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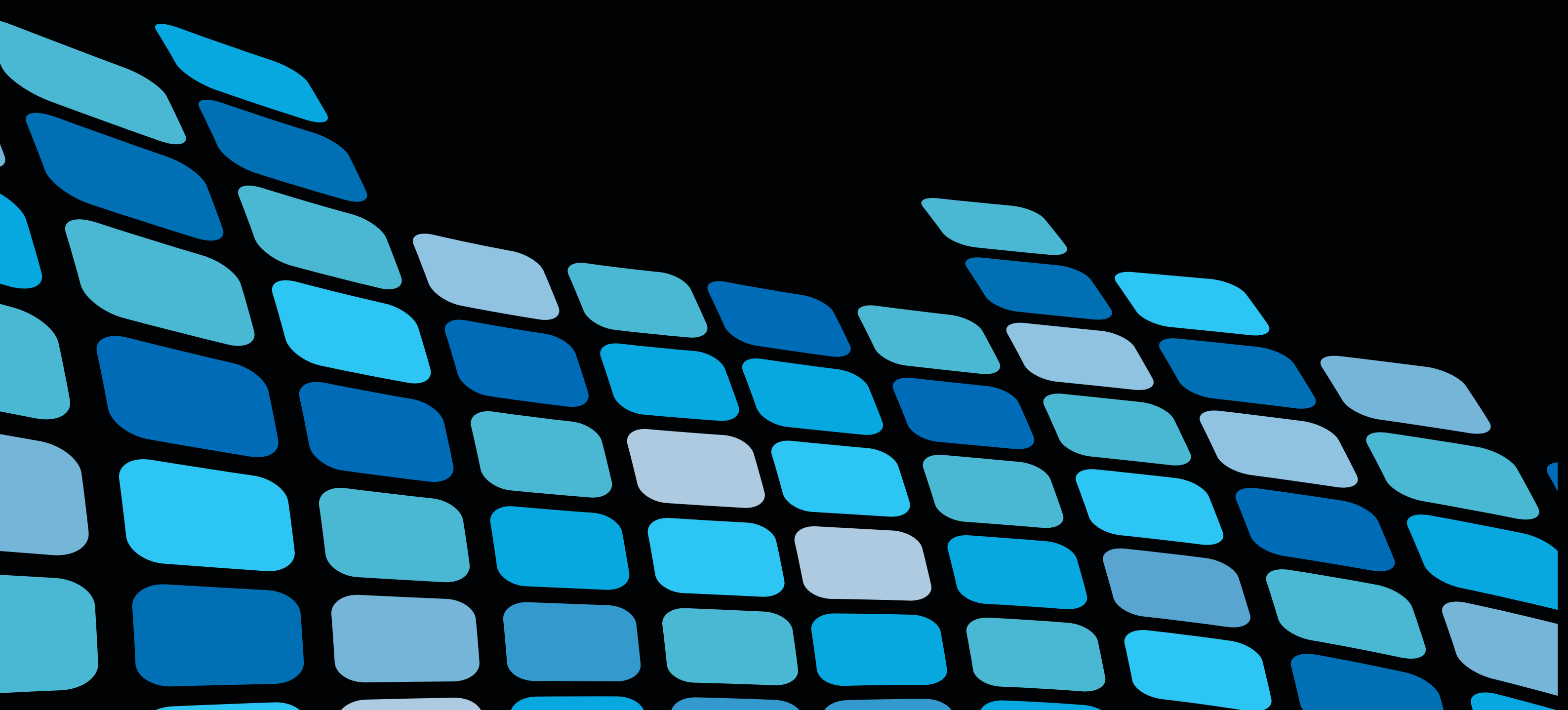
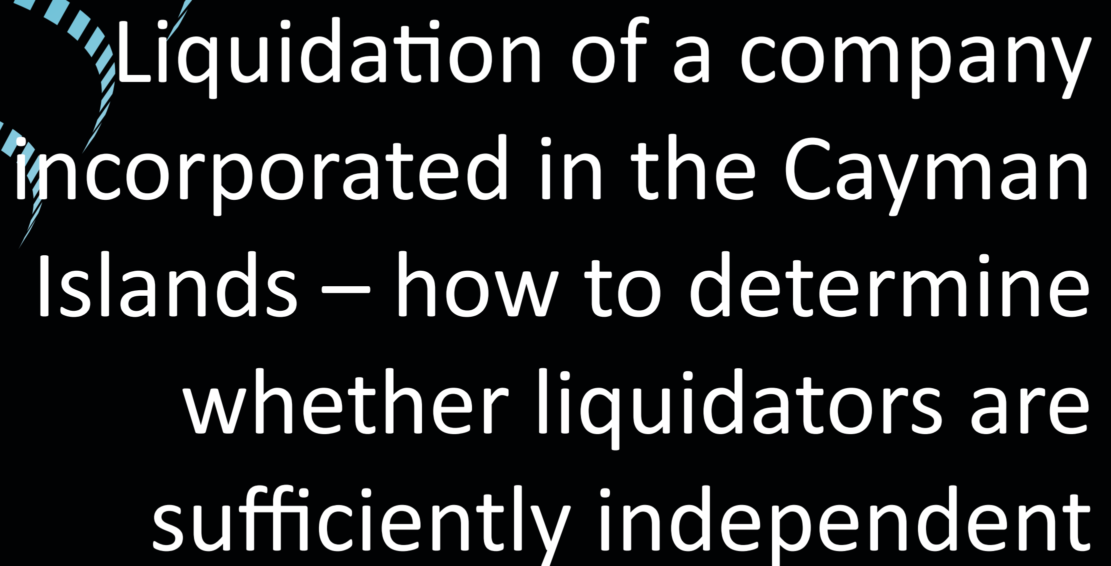




