

UPDATE

Leave to continue proceedings against companies in liquidation – *Re Madison Niche Opportunities Fund Ltd and Madison Niche Assets Fund Ltd*

Update prepared by Simon Dickson (Partner, Cayman Islands)

This was an application for leave to continue proceedings against companies in liquidation, pursuant to section 97(1) of the Companies Law, which arose (as the Chief Justice himself remarked) in somewhat unusual circumstances. The decision illustrates and confirms the Grand Court's approach to such applications.

Background

Madison Niche Opportunities Fund Ltd (the **Opportunities Fund**) and Madison Niche Assets Fund Ltd (together the **Funds**) were exempted Cayman Islands companies which operated as feeder funds in two master/feeder fund structures. The underlying investment funds invested in securities issued by underperforming and insolvent companies, and co-invested alongside one another in several of their investments.

A US oil and gas drilling company in which one investment fund was a substantial shareholder became insolvent, precipitating a risk that the State regulator would seek to impose potentially substantial liabilities on the Opportunities Fund. This could have impacted the abilities of both Funds to deal with assets in which they were co-invested, so the directors recommended that the Funds be placed into voluntary liquidation.

On 1 July 2014, voluntary liquidators were appointed (the **Liquidators**). They subsequently applied under section 131(b) of the Companies Law (2013 Revision) (as amended) to bring the liquidations under the supervision of the Grand Court of the Cayman Islands, and on 12 March 2015 the Liquidators were appointed as Joint Official Liquidators.

The TMC claims

In October 2014, while the Funds were still in voluntary liquidation, the Liquidators entered into a consulting agreement with TMC Consulting Services LLC (**TMC**), a Delaware company. In July 2015, TMC commenced proceedings against the Liquidators in the Delaware courts, claiming approximately US\$2.1m in damages for breach of that consulting agreement.

The Liquidators petitioned the US Bankruptcy Court for Delaware to obtain recognition of the Cayman Islands liquidation proceedings as 'foreign main proceedings' under Chapter 15 of the US Bankruptcy Code. This would enable them to rely on the automatic stay of proceedings under section 97(1) of the Companies Law to restrain the Delaware proceedings.

TMC initially objected to the petition but withdrew its objection following an agreement with the Liquidators that the recognition order would include an express caveat that TMC's claims would not be stayed. The recognition order granted by the US Bankruptcy Court contained various provisions dealing with this agreement, including an injunction prohibiting the Liquidators from resisting any application by TMC to the Grand Court in Cayman to lift the automatic stay under section 97(1).

TMC duly applied to the Grand Court for permission to pursue the Delaware proceedings against the Funds.

Leave to pursue proceedings: the court's approach

The Grand Court granted TMC leave to pursue the Delaware proceedings.

In his written reasons, Smellie CJ referred to the leading authorities on section 97(1) of the Companies Law and its English law equivalent, section 130(2) of the Insolvency Act 1986, *Algosaibi and Brothers Company v SAAD Investments Company Ltd*¹ and *Re Aro Co Ltd*² which make clear that on an application under section 97(1) the court has 'a free hand to do what is right and fair according to the circumstances of each case'.

What is right and fair will depend on the nature of the proceedings which the applicant wishes to pursue against the company, and whether the underlying dispute is one which can be determined within the winding up process, or whether it is more appropriately determined in separate proceedings.³ In general, there can be no objection in principle to a creditor litigating a disputed claim in a foreign court, provided that the jurisdiction is an appropriate one, conducting litigation there is not vexatious or oppressive to the liquidators, and so long as this will not result in the creditor enjoying prior access to any part of the insolvent estate: *Stichting Shell Pensioenfonds v Kryz*⁴ at [40].

In this case, the Chief Justice was satisfied that the claim in Delaware was just a contingent claim for damages which, if successful, would allow TMC to prove as a creditor in the liquidation. It was not a direct claim to assets in the liquidation which might give TMC priority over other creditors. The claim could not be resolved within the winding up procedures and needed to be determined by court proceedings, whether in Delaware or in Cayman.

The Chief Justice concluded that the overwhelming answer was that the Delaware litigation should be allowed to proceed. In reaching that conclusion, he gave particular weight to four considerations.

1. In the peculiar circumstances of the case, the fact that the Liquidators had agreed to the recognition order permitting the TMC litigation to continue. Indeed, it was said that this was by itself a sufficient reason for granting the order requested.
2. The consulting agreement provided for Delaware law and the exclusive jurisdiction of the Delaware courts.
3. TMC's claims involved other entities besides the Funds. Forcing TMC to litigate in Cayman would lead to a wasteful duplication of work caused by litigating parallel claims in two jurisdictions.
4. Delaware was the more convenient forum for the witnesses and would permit the litigation to continue and avoid wasted costs.

Analysis

In essence, the decision offers a straightforward illustration of the approach which the Grand Court will take to the question of whether to permit proceedings to be commenced or pursued against a company in liquidation.

Smellie CJ did not discuss whether the fact that the dispute arose after the appointment of the liquidators was a relevant factor in deciding that the claim could not be determined within the liquidation. Nor did he discuss proportionality. The decision raises the question whether it will be appropriate to give a creditor leave to pursue proceedings in every case where there is a substantive dispute, or whether in some circumstances it will be more appropriate (at least in the first instance) for a liquidator to take a view on the merits of such a claim.

¹ [2010] (1) CILR 553.

² [1980] Ch 196.

³ In accordance with the remarks of Jonathan Parker J in *Re BCCI International SA (No 4)* [1994] 1 BCLC 419.

⁴ [2014] UKPC 41.

The court seems to have been content to place a high degree of reliance on the fact that the Liquidators had taken the view that it was appropriate for the dispute to be litigated in Delaware and in such circumstances this would seem to be the determinative tactic.

Contacts

Simon Dickson
Partner, Mourant Ozannes
Cayman Islands
+1 345 814 9110
simon.dickson@mourant.com

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