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UPDATE

A Person Aggrieved: Challenging a Liquidator's Decision

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Section 273 of the Insolvency Act, 2003 provides that "a person aggrieved" may apply to the Court to challenge a decision of a liquidator. Although, on its face, the section appears to broadly confer standing to make an application, the Courts have interpreted the section so as to restrict standing to specific categories of persons having a sufficient interest in the decision in question.

The Statutory Provision

Section 273 of the Insolvency Act provides that:

A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder.

Office holders in this context include administrators, liquidators, provisional liquidators and administrative receivers.

A Person Aggrieved

The meaning of a 'person aggrieved' has recently been considered by the Eastern Caribbean Court of Appeal in *ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited & Ors v Krys & Caulfield (as Joint Liquidators of Fairfield Sentry Limited)*[1] and *Stanford v Akers & McDonald (as Joint Liquidators of Chesterfield United Inc.*[2]

In the *Stanford* case, the Court summarised the law as follows (at paragraph 77):

We are of the view that section 273 of the Insolvency Act, 2003 requires the "person aggrieved" to be a contributory, a creditor, or a third narrow class of persons directly affected by the exercise of a power specifically given to liquidators, who would not otherwise have any right to challenge the exercise of that power. In this regard we are guided by the well-known principles in Deloitte & Touche AG v Christopher D. Johnson et al. We are in total agreement with the learned judge that all other persons are considered outsiders to the liquidation, who are not capable of being "aggrieved persons" and thus cannot apply under section 273 of the Insolvency Act, 2003.

Thus, in the *Fairfield* case, former shareholders of a number of funds in liquidation who were being sued on behalf of the funds' liquidators in proceedings in the United States of America for recovery of redemption monies did not qualify as persons aggrieved. They had applied in their capacity as mere defendants in the

[1] Appeal Nos. BVIHCMAP: 11-16, 23-28 of 2016, 20 November 2017.

[2] Appeal No. BVIHCMAP2017/0019, 12 July 2018.

US Proceedings (and as alleged debtors), and in such capacity, they had no legitimate interest in the relief sought.

Likewise in the *Stanford* case, the shareholder of a shareholder of the company in liquidation did not have standing to challenge the liquidators' decision to admit a claim in the liquidation.

Most recently, in *Stevanovich v Wide & McDonald*[3], a decision of the BVI Commercial Court, a former director of the company in liquidation was held not to have standing to challenge the liquidators' decision to admit a proof of debt of a creditor of the company which was based upon a default judgment obtained against the company in proceedings in the United States. The former director sought to challenge the liquidators' decision in circumstances where the liquidators had subsequently brought proceedings against him seeking a contribution to the assets of the company. The claim that the liquidators had admitted was the only claim made against the company. If the decision to accept the claim were set aside, there would be no reason for the liquidation (or the contribution proceedings) to continue.

In applying the *Fairfield* and *Stanford* cases, the Court held that the applicant was not directly affected by the liquidators' decision to admit the claim. At best he had only been indirectly affected. It was the later act of bringing proceedings against him that directly affected him. Nor did the applicant have any legitimate interest in the relief sought. His interests were adverse to the liquidation, and as such, he was an outsider to the liquidation.

The Perversity Test

Assuming that standing can be established, the question then arises as to what an applicant is required to establish before the Court will interfere with the liquidator's decision? Generally speaking, the answer is that the applicant need satisfy what is commonly referred to as the 'perversity test'. In essence, bad faith and fraud apart, the Court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable person would have done it.

In the *Stanford* case, the Court referred to long-standing English authority, including the decision of the English Court of Appeal in *Re Edennote Ltd*[4], in holding (at paragraph 83) that:

It is an important feature of the test that the threshold applied is a high one. It is not open to a court to seek to substitute its opinion for that of the joint liquidators; the court is required to ascertain whether the decision is so absurd that no reasonable liquidator could have arrived at it. This point is helpfully explained in [the *Fairfield* case] *where this Court held in relation to section 273, that it is not for a court to question whether a liquidator has chosen the best approach but rather it is to prevent a liquidator from taking steps that are so manifestly absurd or perverse that they fall completely outside the permissible range of options.*

An Exception in the Case of Purely Legal Decisions

However, in obiter in the *Stevanovich* case, the Court recognised the existence of an exception to the perversity test in reliance upon the decision of the English Court of Appeal in *Mahomed v Morris*[5]. There, the Court distinguished between commercial decisions made by liquidators to which the perversity test does apply, and decisions involving purely legal issues to which it does not.

In the *Stevanovich* case, the liquidators had admitted the creditor's claim on the basis that the default judgment obtained in the US would be enforceable in the BVI as the company had been present in the US when the proceedings against it had been commenced. The Court held that, although the question of presence was fact specific, it was a component of a greater legal issue, that being the question of whether a debt is provable in a liquidation. Accordingly, the decision to admit the claim had been a purely legal one, and as such, the applicant would have had to have overcome a much lower threshold in order to set it aside had he had standing.

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[3] Claim No. BVIHCM2013/0043, 5 December 2018.

[4] [1996] BCC 718.

[5] [2001] BCC 223 at 241.

Conclusion

In order to challenge a decision of a liquidator, a prospective applicant must, as a threshold requirement, show that he falls within one of three categories: a creditor in the case of any insolvent company; a contributory (shareholder) in the case of a solvent company; or a person directly affected by the decision made by the liquidator. If the proposed applicant falls within one of these categories, he must then show that he has a legitimate interest in the relief sought before he is able to establish standing.

Assuming that standing can be established, the applicant will face an onerous task of persuading the Court to set aside a commercial decision of a liquidator (such as entering into a compromise) under the perversity test. However, the applicant will face a much lower threshold in the case of decisions by liquidators which involve purely legal issues (such as the admission of claims).

Mourant Ozannes acted on behalf of the successful liquidators in the *Stevanovich* case and instructed Robin Dicker QC of South Square for the hearing.

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