Liquidation of a company incorporated in the Cayman Islands – how to determine whether liquidators are sufficiently independent

Introduction

In its judgment in the matter of Global Fidelity Bank, Ltd (In liquidation)[1] the Grand Court of the Cayman Islands clarified the test that is to be applied when there is an objection to the proposed liquidators of a company on the grounds that they lack the required independence.

The Background

Global Fidelity Bank (the "**Bank**") operated in the Cayman Islands under a Class B Bank License awarded by the Cayman Islands Monetary Authority ("**CIMA**") since October 2014. Ascentra Holdings, Inc (in voluntary liquidation), which was one of the Bank's creditors (the "**Relevant Creditor**"), requested a withdrawal of approximately US$8m from its account with the Bank.

On or around 4 June 2021, following that withdrawal request, the Bank approached insolvency practitioners at FFP Limited ("**FFP**") to undertake a "limited and urgent" review of certain of the Bank's financial information and to produce an independent financial review of the Bank's affairs (the "**FFP Report**").

The FFP Report was produced in a matter of days and was made available to the Bank. Having reviewed the FFP Report, the Bank swiftly resolved to appoint the insolvency practitioners as joint voluntary liquidators (the "**JVLs**") of the Bank.

As the Directors did not intend to make a declaration in respect of the Bank's solvency (as required by section 124(1) of the Cayman Islands Companies Act (2022 Revision) (the "**Companies Act**")), the JVL's applied to court for an order that:

1. the liquidation of the Bank should proceed under the supervision of the Court, pursuant to s.124 of the Companies Act; and

2. the JVLs be appointed as Joint Official Liquidators ("**JOLs**") of the Bank.

Objection to the JOLs appointment

Whilst no objection was made in relation to the supervision order, the Relevant Creditor "vigorously" objected to the appointment of the JOLs and instead sought the appointment of alternative liquidators.

No other creditors of the Bank objected to the JOLs' appointment and indeed one other such creditor (who was also owed approximately US$8m by the Bank) expressly did not object to their appointment.

The reasons for this objection were rooted in the Relevant Creditor's perception that the independence of the JOLs had been compromised by their previous engagement by the Bank to produce the FFP Report. This view had been formed on the basis that:

1. the JOLs had prepared the FFP Report and had been appointed as JVLs by the Directors of the Bank. If appointed, the JOLs would therefore be required to investigate the conduct of those who had appointed them;

2. it is necessary that any liquidators should also appear to be independent, so as not to compromise their findings as any suspicion of partiality would render them less effective as liquidators. The Relevant Creditor had no confidence in the JOLs considering the circumstances in which they had been appointed; and

[1] FSD Case No: FSD 168 of 2021 (DDJ)

3. in the circumstances of the failure of the Bank, it was inappropriate for it to choose its own liquidators and this decision should be taken by its creditors whose views (and objections) should be paramount.

