

UPDATE

T-Bills Mutual Fund: Grand Court sanctions ground-breaking SEC resolution

Update prepared by Nicholas Fox and Adam Barrie (Cayman Islands)

In a recent decision,¹ the Grand Court has approved a multi-million dollar resolution between the joint official liquidators of a Cayman Islands' Mutual fund, the SEC and the fund's only remaining investor, which has been hailed as a creative and first-of-its-kind solution to the issues that arise from the jurisdictional tensions between office holders and the SEC.

Background

In a complaint dated 18 June 2021,² the US Securities and Exchange Commission (the **SEC**) brought a claim in the Court of the Southern District of New York (**SDNY**) claiming Income Collecting 1-3 Months T-Bills Mutual Fund (the **Fund**) and those in control of it had engaged in a fraudulent investment scheme to deceive and defraud investors in the Fund out of approximately US\$106 million. The complaint stated that the two individuals, Ofer Abarbanel and Victor Chilelli, misappropriated investor funds by diverting these monies into shell companies in uncollateralized loan transactions in violation of the Fund's prospectus and in breach of federal securities laws.

The SEC sought permanent injunctions, disgorgement and other civil penalties against the defendants. On 21 June 2021 the SDNY Court granted an order freezing the Fund's assets within the US, which included approximately US\$84 million held in the Fund's US bank accounts (the **Frozen Assets**).

The Fund was placed into voluntary liquidation in the Cayman Islands the following day and on 11 October 2021 it was put into official liquidation pursuant to a supervision order.

The joint official liquidators (the **JOLs**) of the Fund engaged in extensive discussions with the SEC and with Mosaic Financial Services Ltd (**Mosaic**), which was described variously as, '*the Fund's largest and only remaining investor*', '*by far the largest creditor in the [Fund's] liquidation*' and '*the sole party with a financial interest in the liquidation of the [Fund]*.' The aim of those discussions was to come up with a suitable compromise for all parties involved.

The JOLs reached agreements with Mosaic and the SEC on 6 January 2022 whereby the SEC agreed to the release of the Frozen Assets to the Fund; the Fund accepted a disgorgement obligation to pay US\$106m to the SEC; and all parties agreed that this obligation would be satisfied by the Fund making a distribution of US\$77m to Mosaic.³

¹ *In the Matter of Income Collecting 1-3 Months T-Bills Mutual Fund (In Official Liquidation)* (Unreported, 4 February 2022) (the **Judgment**).

² *Securities and Exchange Commission v Ofer Abarbanel, Victor Chilelli and Income Collecting 1-3 Months T-Bills Mutual Fund & Relief Defendants*, Civil Action No 1:21-cv-5429-RA: <https://www.sec.gov/litigation/complaints/2021/comp-pr2021-107.pdf>.

³ See *Final Judgment and Consent as to Defendant Income Collecting 1-3 Months T-Bills Mutual Fund (In Official Liquidation)*: Civil Action No 1:21-cv-5429-RA: <https://www.sec.gov/litigation/lit releases/2022/judgment25336.pdf>.

Sanction from the Cayman Islands Court

An application for sanction of the agreements and the payment of an interim dividend to creditors came before Doyle J in the Grand Court of the Cayman Islands on 21 January 2022. The Judge recognised the inherent tension at play between the duties of the Cayman Islands JOLs to collect the company's assets, and the functions of the SEC to exercise its right to seek and obtain disgorgement, which, in certain US cases, has been analysed as akin to acting as a *de facto* trustee for a company's investors.⁴

The Judge noted that, notwithstanding this tension, both the SEC and the JOLs shared a common interest in maximising distributions to the creditors of the Fund.

After considering the relevant legal principles for sanction applications, Doyle J held that it was well established that 'a court should not unwisely attempt to second guess a liquidator's commercial judgment. The professional and well-experienced office holders in this case are far better placed at arriving at decisions in the best commercial interests of the Company, its creditors and other interested parties than this Court is'.⁵ The Judge noted there was no suggestion in this case of bad faith or partisanship and therefore considerable weight should be attached to the JOLs' views on the compromise unless there are substantial reasons why it should not do so. The fact that Mosaic, as the only party with a financial interest in the liquidation of the Fund, agreed to the relief requested by the JOLs added further support as to why these agreements were in the best interests of all interested parties.

The sanction application was granted and the interim dividend to creditors approved.

Comment

This case represents a notable milestone in cross-border insolvency cooperation between Cayman Islands office holders and the SEC. Whilst, on the facts, this appears to have been a relatively straightforward case, the parties' abilities to come up with a pragmatic and innovative solution to alleviate any tension between the duties of the JOLs and the SEC is to be lauded. It will hopefully set a path for further cooperation and compromise to take place in other suitable cases in the future.

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⁴ See para 8 of the Judgment, which cites the US case of *SEC v Blackburn* No 20-30464 (5th Cir 12 Oct 2021).

⁵ Para 16 of the Judgment.