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UPDATE

Holt Fund SPC: Restructuring Officers, SPCs and the dual approach to solvency

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In the Matter of Holt Fund SPC (Unreported, 26 January 2024) is the first occasion where an application has been made to appoint Restructuring Officers over portfolios of a segregated portfolio company. At first glance the judgment appears uncontroversial. However, it highlights a lacuna in the law which readers should be aware of.

Background

The Petitioner sought the appointment of Restructuring Officers (**ROs**) in respect of two segregated portfolios of the Holt Fund SPC.

An RO can be appointed in respect of a company that (i) is liable to be wound-up under the Companies Act (2023 Revision) (the **Act**), (ii) is or is likely to become unable to pay its debts (the **Insolvency Test**), and (iii) intends to present a compromise or arrangement to its creditors.

It was common ground in this case, that the requirements under (i) and (iii) were satisfied in that (a) a segregated portfolio company (**SPC**)[1] is liable to be wound-up under the Act and (b) with respect to the two portfolios, the ROs intended to present a compromise or arrangement to the creditors.

The Insolvency Test for a SPC

The question at issue was whether an SPC can be said to be unable to pay its debts based on the insolvency of one or more of its segregated portfolios, or whether the statutory framework protects an SPC from liquidation unless the company is or is likely to become unable to pay its debts having regard to its general assets and liabilities only.

If the latter, then the Holt Fund would be a solvent entity and the test for the appointment of ROs not met.

The Court, in raising this question, took note that in Bermuda the test for the insolvency of an SPC was modified, such that only the general assets and liabilities of an SPC were taken into account for the purpose of the Insolvency Test.[2]

The Petitioner, in an unopposed application, argued that under Cayman Islands law there was no such modification and the fact the test had not been modified was good evidence that there was no legislative intent to do so.

Further, the Petitioner argued, the Act expressly provides at section 223(1) for the winding-up of an SPC and provides that a liquidator must respect the statutory separation of assets and liabilities linked to segregated portfolios.

[1] An SPC is a company which remains a single legal entity but creates segregated portfolios such that the assets and liabilities of each portfolio are legally separate from the assets and liabilities of any other portfolio, and from the SPC's general assets and liabilities.

[2] Although the Court did not reference it, this is also the case in BVI; Guernsey and Jersey.

Receivership of Segregated Portfolios

The Court pointed out that the Act also provides at section 224 for the appointment of Receivers to wind-up individual segregated portfolios and that pursuant to section 224, the test for insolvency was the balance sheet test.

The Court questioned whether this provision led to the conclusion that Parliament intended that the receivership regime was the exclusive mechanism for the winding-up of a segregated portfolio and that the winding-up of the SPC was occasioned only when the SPC was insolvent with respect to its general assets and liabilities.

The Petitioners did not deal with these seemingly contradictory provisions and instead pointed to three authorities that suggested that a creditor could have recourse to section 223(1) (winding-up) as well as section 224 (receivership).

The first was a decision of the Court of Appeal,[3] where the Court found that *'Plainly, the court does have jurisdiction to wind up a segregated portfolio company "as a whole"'* and that the holder of segregated portfolio shares is not confined to seeking the appointment of Receivers.

The Court also looked at two unreported first instance judgments. One, where an SPC was wound-up at first instance, but only had a single portfolio,[4] and the other, where the procedural history showed that an SPC had been placed in liquidation, but no reasoned decision was available.[5]

Jurisdiction

The Court concluded that given these authorities and, for the purposes of *'what was after all an unopposed application'*, the Court had jurisdiction to wind-up an SPC by applying the Insolvency Test with respect to all of its assets (both the general assets and the assets ringfenced to one or more of its segregated portfolios) and used its wide powers under section 91(B)(3)(d) to make an order appointing ROs in respect of two segregated portfolios and *not* over the company as a whole.

Conclusion

Whilst this decision is useful with respect to the appointment of an RO where no winding-up order is made, it does nothing to resolve the lacuna in the law.

As currently drafted, and as this case confirms, the law provides that a disgruntled creditor can either petition for the winding-up of the SPC as a whole, or for the appointment of a Receiver over a particular portfolio. Which route a creditor chooses will depend on whether the relevant portfolio is cash flow insolvent in which case the SPC is wound-up or balance sheet insolvent, in which case a receivership order can be sought.

Where a creditor seeks a winding-up of the SPC, the liquidation must be for the company as a whole. It cannot be split. Obviously, the Court will fashion an order such that a liquidator would have powers to deal only with the relevant portfolios. However, this does nothing to solve the nuisance value of such an application; the reputational damage the appointment of liquidator would cause; or the risks, complexities and costs of entering and (hopefully) staying the liquidation.

In all, this points to a potential defect in the law. It may also suggest an overly narrow interpretation of the Act. After all, the legislature has clearly considered how an individual portfolio should be liquidated and decided that it should be liquidated pursuant to a different regime and pursuant to a different test to the winding up of an SPC as a whole. Is it likely that Parliament would have wanted to allow creditors two different routes with two different tests?

To an extent, however, the die is cast. The Court of Appeal and the Grand Court have spoken. Accordingly, it is likely this can only be resolved by legislative intervention. In the meantime, directors of SPCs should remain cautious and creditors aware of the broader routes to insolvency available to them.

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[3] *ABC Company (SPC) v J and Company Limited* [2012 (1) CILR 300] (***ABC Company***).

[4] *Re Coinful* (Unreported, 5 July 2023).

[5] *Performance Insurance Company SPC (in Official Liquidation)* (Unreported, 6 April 2022).

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