In the view of the Relevant Creditor, the circumstances of the JOLs' appointment created an "unavoidable and irremediable appearance of partiality" towards the Directors of the Bank which prevented the JOLs from acting independently.

The applicable law

The Judge in the case considered the previous case law and found that the position is as follows:

1. insolvency practitioners should not be appointed unless they can properly be regarded as independent of the company in respect of which they will be appointed. They will be considered to lack such independence where the practitioners (or their firm) have, in the three years prior to the onset of insolvency of the relevant company, acted as its auditors[2]; and

2. where the appointment of liquidators is challenged and the Court needs to consider whether a proposed practitioner is independent or not, the Court must "(i) identify the relationship and (ii) determine whether it is capable of impairing the appearance of independence and, if so, determine (iii) whether it is sufficiently material to the liquidation in question that a fair-minded stakeholder would reasonably object to the appointment of the nominated practitioner in question".

The Court also stressed the importance of the objective consideration of the subjective opinions of individual creditors, it being noted that "it is not the subjective views of the stakeholders that are determinative. Such views, even from significant stakeholders, will carry little weight if they are irrational or not held in good faith or on reasonable grounds. It is the reasonable views of a fair minded and informed hypothetical stakeholder that are important."

The Court's decision

The Court found that the Relevant Creditor's opposition to the appointment of the JOLs was "not based on solid or reasonable grounds" and as a result the issue before the Court was "not finely balanced". Weight was also given to the fact that the Relevant Creditor was the only person to object to the JOLs appointment.

The Court noted that the prior relationship between the Bank and FPP prior to the appointment of the JOLs was "limited" and "not a significant prior relationship" which therefore could not reasonably impair the independence of the JOLs.

The Court went further and said even if the prior relationship had been capable of impairing the JOLs' independence, "it was not sufficiently material to this liquidation such that a fair-minded stakeholder would reasonably object to the appointment of the Petitioners as JOLs".

As a result, the appointment of the JOLs was confirmed by the Court.

[2] Regulation 6(2) of the Cayman Islands Insolvency Practitioner's Regulations 2018 (the "Regulations")

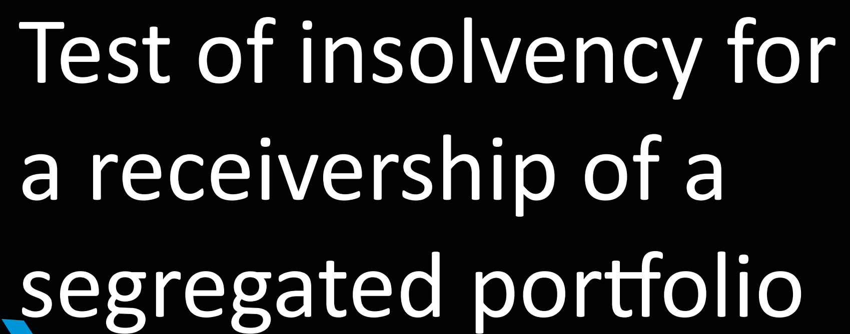
Commentary

This judgment has clarified whether it is a subjective or an objective test that is to be applied by the Court in determining whether liquidators have the requisite appearance of independence. This is particularly welcome as challenges to the appointment of joint voluntary liquidators and joint official receivers, including in the context of investment funds, are common in the Cayman Islands.

It is hoped that this clarification might reduce the number of such challenges or, in the least, allow these applications to be dealt with more quickly and with greater focus on the key issues.

The case also considered the relevance of an insolvency practitioner's previous engagement by a company that is to be liquidated. As noted above, section 6(2) of the Regulations states that an insolvency practitioner cannot be regarded as independent where he or the firm for which he works has audited the company that is facing liquidation in the three (3) years prior to insolvency. However, in his summary of the current law, the Judge noted also that "other than acting as auditors within the previous three years, there could be other circumstances which could be indicative that the practitioner cannot be properly regarded as independent".

The Court further noted that a prior connection with the company that is to be liquidated "can be an advantage rather than a disadvantage or disqualifying factor" and it observed that in this case, the JOLs' limited prior involvement with the Bank "will produce some cost savings and efficiencies". However, expedience cannot be traded for independence such that "if liquidators are not independent, in reality or perception, the fact that a lot of their experience and knowledge will be lost is not a good reason for



Test of insolvency for a receivership of a segregated portfolio

The Grand Court in the Cayman Islands has confirmed the appropriate insolvency test to be applied pursuant to section 224 of the Companies Act in respect of a Cayman Islands segregated portfolio company ("**SPC**").

