

UPDATE

Victory Life: Developments and Innovation in BVI Liquidators' Interim Remuneration Applications

Update prepared by Eleanor Morgan (Partner, BVI)

In December 2016, the BVI Commercial Court confirmed its power to authorise liquidators' interim payments on account of fees and disbursements yet to be incurred.

Mourant Ozannes subsequently applied for, and the Court granted, authorisation of an interim payment on account of fees yet to be incurred, calculated on a fixed fee basis, to the end of the liquidation.

Liquidators' interim remuneration

In December 2016, the BVI Commercial Court considered whether it has the power to permit court appointed liquidators' interim remuneration on account of fees and disbursements to be paid in advance of those fees being incurred (the **Fairfield Judgment**).

In summary, the relevant key points to be taken from the Fairfield Judgment are as follows:

- The Court has the discretionary power under the Insolvency Act, 2003 (the **Act**) to authorise interim payments on account of fees and disbursements yet to be incurred.
- Circumstances may arise in which liquidators can anticipate that certain expenditure will be required for which payment in arrears may not be feasible or commercially sensible.
- Frequent interim fee applications place a costs burden on the liquidation estate and it would be in the interests of stakeholders for that costs burden to be reduced.
- The power will be exercised by the Court only on an application supported by appropriate and cogent evidence, including anticipated steps, likely costs and the current level of assets in the estate.
- It will generally be inappropriate to permit such interim payments right at the very start of a liquidation.
- Liquidators are likely to be required to undertake to repay any amount of an interim payment to the extent that it later proves to have been an overpayment.

Victory Life and Pension Assurance Company Limited (in Liquidation)

Victory Life was an investment vehicle offering investment into *insurance wrapper* products by which investors or policyholders received a policy of insurance in return for their investment. There were approximately 5,500 policyholders based in multiple jurisdictions including Sweden, Norway, Finland, the UK and China. At its peak, Victory Life had Euro240m of assets under management. In 2014, Russell Crumpler and Kris Beighton of KPMG were appointed joint liquidators (the **Liquidators**), by the BVI FSC, for breach of regulatory duties, one of the first appointments of its kind. The Liquidation has now come to an end, after the Joint Liquidators successfully realised significant value for policyholders, which was not thought possible at the outset of the Joint Liquidators' appointment.

Mourant Ozannes' Application

Acting for the Liquidators, Mourant Ozannes made an application for approval of the Liquidators' remuneration on account of fees - on the face of it not an unusual application. However, this particular application was made on more innovative bases owing to its timing and the Joint Liquidators' endeavours to maximise distributions to policyholders to the greatest extent possible. Whilst the Liquidation was

drawing to a close, there were at least two interim remuneration applications foreseen, prior to an application to fix the Liquidators' remuneration and other procedural applications, which are habitually seen as unavoidable costs to the liquidation estate.

The Application was made on the following bases:

- the interim remuneration be paid in advance of incurring the fees (in some respects similarly to the Fairfield application); and
- the amount of interim remuneration was calculated as a fixed fee, up to the end of the liquidation.

The Liquidators remained conscious of their duties to the policyholders and the application was made with a view to reducing the costs burden on the liquidation estate. It was indicated at the previous remuneration application hearing that the Court would be amenable to an innovative approach, for this very reason. Given the status of the liquidation, it appeared prudent to the Liquidators to apply for the rest of their fees, costs and disbursements in advance as an estimated fixed fee, in order to avoid the expense to the liquidation estate of a further fee application, in addition to an application to fix the remuneration and other procedural applications at the close of the liquidation.

The comments made by the Court in the Fairfield Judgment provided a helpful guideline as to the level of evidence that would be required. In addition to the typically detailed evidence filed in support of interim remuneration applications, comprehensive spreadsheets containing calculations of costs and detailed fee estimates for each professional service provider were filed. Supplementing this comprehensive evidence was an explanation of the Liquidators' rationale behind the application. In order to further save costs to the liquidation estate, the Liquidators' applied for directions that their final applications for the fixing of their remuneration and other procedural applications be decided on the papers.

Application Successful

The Court granted the orders sought by the Liquidators and in particular, made a number of useful and positive comments (inter alia) including:

The Court was supplied with bundles containing no less than 17 witness statements of one of the Liquidators (Mr. Crumpler), which were filled with commendable and considerable detail.

In a case where the liquidator is depending upon the scrutiny of the Court to apply the requisite degree of scrutiny, standing in the shoes of the non-existent creditors' committee, the Liquidator rightly apprehended the need to the fullest and meticulous disclosure, taking into account proportionality to ensure that the Court is given as full picture as possible.

The estimate of remuneration, fees and disbursements to the end of the liquidation was a wise, careful and prudent estimate. Given the detailed material provided and the proportionality of the estimate, the Court had no hesitation in approving the fixed fee figure provided to the end of the Liquidation.

Finally, that the Liquidation had been *thoroughly, properly and admirably conducted* by the Liquidators.

The final applications for orders to fix the Liquidators' remuneration and other procedural applications to terminate the Liquidation were all approved by the Court, on the papers, in November 2017.

Obiter

Mr. Justice Kaye made interesting obiter comments in relation to Bannister J's decision of *Re Shangri La International Development Holding Limited* and the *utter rejection* of the judgment made by Mr. Justice Ferris in *Mirror Group Newspapers and Maxwell and Others (No. 2)*. As is well known, in *Re Shangri La* Mr. Justice Bannister found that the test described in the *Mirror Group* was unworkable. Whilst Mr. Justice Kaye did not revisit the reasoning of Mr. Justice Bannister on this occasion, but commented that it *may have to be revisited in the future* and that he

...would endorse what Mr. Justice Ferris says in respect of his comment that liquidators are expected to deploy commercial judgment but not to act regardless of expense. The act or the judgment in Shangri La is not a licence to print money...

To be continued...?

Contacts



Eleanor Morgan
Partner, Mourant Ozannes
BVI
+1 345 814 9235
eleanor.morgan@mourant.com

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED