

UPDATE

Cayman Liquidators: use of discretionary powers

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The Cayman Islands Court of Appeal has held that there was no jurisdiction to order Cayman liquidators to exercise their liquidation powers under sections 103 and 138 of the Companies Law and/or the common law to gather in information and documentation, for the purpose of collecting evidence for discovery in proceedings, through an application for a letter of request to obtain documents from foreign third parties.

The Cayman Islands Court of Appeal (**CICA**) has recently considered the powers available to liquidators appointed in the Cayman Islands to obtain documents from third parties for use in litigation. The decision considers the proper approach to the use of the powers given to Cayman liquidators (**JOLs**) by sections 1031 and 1382 of the Companies Law and/or the common law.

Unlike the Civil Procedure Rules in England and Wales, the Cayman Islands' Grand Court Rules (**GCR**) do not provide for a power to obtain discovery from third parties. The issue before the CICA was whether JOLs could be compelled to exercise their liquidation powers to gather in information and documentation relating to the company's affairs (the **Liquidation Powers**), for the purposes of collecting evidence for discovery in proceedings, through an application for a letter of request to obtain documents from foreign third parties.

The CICA held that there was no jurisdiction to order the JOLs to exercise their Liquidation Powers for a purpose other than the liquidation. It found that the Grand Court had conflated the JOLs' statutory duties with the company's discovery obligations, effectively imposing a greater obligation on the JOLs than that placed on ordinary litigants. The CICA observed that the burden placed on JOLs giving discovery in proceedings is simply that provided for in the GCR and they cannot be compelled to exercise their Liquidation Powers to obtain discovery from other sources.

Facts

Primeo brought proceedings against HSBC entities (**HSBC**) for breaches of duty as administrator and custodian to the fund, which lost substantially all its assets in the Madoff fraud. HSBC made an application for an order requiring Primeo to apply for a letter of request to the Federal Ministry of Justice of the Republic of Austria for the purposes of compelling Unicredit Bank Austria AG (**Bank Austria**) and former directors of Primeo who were employees of Bank Austria (the **Austrian Directors**) to deliver up any hard

¹ Section 103(3) states: 'While a company is being wound up, the official liquidator may at any time before its dissolution apply to the Court for an order- (a) for the examination of any relevant person; or (b) that a relevant person transfer or deliver up to the liquidator any property or documents belonging to the company'. Section 103(7) states: 'The Court shall have jurisdiction- (a) to make an order under this section against a relevant person resident outside the Islands; and (b) to issue a letter of request for the purpose of seeking the assistance of a foreign court in obtaining the evidence of a relevant person resident outside the jurisdiction'.

² Section 138(1) states: 'Where any person has in his possession any property or documents to which the company appears to be entitled, the Court may require that person to pay, transfer or deliver such property or documents to the official liquidator'.

copy and electronic documents within their possession, custody or power which belonged to Primeo or to which Primeo was otherwise entitled. HSBC asserted that these documents were relevant to the on-going litigation.

At the initial hearing in December 2015, Primeo argued that the letter of request was an inappropriate exercise of the JOLs' powers under sections 103 and 138, in particular in circumstances where HSBC had not identified specific documents, it seemed unlikely that such an exercise would yield any new or relevant documents not already in discovery, the exercise was likely to be very expensive and Primeo had already carried out and explained various attempts to obtain documents from Bank Austria and the Austrian Directors.

Nevertheless, the Grand Court ordered Primeo to apply for the letter of request, on the basis that it was inherently likely that the Austrian Directors' documents relating to Primeo were held by Bank Austria and that the cost was relatively small compared to the amounts that HSBC claimed to have spent on its own discovery in the proceedings. The Judge required the letter of request to be pursued against the Austrian Directors as well as Bank Austria, to prevent any attempt to suggest that any documents were the property of the Austrian Directors rather than Bank Austria.

At a further hearing in April 2016 to deal with the application for the issue of the letter of request, Pioneer Alternative Investment Management Limited (**Pioneer**), Primeo's former investor advisor and part of the same corporate group as Bank Austria, intervened. Pioneer argued that there was no jurisdiction to issue the letter of request under sections 103, 138 and/or the common law in these circumstances (ie to enable HSBC to obtain discovery from foreign third parties for use in its litigation against Primeo).

The Grand Court dismissed Pioneer's arguments and issued the letter of request, finding that it had jurisdiction under sections 103, 138 and/or the common law on the basis that collecting in a company's books was a proper exercise of the statutory powers and that it was not an abuse to do so for the purpose of complying with discovery obligations in litigation against an unrelated third party. Pioneer appealed the decision and was granted a stay of execution of the letter of request, pending the appeal.

CICA decision

The CICA noted that in considering the matter the Grand Court had failed to give sufficient consideration to the JOLs' views. The Court should not have interfered in the JOLs' decision not to pursue the letter of request, unless the JOLs had '... done something so utterly unreasonable and absurd that no reasonable man would have done it' (see *Edenote Ltd* [1996] 2BCLC 389).

In relation to the Liquidation Powers, the CICA found that the Grand Court's approach was flawed for a number of reasons. It conflated the JOLs' statutory duties with Primeo's discovery obligations under the GCR. The Judge also accepted the principle that the statutory powers had to be exercised for the purposes of the liquidation, but failed to apply that principle when concluding that the collection of documents from third parties was capable of being a statutory purpose when the collection would not assist in the realisation and distribution of the company's assets. The CICA noted that the Judge had not previously been prepared to criticise the JOLs for failing to obtain the documents for the purpose of the liquidation, and there was no finding that they had failed to exercise their discretionary powers in circumstances which clearly required that they should have done so (see *Edenote*). The CICA was satisfied that the facts demonstrated that if the documents were to be obtained the only purpose which would be served would be their disclosure to HSBC. The Judge had failed to give any or any proper weight to the JOLs' opinion that the letter of request would be speculative and expensive.

The CICA also held that it was wrong to conclude that the principle of abuse of the statutory powers was confined to the situation where the documents were sought from parties to the litigation; the abuse arose whenever a power was deliberately used to obtain a result outside the contemplation of the Law creating the power.

Conclusion

Whilst providing helpful guidance on the use by JOLs of the powers contained in sections 103 and 138 of the Companies Law, the CICA decision also clarifies the general approach to be adopted by the Courts. The decision illustrates that the Courts should be slow to interfere in decisions made by JOLs as to the use of their Liquidation Powers, and that such powers can only be used for their proper purpose.

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