Segregated portfolio companies

An SPC is a single legal entity, which can create an unlimited number of separate segregated portfolios. The assets and liabilities of a segregated portfolio benefit from a statutory "ring-fence" from the assets and liabilities of (i) any other segregated portfolios of the SPC and (ii) from the general assets and liabilities of the SPC, under section 216 of the Companies Act. Given the flexibility of corporate structure, ability to prevent cross-liability issues between different segregated portfolios and to pursue a different investment strategy for each segregated portfolio, the SPC is a common vehicle of choice for multi-class investment funds.

Facts

In the Obelisk Global Fund SPC case, the SPC Fund is registered with the Cayman Islands Monetary Authority as a mutual fund.

Obelisk Capital Management Ltd. (in official liquidation) ("**Investment Manager**") is Cayman Islands investment manager, which provided (i) investment management services to segregated portfolios of the SPC Fund, (including SP1) and (ii) operated the sourcing and pre-financing of gold doré from mines in East and West Africa. The Investment Manager was placed into official liquidation on 26 June 2020.

The SPC Fund on account of SP1 was indebted to the Investment Manager in the sum of approximately US$55,000 pursuant to a loan transferred by the SPC Fund to SP1 on 6 May 2019 ("**Debt**"), which was described in the bank transfer documentation as being a "loan to funds to pay dividends".

The joint official liquidators of the Investment Manager demanded payment of the Debt and issued a statutory demand on SP1 on 10 February 2021 in respect of the Debt, which was acknowledged but not paid by SP1. The Investment Manager sought a receivership order from the Grand Court in respect of SP1, on the basis of SP1's insolvency.

Key statutory provisions

The winding-up processes set out in Part V of the Companies Act apply in respect of a "company", therefore as a segregated portfolio does not have a distinct legal personality to the SPC, the statutory modes of winding-up which are available to a company, cannot apply to a segregated portfolio on its own. However, receivership allows a specific segregated portfolio to be closed down without the overall SPC structure having to be wound-up.

Section 224 of the Companies Act sets out the grounds for the appointment of a receiver over a segregated portfolio of an SPC. The key provisions are summarized as follows:

(a) Section 224(1) of the Companies Act provides that the Court may make a receivership order in respect of a segregated portfolio if the Court is satisfied:

(i) "that the segregated portfolio assets attributable to a particular segregated portfolio of the company (when account is taken of the company's general assets, unless there are no creditors in respect of that segregated portfolio entitled to have recourse to the company's general assets) are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio"; and

(ii) the making of a receivership order would achieve the purposes of "the orderly closing down of the business of or attributable to the segregated portfolio" and "the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto."

(b) Section 224(2) of the Companies Act states that a receivership order may be made in respect of one or more segregated portfolios.

Balance sheet v cash flow test?

SP1 did not dispute the fact that the Debt is owed by SP1, the quantum of the Debt or that the sum of the Debt is above the statutory minimum for a statutory demand pursuant to section 93(a) of the Companies Act (being KYD$100).

However, counsel for SP1 opposed the receivership application in respect of SP1, on the main basis that it had not been shown that SP1 "has or is likely to have insufficient assets to meet the claims of its creditors" and argued that if SP1 is deemed to be "balance sheet solvent" in the long term, the Court may not make an order for the appointment of a receiver.
Counsel for the Investment Manager asserted that the relevant test for insolvency is by reference to a "cash flow test" or "balance sheet test":

(a) Cash flow test: a company is deemed to be insolvent under the cash flow test if it cannot pay the debts that are due at present, or if on the balance of probabilities, it does not or will not have the resources to discharge those debts that will fall due in the reasonably near future.

(b) Balance sheet test: following the wording in section 123(2) of the Insolvency Act in the UK, a company is insolvent under the balance sheet test if its assets do not exceed its liabilities, taking into account contingent and prospective liabilities.

It was further submitted by Counsel for the Investment Manager in the case that there is no case in the Cayman Islands Court of a petitioner having to prove that an entity is balance sheet insolvent. Furthermore, a balance sheet test would bring up evidentiary issues for a petitioner (i) as a creditor would not usually have access to the books and accounts of the applicable company (especially in respect of a Cayman Islands company, for which there is no legal requirement to make accounts publicly available) and (ii) the valuation of assets is not an easy matter, even if a creditor has access to the relevant information.

