despite the clear language of the release clauses.

29. The Settlement Agreement was made in the context of a pending action for damages against Pioneer. There were no pending disputes about the ownership of documents and there were no outstanding claims against any UniCredit Group companies for the delivery of documents belonging to Primeo. The Settlement Agreement was concluded for the purpose of achieving a full and final settlement of the claim for damages asserted against Pioneer and all other monetary claims, both known and unknown to the parties, which might be asserted against any other UniCredit Group company. The subject-matter of the release was causes of action for damages, the assertion of which could have an adverse financial impact upon the UniCredit Group, either directly or indirectly in circumstances where the party against whom the claim could be asserted would have a right of indemnity or a right of contribution against a group company. The purpose of the Settlement Agreement was to limit the UniCredit Group's liability to $100 million. There is nothing in the factual context to suggest that the parties should be taken to have intended to release any proprietary rights relating to Primeo's documents, the assertion of which would have no adverse financial impact upon any UniCredit Group company. To the extent that Bank Austria incurs cost and expends management time in delivering up the Director Files, it can expect to be reimbursed by the Official Liquidators. Therefore, viewed objectively, the parties cannot be said to have intended to release Primeo's rights in respect of any of its documents which remain in the possession of the Austria Directors or any UniCredit Group company because such a release would be wholly irrelevant to the purpose of the Settlement Agreement.

30. Because the Settlement Agreement was made in the context of a pending action between the parties, Clause 21.2 makes express provision for Primeo and Pioneer to return or destroy the documents which had been disclosed to each other by way of discovery. Having acted as Primeo's investment manager, Pioneer must necessarily



have had in its possession documents belonging to Primeo. These documents had been delivered up to the Official Liquidators. Clause 21 therefore distinguishes between Primeo's documents (listed in Schedule 7) which had been delivered up to the Official Liquidators and Pioneer's documents which had been produced to Primeo on discovery in the action. The former are to be retained by the Official Liquidators and the latter are either to be destroyed or returned to Pioneer. Clause 21 is wholly silent about what is to happen to documents belonging to Primeo which are or were in the possession of other UniCredit Group companies or former Primeo directors who are or were their employees. The fact that these other documents are not included in the subject-matter of Clause 21 leads me to the conclusion that the parties did not intend that they be included in the subject-matter of Clause 3.

31. Primeo's action against HSBC was pending in this Court at the same time as its action against Pioneer. As part of the factual context in which the Settlement Agreement was made, Pioneer and its lawyers must have been aware of the existence of the Primeo/HSBC Proceedings and HSBC's role as a former custodian and administrator of Primeo. They must be taken to have known that many, if not all of Primeo's documents, including those listed in Schedule 7 and those which were or might still be in the possession of the Bank Austria and the Austrian Directors, would be discoverable in the Primeo/HSBC Proceedings. The parties to the Settlement Agreement and their respective lawyers must be taken to have known that Primeo (acting by is Official Liquidators) could not properly release its right to retain or secure possession of its own documents which were discoverable in a pending action against another of its former service providers. The reasonable person, being aware of the existence of the Primeo/HSBC Proceedings, would not have understood Clause 3 as having the purpose and effect of achieving this result.

32. In my judgment, the factual context in which the Settlement Agreement was made clearly leads to the conclusion that the parties did not intend that Primeo should release ownership of its documents or its right to collect in those documents, if necessary by commencing proceedings.

Conclusions

33. The Court does have jurisdiction at common law to issue a letter of request to the Federal Ministry of Justice of the Republic of Austria for the purpose of compelling Bank Austria and the Austrian Directors to deliver up the Director Files comprising hard copy and electronic documents which are in their possession, custody or power, which belong to Primeo or to which Primeo is otherwise entitled. If they were carrying on business in the Cayman Islands, the Court would have jurisdiction to make such orders against them under section 138(1).

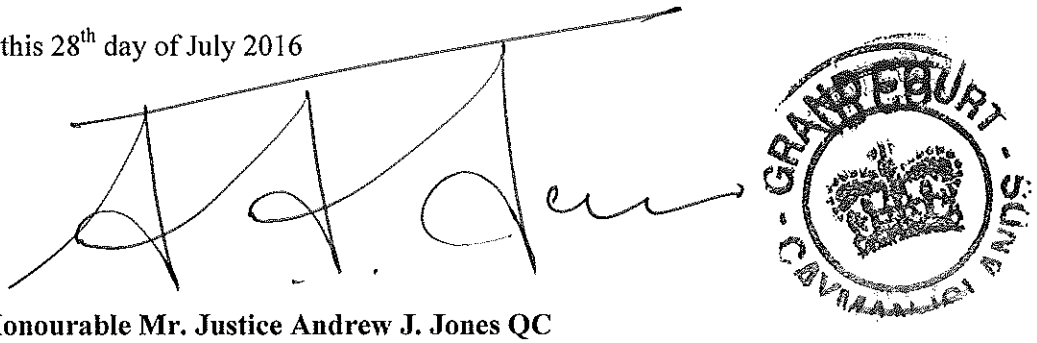
34. Upon the true construction of the Settlement Agreement, Primeo has not released its rights to ownership of the Director Files or covenanted not to exercise its rights by

applying for the issue of a letter of request or otherwise commencing proceedings against Bank Austria and the Austrian Directors for the delivery up of the Director Files.

35. The Official Liquidators need to collect in the Director Files so that Primeo can comply with its discovery obligations in the Primeo/HSBC Proceedings which, in the circumstances of this case, is a proper purpose for which the statutory power is intended to be used. The Official Liquidators are not seeking to obtain evidence from Bank Austria or the Austrian Directors. Nor are they seeking to obtain discovery of documents belonging to Bank Austria or the Austrian Directors. Nor are they contemplating that the Director Files might be used for the purposes of asserting any causes of action for breach of duty against Bank Austria or the Austrian Directors. All such causes of action, whether known or unknown to the Official Liquidators, have been released under the terms of the Settlement Agreement.

36. For these reasons, I ordered that a letter of request be issued in the liquidation proceeding (FSD 30 of 2010) in the terms which have been agreed between counsel for Primeo and HSBC.

Dated this 28th day of July 2016



The Honourable Mr. Justice Andrew J. Jones QC