

UPDATE

Cayman Islands Court of Appeal dismisses application for automatic and discretionary leave to appeal

Update prepared by Peter Hayden (Partner, Cayman Islands) and Jonathan Moffatt (Senior Associate, Cayman Islands)

In the recent decision in *Palladyne International Asset Management B.V. v Upper Brook (A) Limited et al*, CICA Appeal No 5 of 2019, the Cayman Islands Court of Appeal refused an application for leave to appeal to the Privy Council, deciding that the appeal was not as of right and that discretionary leave should also not be granted. The decision will be of interest to practitioners and parties considering a second appeal and illustrates that even appeals on discrete points of law will only be permitted if they have real prospects of success.

In the substantive proceedings¹, the applicant had sought a declaration that shareholder resolutions removing the applicant as a director of three Cayman Islands investment funds in 2014 were prohibited by the Libya (Restrictive Measures) (Overseas Territories) Order SI 2011 No 1080, which operated to freeze Libyan state assets, and that the shareholder resolutions were therefore void and of no effect. The claim was dismissed at trial and the CICA dismissed the appeal, finding that exercising voting rights was not prohibited. Both courts declined to decide the secondary question of, had the shareholder resolutions breached the sanctions order, whether this would have nullified the legal effect of the shareholder resolutions or only invoked criminal liability.

The applicant sought leave to appeal as of right pursuant to Article 3(1)(a) of the Cayman Islands (Appeals to Privy Council) Order 1984, which applies to an appeal involving *a claim to or question respecting property or a right of the value of £300 sterling or upwards*. The CICA relied on the Privy Council's recent analysis of this wording in *Jacpot Ltd v Gambling Regulatory Authority* [2018] UKPC 16 and found that, in cases where there is no money claim or claim to property, the question is whether the appeal would determine the existence of a property right or a proprietary right to dispose of property (worth at least £300).

The CICA concluded that the appeal did not involve such a right:

- A director does not have a right to continue to be a director. To the extent that a director has a right or interest in ensuring that any appointment or removal of directors is lawful, this is no different from the right of any person to see that the law is applied, which the authorities confirm is not the type of civil right which suffices for an appeal as of right.
- Nor does a director have a proprietary right to control and dispose of a company's assets. The power to dispose of a company's property is exclusively the company's own and this is unaffected by a director's authority to procure an exercise by the company of its own power to dispose of its property. This fundamental principle has been repeated recently by the English appellate courts in *Bilta (UK) Ltd. v Nazir (No 2)* [2014] Ch 52 and *Prest v Petrodel* [2013] 2 AC 415.

¹ *Palladyne International Asset Management B.V. v Upper Brook (A) Limited et al*, CICA Appeal No 5 of 2019 (unreported, 18 November 2019); FSD 68 of 2016 (NSJ) (unreported, 30 January 2019)

The CICA also refused to grant discretionary leave under Article 3(2)(a). The applicant had not relied on any inconsistent decisions in jurisdictions applying similar sanctions provisions which could suggest that their meaning was uncertain or required clarification. In any event the Privy Council would be better placed than the CICA to consider any further application for leave given its familiarity with those other jurisdictions. The appeal also lacked merit – it could not be realistically argued that the passing of the shareholder resolutions had breached the sanctions order as they did not dissipate or affect the value or character of the shares as financial assets.

This decision provides a practical illustration of a non-money claim failing to meet the test for automatic leave to appeal and offers a welcome reminder of the distinction between the rights of a company and its directors. It is also clear that the CICA is carefully scrutinising applications for discretionary leave and will only allow the matter to proceed if it has a real prospect of success. This approach is consistent with the Privy Council's own test in respect of leave applications made directly to it (the appeal must be *arguable*).

Peter Hayden and Jonathan Moffatt of Mourant acted successfully for the funds on the appeal and application for leave to appeal.

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