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UPDATE

Not merely shadowy figures – In Re Exten Investment Fund et al

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This decision represents the first time the wording of s. 151(3) of the Companies Law in its current form has been considered by the Cayman court. It confirms that Cayman will adopt the generous approach taken in other commonwealth countries on the issue of who is considered to be interested in deferral applications. The decision also informs the definition of a contingent creditor in the context of who can present a winding up petition and apply for a supervision order.

The Petitioner, Credit Suisse London Nominees Ltd, was the sole investor in two funds (the **Funds**) prior to its shares being compulsorily redeemed when the Funds were placed into voluntary liquidation. The managers of the Funds (the **Managers**, together the **Companies**) were also placed into voluntary liquidation.

The Petitioner applied to defer the Companies' dissolution date, and sought a supervision order in respect of the Funds on the basis that an investigation into the affairs of the Companies was needed. The voluntary liquidations of the Companies had been completed in only a week against a backdrop of extensive correspondence from the Petitioner raising various unanswered questions and requesting information regarding the operation of the Funds. In particular, certain suspect payments had been made by the Managers, and the Petitioner considered that an independent investigation by official liquidators was necessary to determine whether the Companies had any claims arising from those payments. The Petitioner wanted to defer the dissolution date of the Companies so all of these issues could be resolved prior to terminating the Companies' existence.

Standing

At the outset, the voluntary liquidator (the **Liquidator**) challenged the standing of the Petitioner to bring the deferral applications on the basis that it lacked sufficient interest in the deferral to do so.

Mangatal J considered the meaning of the phrase 'any person who appears to be interested' in s. 151(3)[1] of the Companies Law (the **Law**). In the absence of Cayman Islands authority considering s. 151, she relied upon English jurisprudence considering the similarly drafted s. 352(1) of the UK Companies Act 1948. In doing so, she adopted the approach taken by Megarry J in *Re Test Holdings*[2] that the phrase 'any person who appears to be interested' is one of great amplitude and, provided the interest was 'not merely shadowy'[3], it would be sufficient to establish standing for the present purpose.

[1] Which states:*...the Court may, on the application of the liquidator or any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect to such date as the Court thinks fit.*

[2] *Re Test Holdings (Clifton) Ltd: Re General Issue and Investment Co Ltd* [1969] 3 All ER 517

[3] Per Meggary J in *Re Wood and Martin (Bricklaying Contractors) Ltd* [1971] 1 All ER 732, at 736

In her view, the Petitioner, as the sole economic stakeholder in the Funds, and as the party entitled to ultimately benefit from any potential recoveries made in respect of the suspect payments, had clearly established itself as having a sufficient interest, for the purposes of s.151(3), in the deferral of the dissolution of the Companies. It was not a question of the Petitioner showing it had a pecuniary or proprietary interest in the Companies, rather, it had to demonstrate an interest in resuscitating the Companies, and had convincingly done so.

Deferral

Mangatal J then considered the application to defer the dissolution date of the Companies. Reference was made to the Hong Kong Companies Ordinance[4], which is also in substantially similar terms as s. 151 of the Law. Mangatal J relied upon a couple of Hong Kong decisions[5] which held that deferring the dissolution of a company is justified where some aspect of the company's business has not been concluded. The question of deferral should be considered in the context of what is hoped and what is likely to be achieved by deferring the dissolution. Importantly, she accepted that, if it appears that it is in the public interest for certain matters to be investigated, deferral is justified.

The deferral was granted on the grounds that:

- it was clear the Companies had unfinished business, namely the investigation into the matters raised by the Petitioner in its correspondence and the possible pursuit of claims in connection with the suspect payments;
- the Companies would not be able to pursue recoveries in relation to the suspect payments if they were dissolved;
- it was in the public interest that past wrongs be investigated and appropriate action taken;
- the Petitioner was willing to fund the liquidations despite the fact that it had already suffered losses, indicating its commitment to investigate outstanding matters; and
- importantly, no party would suffer any detriment as a result of the deferral.

Application for Court Supervision of the Liquidation of the Funds

The application for court supervision was made only in respect of the Funds (as the Petitioner accepted it did not have standing to make such an application in respect of the Managers) and upon the following grounds:

- granting the application would enable the JOLs to require delivery up of documents and property belonging to the Funds or to examine any relevant person pursuant to s. 103 of the Law[6];
- the JOLs could apply to issue a letter of request to obtain the assistance of a foreign court if needed; and
- the proposed appointees were appropriate because they had the geographic coverage and experience necessary to conduct the kind of investigation called for in this case and were wholly independent, having had no prior dealings with the former management of the Companies.

In opposition, the Liquidator submitted that a petition under s. 131 could only be issued by a voluntary liquidator, contributory or creditor, and that the court lacks jurisdiction to grant a supervision order on the application of any other class of person. It argued the Petitioner was not a creditor of the Funds. It never submitted a proof of debt in the liquidations of the Companies, and any rights it had as a former redemption creditor ceased on the date of payment of the redemption proceeds. Further, the Liquidator did not consider the Petitioner to be a contingent creditor, because it had not adduced evidence of a claim which would amount to a provable debt within the meaning of s. 139 of the Law.

Mangatal J reviewed s. 94 of the Law, which sets out the categories of persons who can present a winding up petition, including contingent creditors[7]. She ultimately took the view that, given the allegations

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[4] S. 248(4), Cap 32

[5] *The Commission of Inland Revenue v Fullbright Co Ltd* HCCW 208/2008 and *Kelso Enterprises Ltd v Liu Yiu Keung* CACV 303/2006

[6] S 103 provides for the examination of relevant persons, including a company director or a professional service provider

[7] S 94(1)(b)

surrounding the payments made by the Managers, and the fact that the Petitioner was the sole investor in the Funds and may ultimately become entitled to the benefit of any repayment, it could be considered a contingent creditor.

Further, given the wide scope of the language in s. 131, she held that the word 'creditor' can be construed to include contingent creditors, so a contingent creditor may apply for a supervision order. For these purposes, she considered it unnecessary for the Petitioner's claim to exist as a provable claim in order to fall within the scope of s. 131.

Accordingly, given the existence of valid reasons for pursuing investigations into the Funds' affairs which could lead to legal action in relation to the suspect payments, she granted the Petitioner's application and made a supervision order in respect of the Funds. However, she dismissed as premature a request for the JOLs to have power to litigate in the names of the Funds pending a thorough investigation of the facts. She did however grant the JOLs power to apply to court for a supervision order in respect of the Managers. The Petitioner had initially refrained from making such an application in respect of the Managers because it was neither a contributory nor a direct creditor of the Managers. Notwithstanding this, it had been envisaged from the outset that if supervision orders were granted in relation to the Funds, the JOLs would then consider whether to cause the Funds, as creditors or contingent creditors of the Managers, to apply to bring their voluntary liquidations under court supervision.

Conclusion

This decision represents the first time the wording of s. 151(3) of the Law in its current form has been considered by the Cayman court. Happily, there was sufficient jurisprudence from other jurisdictions to enable the judge to make a well-informed decision based upon legal precedent, confirming that Cayman will adopt the generous approach taken in other commonwealth countries on the issue of who is considered to be interested in deferral applications.

The decision also informs the definition of a contingent creditor in the context of who can present a winding up petition and apply for a supervision order. In so finding, Mangatal J acknowledged that this was not a clear cut case, but that on balance, the Petitioner was indeed a contingent creditor because of its potential to make recoveries provided the process of liquidation was allowed to properly run its course.

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