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UPDATE

Strength in numbers: joint liquidator appointments in cross-border insolvency

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The appointment of joint liquidators can be a useful tool in cross-border insolvency proceedings, particularly when assets are located in a number of jurisdictions. However, courts must ensure that a joint liquidator appointment does not lead to conflicting duties based on the respective laws in each jurisdiction. This was the main issue for consideration in *West Bromwich Commercial Ltd v Hatfield Property Ltd*, where Jack J was satisfied that the appointment of joint liquidators was necessary.

The recent case of *West Bromwich Commercial Ltd v Hatfield Property Ltd*[1] (***West Brom v Hatfield***) demonstrates how the appointment of joint liquidators can be a very useful tool in cross-border insolvencies, particularly when the assets of a BVI company that is wound up by the BVI courts are located outside the jurisdiction or when a BVI company is the subject of a winding-up order made in another jurisdiction. There are certain factors to be addressed when seeking to appoint joint liquidators, especially if they may be faced with conflicting obligations in two jurisdictions or where their duties pursuant to their appointment in one jurisdiction make it difficult for them to carry out their duties in another.

Background

West Brom v Hatfield concerned an application by the Applicant (**West Brom**) for an order appointing liquidators to Hatfield Property Ltd (**Hatfield**) on the basis that it was insolvent or that it was just and equitable to do so.[2] In 2009, Hatfield had defaulted on a loan agreement with West Brom in the sum of £28.55m and receivers were appointed over the property that was the subject of the loan. In 2013, Hatfield was wound up by the English High Court (the **English Court**) following a petition by Her Majesty's Commissioners of Revenue and Customs (**HMRC**) on the basis that Hatfield was unable to meet its tax liabilities. The Official Receiver was originally appointed as liquidator by the English Court but he was replaced a year later by a liquidator from Grant Thornton (**GT**) (the **English Liquidator**).

When Hatfield's registered agent, Mossack Fonseca, ceased BVI operations in March 2018, GT asked the BVI Financial Services Commission (the **FSC**) if it would allow the English Liquidator to change Hatfield's registered agent in the BVI but the FSC said that the English Liquidator would not have authority to do so without assistance from the BVI High Court (the **BVI Court**). Hatfield was subsequently struck off the register for failing to have a registered agent. If the BVI Court appointed liquidators over Hatfield, it would not require a registered agent, so West Brom proposed that a liquidator from GT in the BVI be appointed to act jointly with the English Liquidator.

Enforcing foreign law

The BVI Court was concerned that assisting the English Liquidator might indirectly lead to the enforcement of English revenue law. Indirect enforcement occurs when a foreign state, or its nominee, seeks a remedy

[1] Claim No. BVIHC (Com) 2020/0138.

[2] Under sections 159(1)(a); 162(1)(a) and/or (1)(b) of the Insolvency Act, 2003.

which is not based on a foreign rule but which is designed to give it extraterritorial effect to obtain money or property in reliance on the foreign or penal rule in question. Jack J compared the facts in *West Brom v Hatfield* to the recent BVI case of *Re Meribelle Investments Ltd*[3] (**Meribelle**), over which he also presided and in which the respondent company also owed money to HMRC. His concerns mirrored those he had in *Meribelle*; because the English Liquidator was appointed on foot of monies owing to HMRC and the BVI Court granting him assistance might indirectly enforce the payment of a foreign revenue debt, which is barred in the BVI as there is no legislation allowing reciprocal enforcement of tax debts between the UK and the BVI (this is known as the 'revenue rule').

In considering a number of authorities where the English courts refused to directly or indirectly enforce the laws of another country, Jack J considered whether the refusal to enforce foreign revenue law also applied as between the UK and the British Overseas Territories. Citing the Canadian case of *Attorney General for Canada v William Schulze & Co,*[4] (**AG v Schulze**), where it was pointed out that the '*...mother country and her self-governing colonies stand in different relationship from that which exists between two foreign states*', Jack J said '*...it may thus not matter whether the Queen acts in right of the Virgin Islands or in right of the United Kingdom when the question of enforcement of UK tax obligations in this jurisdiction is in question*'.

Conflicting liquidator duties

Returning to *West Brom v Hatfield*, Jack J considered that if the line of thinking in *AG v Schulze* was correct, a liquidator appointed by the BVI Court would not be entitled to distribute to HMRC assets that came into his possession; he could only distribute to non-sovereign creditors. As such, it would not be appropriate to appoint the English Liquidator as it would be placing him in an impossible situation where he would owe duties to the English Court to distribute to HMRC but also owe duties to the BVI Court *not* to distribute to HMRC. The alternative was to appoint a sole liquidator in the BVI, which would allow Hatfield to be revived and the English Liquidator could then act in the UK with full power to collect and distribute assets. However, would this mean that the English Liquidator could distribute Hatfield's assets to a creditor who, under the laws of the BVI, would not be entitled to payment? Jack J adjourned the matter for further submissions.

The 'revenue rule'

West Brom referred the BVI Court to a number of authorities relating to the indirect enforcement of foreign revenue or penal law, including the English Court of Appeal decision in *QRS 1 ApS & Ors v Frandsen,*[5] which was relied on by the Grand Court of the Cayman Islands in *Wahr-Hansen & Ors v Compass Trust Company Limited & Ors* (**Wahr-Hansen**).[6] In *Wahr-Hansen*, Henderson J held that there were three essential elements to what is referred to as the 'tax-gathering defence', namely (i) there has to be an unsatisfied tax claim, (ii) the entire proceeds of the litigation must be payable to the foreign revenue authority, and (iii) the claim must, in substance, be an attempt to collect foreign tax. It was clear from other cases cited that when a liquidator was acting as a nominee or 'puppet' of a foreign revenue authority in order to enforce a revenue claim, the claim should be rejected. However, if there were other creditors besides the revenue authority who were likely to benefit, the claim should be allowed. In other words, the 'revenue rule' should not be invoked when ordinary creditors are likely to be disadvantaged. West Brom submitted that the 'revenue rule' only barred recovery when a revenue authority was the sole creditor. It did not apply where other ordinary creditors stood to benefit from the liquidation. As such, the 'revenue rule' had no application in this case because Hatfield was massively insolvent, HMRC was not the only creditor, its only asset was secured by a major creditor, and HMRC were not likely to receive anything.

The decision

In January 2021, Jack J delivered his second judgment in the matter and acceded to West Brom's application for the appointment of a GT liquidator in the BVI to Hatfield. He was satisfied that the appointment of BVI liquidators was necessary, despite the absence of assets for distribution, and particularly when the only way Hatfield could be restored to the register was if a liquidator was appointed.

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[3] Claim No. BVIHC (Com) 2020/0013 (the second judgment in the matter, determined 16 March 2020).

[4] (1901) 9 SLT 4.

[5] [1999] 1 WLR 2169.

[6] [2007] CILR 55.

Jack J also held that because only provable debts could be admitted in a liquidation and a foreign revenue debt is not provable, a VAT liability owed to HMRC was not provable in a BVI liquidation.

Mourant acted for West Brom in this case.

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