The decision

As the Debt was settled before the judgment in this case was delivered, the judgment only covered the jurisdictional aspects of the application for receivership by the Investment Manager.

The Judge in the case did not accept that the wording in section 224(1) of the Companies Act equates to a cash flow test of insolvency – in particular, it was noted that no language as to debt and timing of payment is included within this sub-section.

It was held that on a plain reading of section 224 of the Companies Act:

(a) the test as to whether the Court has jurisdiction to make a receivership order is whether the assets of a company ***are or are likely to be sufficient to discharge the claims of creditors***, which can be regarded as its liabilities i.e. a balance sheet test, rather than a cash flow test; and

(b) this involves a determination on the available evidence of whether the assets are sufficient at present or are likely to be in the reasonably near future when assessed against its liabilities (including prospective and contingent liabilities) and are held in a form where they may be used to pay the claims of creditors.

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Minority shareholder rights under Cayman Islands law

1 Introduction

1.1 In the context of investment funds structured as companies (including SPCs) the rights of investors (i.e. shareholders in the company) will be set out in the key terms of the offering as set out in the offering document the subscription agreement, the Memorandum of Articles of Association ("**Articles**"), and the provisions of the Companies Act.

This section seeks to explore the general areas of Cayman Islands law which may bestow certain rights to shareholders of a Cayman company whether that company operates as an investment fund or otherwise.

1.2 Under Section 25(3) of the Companies Act, the Articles of a Cayman Islands company when registered bind the company and the members to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such Articles contained a covenant on the part of himself, his heirs, executors and administrators to conform to all the regulations contained in such Articles subject to the Companies Act.

1.3 Each shareholder by agreeing to be a member of the company agrees, therefore, to be bound by the voting provisions set out in the Articles and subject to the decisions of the majority or special majorities required under the Companies Act and the Articles. As for voting, the usual rule is that with respect to normal commercial matters there is no obligation on shareholders to consider the interest of others when exercising the right to vote attached to their shares.

1.4 The provisions of the Companies Act which govern minority shareholder protection are to a large extent derived from the equivalent provisions in English law. However there are some notable differences.

2 Unfair Prejudice

Unlike under English law, there is no ability for a shareholder of a Cayman Islands company to bring a petition before the Courts on the basis of "unfair prejudice". However under section 95(3) of the Companies Act, the Cayman Islands courts hearing a just and equitable winding-up petition has the discretion to grant alternative remedies, which are the same as the remedies which an English court can grant on an "unfair prejudice" petition (e.g. (i) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do, or (ii) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's share capital accordingly).

3 Right to Information

Unless specifically stated in the Articles, or agreed by contract (for example in a shareholders agreement), the shareholder of a Cayman Islands company has no right by virtue of his position as shareholder to be provided with information regarding the company, including the company's accounts. Nor is this information publicly available. The Cayman Islands Companies Registry can be searched, but the only information a search will reveal is the company's name, number, formation date, type, registered office and status. A specific search can also be undertaken to determine the current directors of the company.

By virtue of section 64 (b) of the Companies Act, on the application of the holders of not less than one-fifth of a company's issued and outstanding shares, the Cayman Islands courts may appoint one or more inspectors to examine the company's affairs and prepare a report thereon to the Court.

4 Right to bring Action

A shareholder in a company may be able to bring an action against its directors if the shareholder can show that they have breached a duty owed to him personally (rather than to the company). However actions against directors for breach of their duties, are typically brought to enforce a right belonging to the company rather than to one or more shareholders and, as such, have to brought by the company itself (i.e. the right will lie with the Board of Directors of the company for and on behalf of the company).

5 Derivative Actions

5.1 As stated above, the general principle or rule is that an action seeking to enforce a right belonging to a company has to be brought by the company itself. [1]

5.2 Naturally, there will be occasions when a shareholder, who is in the minority on a vote, will wish to object to the result. Generally speaking, shareholders will object to the result of a vote in circumstances where (they believe) that harm will result to the company (and consequently the value of their shareholding), or where their personal rights as shareholders have been infringed.

