JANUARY 2021

UPDATE

'Blessing' of office holder decisions: Canargo Limited - In Liquidation ([2020] GRC064)

Update prepared by Abel Lyall (Partner, Guernsey) and Greg Coburn (Associate, Guernsey)

In circumstances where Guernsey insolvency practitioners face taking a course of action that is contested by creditors, such as taking a commercial decision, they can now consider applying to the Court to have the proposed course of action 'blessed'. In the case of *Canargo Limited - In Liquidation* ([2020] GRC064), the Royal Court has provided clarity and guidance regarding the principles that it will apply when considering such an application

Background 1

On 4 October 2019 the Joint Liquidators of Canargo Limited (the **Company**) entered into a Conditional Asset Purchase Agreement (**CAPA**) with MND Georgia BV (**MND**). The CAPA was conditional on the Joint Liquidators obtaining the Court's approval of the Joint Liquidators' decision to enter into the CAPA. Shortly after the execution of the CAPA, on 11 October 2019, the Joint Liquidators sought directions from the Court by application (the **Application**) pursuant to section 426 of the Companies (Guernsey) Law, 2008 (the **Law**).

In terms of the CAPA, the Joint Liquidators conditionally sold the Company's 50% shareholding in, and loan notes issued to it by, three subsidiary companies (the **Assets**). MND already held the other 50% shareholding in those subsidiaries and, as the First Respondent to the Application, MND supported the Joint Liquidators' position.

Of the other Respondents, Achernar Assets AG and Achernar Partners Limited (together **Archernar**), a prospective creditor with a combined total debts which exceeded 99% of the Company's debts, contested the Application. The basis of Archernar's concern was that there was a risk that the sale of the Assets would prejudice the recovery of potentially large realisations for the benefit of the liquidation estate by the Company against MND in terms of contracts governed by English law.

Power to bless a liquidator's commercial decision

In her judgment, Lieutenant Bailiff Hazel Marshall QC considered circumstances in which the Court will consider approving a liquidator's particular course of action under section 426 of the Companies Law. In summary, Lieutenant Bailiff Marshall QC set out the general principles that arose in this case as follows:

1. Although section 426 of the Companies Law authorises a liquidator to seek directions, it is wide enough in scope to include an application to the court to approve a liquidator's intended course of action;
2. Such an application will be considered on the same principles as a request by a trustee to 'bless' a momentous decision, according to the second category of trustee applications recognised in Public Trustee v Cooper [2001] WTLR 901 at 922-4, taking account of the different purposes of a trust and a liquidation;
3. This application can be conducted in private between the applicant and the court, however, where the application seeks to bind any party to the result of the application, then parties will need to be convened so that they might be heard on the matter;
4. The application must satisfy the Court that the decision by the liquidator has been taken properly. The court will not consider approving the merits of the decision to the detriment of the decision making

power of the liquidator. Based on the evidence, the court will determine that the decision has been properly and reasonably taken within the general bounds of what could be a reasonable decision in the circumstances;

5. Although a 'proper' decision must mean a properly and fully informed decision, failing to obtain potentially helpful professional advice during the decision-making process will not automatically mean that the Court will refuse to bless the decision. In the event that, for instance, a lack of funding precluded made this impractical, the Court could still accept the decision as being the best that could be taken in the material circumstances;
6. In the event that the Court does not give its 'blessing', office holders can still proceed with their intended course of action. In the absence of the Court's blessing, if the decision later becomes subject to challenge, the liquidator would not benefit from the Court's endorsement that he had been found to act properly. This does not however mean that the transaction or the any decision proceeded with in the absence of the Court's affirmation would be wrong or improperly taken;
7. To obtain the 'insurance policy' of the Court's blessing, liquidators must explain the facts and reasons bringing them to their determination. This must be carried out in good faith and with frankness to the Court;
8. Regarding commercial transactions, three specific points may need consideration arising from the above:
    - Liquidators should carefully consider whether a proposed contractual obligation, contingent on the Court's approval, would impede their obligation to make full and frank disclosure to the Court.
    - Liquidators should ensure that 'exclusivity of dealing' provisions do not prevent their obligations to act on information (or take advantage of opportunity) which might arise subsequent to those contractual arrangements.
    - If relevant material comes to the liquidator's knowledge on a confidential basis, then they must at least reveal this fact to the Court as well as explaining that the information has had any effect on their decision. The Court will then have to consider whether it can 'bless' their decision without knowing the content of the confidential material. If not, arrangements might be made by those to whom the confidentiality is owed consenting to disclosure to the Court.

Summarising these principles, LB Marshall QC helpfully commented:

In summary, the applicant liquidator (or other similar office-holder) needs to bear in mind, in preparing evidence for the court in such an application, that its objective is to take the court through the whole of the decision making process which he has himself taken, so as to satisfy the court that this has been careful, comprehensive and rational, according to the particular circumstances, and thus that the decision which he has made, but which remains his own decision, has been reasonably made.'

In Canargo Limited the CAPA was ultimately not approved in the form sought by the application and, instead, a varied version was approved by the Court.

Summary

The ability for an insolvency office holder, whether an administrator or liquidator, to apply to the Guernsey Court to obtain sanction for a proposed commercial decision is a valuable one. This is particularly so where those decisions are contentious or opposed by some stakeholders. This judgment will likely act as a departure point for office holders considering applying to the Royal Court for directions approving their proposed course of actions.

As for a trustee taking a decision for which they propose to obtain the Court's blessing under *Public Trustee v Cooper* principles, officer holders should ensure they follow a robust decision making process and give proper consideration to the proposed action. It should also be borne in mind that the Court expects frank disclosure by an applicant to allow it to come to its determination when deciding an application under section 426 of the Companies Law.

Contacts

Abel Lyall
Partner, Mourant Ozannes
Guernsey
+44 1481 739 364
abel.lyall@mourant.com

Greg Coburn
Associate
Guernsey
+44 1481 739 347
greg.coburn@mourant.com

2021934/79801277/1