

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2002/COM/bnk/2120

BETWEEN

IN THE MATTER OF AWH FUND LIMITED

(In Compulsory Liquidation)

AND

IN THE MATTER OF THE INTERNATIONAL BUSINESS

COMPANIES ACT, 2000

Before Hon. Mr Justice Ian R. Winder

Appearances: Travette Pyfrom for the Official Liquidator

**Brian Simms with Sophia Rolle-Kapousouzoglou and Wilfred
Ferguson Jr for ZCM Asset Holding Company (Bermuda)
Limited**

9 January 2021, 19 March 2021, 6 May 2021

DECISION

WINDER, J

This is the application for ZCM Asset Holding Company (Bermuda) Limited (ZCM) for disclosure relative to the clawback claim of the Official Liquidator (the Liquidator) of AWH Fund Limited (AWH).

[1.] AWH is a mutual fund which was placed into compulsory liquidation on 18 May 2004 and Alan Bates appointed as the Liquidator. The liquidation was preceded by the filing of a winding up petition on 17 October 2002. ZCM, which held shares in AWH, as custodian for another party, received the sum of US\$13,148,013.01 from AWH on 24 July 2002 following a redemption request.

[2.] On 3 April 2008 the Liquidator issued a Summons (Amended) seeking a declaration that the payment of the sum of US\$13,148,013.01, which was paid to ZCM on 24 July 2002, was wrongful by reason that it constituted an undue and/or fraudulent preference pursuant to section 160 of International Business Companies Act (the IBC Act).

[3.] Section 160 of the IBC Act provides:

160. (1) Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such traders, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and is invalid accordingly.

(2) For the purposes of this section —

(a) the presentation of a petition for winding up a company in the case of a company being wound up by the court or subject to the supervision of the court; and

(b) a resolution for winding up the company, in the case of a voluntary winding up, shall be deemed to correspond with the act of bankruptcy in the case of an individual trader, and any conveyance or assignment made by any company formed under this Act of all or any part of its estate and effects to trustees for the benefit of all or any part of its creditors is void.

[4.] On 26 May 2020 the Court gave directions for the hearing of AWH's claim and providing for the filing of Points of Claim by the AWH in addition to discovery. Following the filing and service of AWH's Points of Claim on 30 June 2020, ZCM filed and served a Request for Discovery identifying 40 types of documents which it says are relevant to the matters in question in the claim against ZCM. AWH objected to the request for discovery in a letter dated 24 July 2020.

[5.] On 22 October 2020 AWH filed and served a list of documents disclosing 140 documents which it says are relevant to its claim. ZCM maintains that the discovery provided is not full and complete and issued a Summons on 3 December 2020 seeking an order for full discovery. ZCM's Summons seeks an order in the following terms:

1. The Liquidator of AWH Fund Limited ('AWH') do within 21 days of an order of the Court issued pursuant to this Summons, make and serve an affidavit stating whether any of the documents specified or described in the Request for Discovery or any class of documents so specified or described or any other relevant documents to the proceedings which it is reasonable to suppose contains information which may enable the party ZCM to advance its own case or to damage that of the Liquidator or if it is a document which may fairly lead ZCM to a train of inquiry, are or have been at any time in his possession, custody or power, and if not in his possession, custody or power, when they or any of them parted with it or them and what has become of the document or documents.
2. That the AWH do within the aforesaid 21 days of the said Order in paragraph 1 make and serve in relation to the documents or class or documents specified or described in paragraph 1 of this Summons, a further and better list of documents which are or have been in their possession, custody or power, and an affidavit verifying such further and fuller list of documents.
3. That AWH do within 14 days of the making of serving the further and better list of documents pursuant to paragraph 2 of this Summons permit ZCM to inspect and take copies of the documents identified in such further and fuller list of documents and all such documents as are referred to in the stated affidavit of AWH as being in their possession, custody or power.

[6.] ZCM claims that save of items numbered 1, 3, 5, 6, 8, 9, 13, 15, 18, 23, 24, 25, 26, 27 and 28 on its Request for Discovery, the complete list of the 40 items sought remains undisclosed. ZCM has produced a schedule of the documents and the basis of the

liquidator's objections. The Liquidator object to the disclosure on the basis, he says, that the documents are not relevant to matters in question in the action. In particular he says:

- (i) the Swiss proceedings and/or any other proceedings against other parties do not relate to the issues to be determined;
- (ii) the correspondence between the Liquidator and other Funds are not relevant to the issues in the actions;
- (iii) the documents generated in the interview with Mr. Oxnam, the former director are irrelevant; and
- (iv) the documents related to the disciplinary proceedings against Anthony Wong are also irrelevant.

[7.] AWH says at paragraphs 11-13 of its submissions, that:

11. The Liquidator's position in summary is that ZCM is not entitled to many of the documents or class of documents requested as such documents were obtained by the Liquidator under his compulsory powers, and cannot be released without an order of the court, others are protected by Legal Professional Privilege ("LLP") and many are irrelevant to the issues as presently pleaded before the court.

12. It is submitted that the applicant ought to file its defence so that the disclosure exercise can proceed within the parameters of the pleadings and the issues which the court is being asked to determine (i.e. against the background of the proceedings).

13. There is no objection to disclosure; the resistance is to the general nature of the request. Disclosure ought to be relevant and proportional and ought to be related to disclosable documents.

[8.] Further, they say that the position of a Liquidator is not the same as that of an ordinary party in civil litigation and that his duties vis-à-vis disclosure is limited to use of the documents obtained by him in the interest of the body of creditors and the company. They also say that many of the documents requested by ZCM were obtained by the Liquidator under the court's powers to compel witnesses to attend and to give evidence and be questioned concerning matters connected with the insolvent estate.

[9.] I accept that the Liquidator has a genuine concern to require the security of this Court's order for the disclosure of documents which may have been obtained for collateral purposes.

[10.] I also accept the principles identified by ZCM that: (a) the authorities and the IBC Act merely renders the relevant payment voidable as a preference; (b) it does not make any provision as to the recovery of the payment and that the consequence of the avoidance of a payment falls to be determined at common law; and (c) the Section 160 presumption of undue or fraudulent preference comes into play where there is a dominant motive to prefer a particular creditor.

[11.] I am satisfied that, having regard to the principles identified, the documents requested are relevant and should be disclosed. The documents in the possession arising from the liquidator's investigation of the actors involved could speak to the motivation for the payment to ZCM and ZCM ought to be permitted to examine this information. I am satisfied that the disclosure is in the interest of the liquidation for a proper determination as to whether the funds were wrongfully paid to ZCM.

[12.] The disclosure is ordered subject to the genuine claims of privilege and any pre-existing restraints imposed by courts and/or authorities of other jurisdictions (such as the UK and Switzerland) where documents may have been obtained. In the event documents were laid over to the Liquidator by foreign authorities for limited purposes, and it is possible to seek permission for the disclosure of the documents, the Liquidator should seek the required permission of the said authorities prior to any sharing of those documents.

[13.] I order that a further list of documents be provided by AWH within 28 days of the date hereof and that the list be verified by affidavit.

[14.] I make no order as to costs.

Dated this 8th day of October AD 2021



Ian Winder

Justice