5.3 Where the wrong done is not to the company but to the shareholder personally, whether by the directors or the company, the rule stated above should not, as a matter of logic, apply: it would seem in principle entirely a matter for the shareholder whether the right is enforced or not. In fact, this principle has been recognised in the Court of Appeal of England and Wales which is persuasive authority under Cayman Islands law.[2] However, it is also true to say that the rule in Foss v Harbottle has been extended to cover the principle that "an individual shareholder cannot bring an action in the courts to complain of an irregularity (as distinct from an illegality) in the conduct of the Company's internal affairs if the irregularity is one which can be cured by a vote of the Company in general meeting"[3]. This is often referred to as the second limb of the rule in Foss v Harbottle.

5.4 The reason behind what is known as the second limb of the rule in Foss v Harbottle was the courts desire to avoid futile litigation. If the thing complained of was an action which in substance was something the majority of the company's shareholders were entitled to do, or if something has been done irregularly which the majority of the company's shareholders are entitled to do regularly, there was no point in having litigation about it as the ultimate end of the litigation is that a general meeting of the company's shareholders has to be called and ultimately the majority gets its way. The result of these combined principles is that a minority shareholder can seldom bring an action in his own name against those in control of the company where the action is in respect of a wrong done to the company. The minority shareholder will simply not have *locus standii* to do so. Furthermore, it will be difficult for a minority shareholder to use the name of the company to bring an action (i.e. a derivative action).

[1] Foss v. Harbottle [1843] 2 Hare 461. The Cayman Islands Court of Appeal has affirmed this principle in two cases: Schultz v Reynolds [1992-93] CILR 59; and Svanstrom v Jonasson [1997] CLLR 192.

[2] Edwards v Halliwell [1950] 2 All E.R. 1064

[3] Prudential Assurance Co. Ltd. v Newman Industries (No. 2) [1982] Ch. 204, C. A.

5.5 However, based upon established English case law authorities, if the shareholder can bring himself within one of the exceptions to the rule in Foss v Harbottle, the shareholder may be able to bring a derivative action, whereby he or she may bring an action in his or her own name but on behalf of the company. The exceptions are as follows:

5.5.1 where the alleged wrong is ultra vires (i.e. beyond the capacity of) the company or illegal;

5.5.2 where the action complained of is an irregularity in the passing of a resolution which could only have been validly done or sanctioned by a special resolution or special majority of shareholders (i.e. a majority which is more than a simple majority of over 50%);

5.5.3 where what has been done amounts to a “fraud on the minority” and the wrongdoers are themselves in control of the company, so that they will not cause the company to bring an action; and

5.5.4 where the act complained of infringes a personal right of the shareholder seeking to bring the action.

6 Illegal or Ultra Vires Acts

6.1 In Edwards v. Halliwell [1950] 2 All ER 1064 it was stated that "there is ... no room for the operation of the rule if the alleged wrong is ultra vires the company, because the majority of members cannot confirm the transaction". The same would apply for illegal acts.[4]

6.2 It should be noted that under section 28 of the Companies Act the rule regarding ultra vires has been abolished as regards third parties dealing with a Cayman Islands company. Section 28 states that no act of a company and no disposition of real or personal property to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to perform the act or to dispose of or receive the property.

However, the lack of capacity or power may be asserted (a) in proceedings by a member or director against the company to prohibit the performance of any act, or the disposition of real or personal property by or to the company, and (b) in proceedings by the company, whether acting directly or through a liquidator or other legal representative or through members of the company in a representative capacity, against the incumbent or former officers or directors of the company for loss or damage through their unauthorised acts.

Furthermore, Section 7 (4) of the Companies Act, permits a company to have unrestricted objects and Section 27 (2) of the Companies Act states that from the date of incorporation, a company is capable of exercising all the functions of a natural person with full capacity irrespective of any questions of corporate benefit. Therefore, the question of whether or not an act is ultra vires the company is unlikely to arise in practice.

7 Where a Special Resolution or other Special Procedure is required

The decision in Edwards v. Halliwell stated that the reason for this exception was that a "simple majority cannot confirm a transaction which requires a concurrence of a greater majority", for example, acts which require a special resolution.

[4] North-West Transportation Co. v. Beatty (1887) 12 App Cas 589.

