

BVI and Cayman Islands Case Notes

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Harneys continues its Commercial Court case notes after another busy quarter for the Court. If you have any questions, please contact Global Head of Litigation and Insolvency Phillip Kite (phillip.kite@harneys.com or +1 284 494 6059).

Redemption of shares and consideration

In a decision of interest in a number of jurisdictions where these types of claims have been made, the BVI Commercial Court handed down judgment today in the claim brought by the liquidators of Fairfield Sentry Limited, a BVI fund which invested in Bernard Madoff's investment vehicle.

Before Madoff's arrest investors in Fairfield invested and redeemed in the normal way, based on a NAV which itself was calculated on a presumed value of Fairfield's investments managed by Madoff's company. After Madoff was arrested Fairfield went into liquidation and brought claims against redeemers arguing that a mistake had been made as to the NAV.

In a decision on certain preliminary issues, the Court decided that it was not open to Fairfield to now seek to recover the price it had paid for the purchase of the shares of redeeming shareholders simply because Fairfield's calculation of the NAV was based on information which subsequently proved to be unreliable for reasons unconnected with any of the redeemers. The decision was grounded on the finding that the redeemers had given Fairfield good consideration in redeeming the shares and this was an absolute bar on the claim. (Referring to *Aiken v Short* [1856] 1H&N 210 and *Barclays Bank v WJ Simms Son* [1980] QB 677.)

The Court found in favour of Fairfield on a second preliminary issue on an interpretation of what documents constituted certificates as to the NAV in the articles of association.

Discounted valuation

In a recent test case parties agreed a "protocol" to value the shares following a section 176 forced redemption.

However one side argued that it was not possible to contract out of the statutory appraisal process; and "fair value" for valuation purposes of a section 176 forced redemption necessarily meant that there would be no minority discount (following a number of common law jurisdictions).

However the Judge held that there was no reason why parties should not be allowed to contract out of the statutory valuation machinery and indeed there were no policy reasons that would demand it. Whilst probably obiter but nevertheless a strong indication of the Court's view, section 179's fair value did not necessarily mean no minority discount, notably because section 179 applied across 5 different circumstances and fair value was calculated according to a number of factors depending on the business and the circumstances of an individual case.

Restoration

In another of a series of restoration cases the Court ruled that a company formally in voluntary liquidation before dissolution will not be restored to liquidation following restoration, but instead will be put back in good standing, and that a restoration application is now granted in only very limited circumstances:

- a) where an application to restore is made by or in relation to a company whose liquidation has previously been reported to the Registrar as completed, it will generally be difficult to see why the application should be granted otherwise than for the purpose of enabling newly discovered assets to be distributed by the company or claims to be made against it which had not previously been made.
- b) There could, otherwise than in the most exceptional circumstances, be no good grounds for avoiding the dissolution of a company that has been wound up simply so that its owners could resume carrying on business through it as if nothing had happened.

The Judge also gave some procedural guidance that the proper party to name in a restoration application is the Registrar of Companies and the Registrar will be awarded costs for the public interest requirement for him to be in attendance at the hearing through Counsel. However the Attorney General should not be named as a party unless a specific issue as to *bona vacantia* arises.

Finality of foreign judgments

In an application to wind up a BVI company the BVI Court re-stated the rules on when a foreign judgment creates an issue estoppel. Following *The Sennar*

[1985] 1 WLR 490 the Court found that there would be an estoppel where a foreign judgment is (1) of a court of competent jurisdiction; (2) is final and conclusive; and (3) on the merits. Importantly the Court found that the foreign judgment was final despite a challenge to it by third parties in another Court and a potential dispute as to the amount of the creditor's claim in a foreign liquidation of the debtor, as the Court found that these factors would not themselves affect the judgment.

Commercial Court Registry and practice directions

The separate commercial registry opened in July meaning more efficient filing of documents. The Chief Justice has also issued practice directions in a number of areas.

Weaving judgment provides invaluable guidance

In the Cayman Islands, a ruling in the Weaving case has provided fund directors with some invaluable guidance on what's expected of them. The Weaving judgment reinforces the need for directors to be diligent in the execution of their duties.

The foregoing discussion and analysis is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.