8 Where the Acts amount to a Fraud on the Minority and the Wrongdoers are themselves in control of the Company

8.1 The reason for this exception in the rule of Foss v. Harbottle is that if minority shareholders were denied the right to bring an action on behalf of themselves and all others in such circumstances, their grievance would never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue. In order for this exception to apply, first it must be shown that there has been a fraud within the meaning of that word in the English case law authorities in this area and second, it must be shown that the wrongdoers are in control so that the minority shareholder is being improperly prevented from bringing a legal action in the name of the company.

8.2 In this context, fraud is thought to comprise "fraud in the wider equitable sense of that term, as in the equitable concept of a fraud on a power".[5] Fraud does not include pure negligence, however gross.[6] The traditional approach that appears to have been followed by English courts in the circumstances is to examine the nature of the act complained of to determine whether it is ratifiable by the majority and if it is not, then it will amount to a fraud on the minority. Based on English case law authorities, the following points can be made:

8.3 The misappropriation of the company's property or assets by the majority for their benefit, at the expense of the minority, is an act which can be interfered with by the court at the suit of the minority, since it is not ratifiable by the majority.[7]

8.4 Many breaches of directors' duties are ratifiable by the majority shareholders in general meeting, and in these circumstances the minority will have no remedy. Therefore, for example, in the case of Pavlides v. Jensen where it was alleged that the directors were grossly negligent, but not fraudulent, in selling property of the company at an under-value, this was ratifiable by the majority.

8.5 There may be circumstances in which the majority shareholders do not exercise their powers bona fide for the benefit of the company as a whole which could amount to a fraud on the minority.[8]

8.6 As stated above, an individual shareholder will only be permitted to bring an action in respect of a fraud on the minority if he or she shows that the company is controlled by the wrongdoers.[9] The meaning of control in this context is not clear although it covers voting control, even where shares are held by nominees.[10]

8.7 The question of whether or not there has been a fraud in the sense discussed above and whether or not the wrongdoers are in control of the company must be determined before the minority shareholder's action is allowed to proceed.[11]

[5] McGarry V-C in Estmanco (Kilner House) Ltd. v. GLC [1982] 1 All ER 437)
[6] Pavlides v. Jensen [1956] 2 All ER 518
[7] Menier v. Hooper's Telegraph Works [1874] LR 9 CH APP 350), (Cook v. Deeks [1916] 1 AC 544
[8] Estmanco (Kilner House) Ltd. v. GLC
[9] Russell v. Wakefield Waterworks Co. [1875] LR 20 EQ 474
[10] Pavlides v. Jensen
[11] Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2) [1980] 2 All ER

9 Where the Act complained of infringes a Personal Right of the Shareholder seeking to bring the legal action

9.1 It is established under English law which is persuasive authority in the Cayman Islands that certain rights of the individual shareholder may be acted upon by him on his own behalf.[12] The difficulty lies in drawing the line between those cases where a legal action is allowed and those where it is not. The test may be whether or not the wrong in question is ratifiable by the majority. As a practical matter, if an act is ratifiable by the majority, little purpose is served by allowing an individual shareholder to proceed with the personal action.

9.2 Some wrongs are of such a fundamental nature that they are not ratifiable and can be acted upon by the individual, for example, an attempted removal of the right to vote.[13] Similarly, a shareholder may be allowed to bring an action if he is deprived of other rights conferred by the Articles of the company. A personal or representative action may be permitted where the majority attempt to alter the Articles to the detriment of the minority. However, such an action will only be successful if it can be shown that the alteration was not bona fide for the benefit of the company as a whole.[14] It should be noted that the mere fact that a shareholder may have suffered a reduction in his/her share value as a consequence of the wrongdoing does not give rise to personal action against the wrongdoer, since the wrong has been suffered by the company.[15]

9.3 Definitive guidance as to when the courts will allow the enforcement of personal rights is difficult to provide and such an action will be advisable only as a last resort. Therefore, this exception is a difficult one to rely upon except in a case falling squarely within the ambit of a previous case law decision.

9.4 It has also been suggested that a further exception to the rule in Foss v. Harbottle would be permitted "where the justice of the case requires it". However, the existence of such an exception is doubtful because it is not practical to decide exceptions to the rule merely on the basis of whether the justice of the case required an exception, since that would involve a full trial before it could be decided whether the rule applied.[16]

[12] Pender v. Lushington [1877] 6 CH D70
[13] Pender v. Lushington
[14] Brown v. British Abrasive Wheel Co. [1919] 1 CH 290
[15] Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2); Stein v Blake [1998] 1 ALL ER 724
[16] Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)

10 Just and Equitable Winding Up

10.1 An alternative remedy to taking a derivative action for an aggrieved shareholder would be to petition the Cayman Islands court on the basis that it is just and equitable that the company should be wound up under section 92(e) of the Companies Act. If a winding-up order is made, liquidators will be appointed who can then investigate the company's affairs and pursue claims against the former directors (and any others who have caused loss to the company).

As stated above, under section 95(3) of the Companies Act, the Cayman Islands courts hearing a just and equitable winding-up petition has the discretion to grant alternative remedies to a winding up of the company:

(i) An order regulating the conduct of the company's affairs in the future;

(ii) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do; or

(iii) an order authorizing civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or

(iv) an order providing for the purchase of the shares of any shareholders of the company by other shareholders or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's share capital accordingly).

11 Schemes of Arrangement

Sections 86 to 88 of the Companies Act, copies set out provisions regarding schemes of arrangement that may be entered in relation to the company pursuant to which a minority shareholder may be bound by the actions of the majority specified in such provision. Section 88 of the Companies Act also sets out the powers to acquire the shares of dissenting shareholders.

12 Dissenting Rights under the Cayman Statutory Merger Regime

Section 238 of the Companies Act provides a shareholder of a Cayman Islands company, involved in a merger or consolidation under the merger regime set out in Part XVI of the Companies Act with the entitlement to be paid the fair value of his or her shares upon dissenting from the merger or consolidation.

13 English case law guidance

In relation to a number of the points discussed herein we are relying not on specific case law authority of the Cayman Islands Court, but on such case law authority as exist in England, which we would regard as being persuasive authority, although not binding authority, in the Cayman Islands court. There is Cayman Islands case law authority on this subject, which confirms that the position under Cayman Islands law is essentially the same as that under English common law. Accordingly, the content herein, absent specific case law authority of the Cayman Islands Court, represents our considered opinion as to the position as a matter of Cayman Islands law.

More thoughts on the ruling in The Matter of Padma Fund L.P. and potential impact on Investment Fund practice

Introduction

In The Matter of Padma Fund L.P. [FSD 201 of 2021] (RJP), the Cayman Grand Court held that the Cayman Court does not have jurisdiction to order the winding up of a Cayman exempted limited partnership ("**ELP**") on the basis of a creditor's petition for the winding up of the ELP. The Court ruled that the correct procedure for a creditor to follow is to commence proceedings against the general partner of the ELP for an unpaid debt. This case has clarified the process for creditors' claims against ELPs but has also in the process added some interesting scenarios to consider for a general partner. This is particularly interesting in light of the fact that ELPs are commonly used for private equity funds, venture capital funds and other private investment transactions and therefore the ruling provides guidance not only for general partners but also for investors and creditors.

Facts

In the Padma case, the petitioners presented the petition in July 2021 seeking orders from the Court for the winding up of Padma Fund L.P. (the "**Partnership**") on the basis that the Partnership is unable to pay its debts and therefore should be wound up pursuant to section 92(d) of the Companies Act as applied by section 36(3) of the Exempted Limited Partnership Act (2021 Revision).

Certain Implications

If, as the Court ruled, the remedy of any creditor of an ELP is to commence proceedings against the general partner, how will this impact on the registration of foreign companies which are sometimes registered in the Cayman Islands in order to become the qualifying general partner of the ELP? For example, how easy will it be to successfully bring a winding up petition in the Cayman Islands against a U.S. domiciled company registered in the Cayman Islands as general partner of an ELP which can apply for Chapter 11 debtor in possession protection in the U.S.?

Will the Court's decision perhaps over time change the often seen practice of having one general partner in respect of several ELPs in order to, among other things, consolidate and maintain control of several ELP investment funds? The general partner holds the assets of each ELP on statutory trust.

If a winding up order is made against the general partner of an ELP, and there is a shortfall in the ELP's assets available for distribution to creditors, the liquidator appointed has a claim against the separate assets (if any) of the general partner and such claim would constitute an unsecured claim in any liquidation of the general partner. The use of one general partner to manage and control large numbers of ELP investment funds is likely to bring the solvency of such general partners more into focus.

This publication is not intended to be a substitute for specific legal advice or a legal opinion. For more information or specific advice, please contact:

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