

International Corporate Rescue

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A More Common Thread Running Through the Common Law? The Supreme Court of Bermuda Grants What Is Believed To Be the First-Ever Extra-Territorial Summoning of a Company Director to Appear Before It for a Private Examination by Joint Provisional Liquidators

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Synopsis

In a landmark decision of the Supreme Court of Bermuda ('Court'), Harneys and the joint provisional liquidators ('JPLs') of a Bermuda company (the 'Company') successfully argued that the Court's power to summon officers of a company in liquidation or provisional liquidation before it for a private examination and delivery up of books and records under the Companies Act, 1981 ('Companies Act') has extra-territorial effect.

The Company is a Class C long-term insurer registered under the Bermuda Insurance Act 1978 ('IA'), and is a segregated accounts company under section 6 of the Segregated Accounts Companies Act 2000 ('SAC Act'). It has been licenced by the Bermuda Monetary Authority ('BMA') since 2013.

Background

The Petition

In November 2023, the BMA, acting pursuant to its statutory powers and functions under the Bermuda Monetary Authority Act 1969, filed a winding-up petition against the Company ('Petition'). The BMA alleged that the Company was in breach of sections 15, 15A, 16, and 17 of the IA, which cover the maintenance of adequate capital and solvency margins, the keeping of proper books and records, and the requirement for regulatory approval of controllers, directors, and officers. The BMA sought the immediate appointment of joint provisional liquidators to displace the incumbent Board of Directors ('Board') on the following alleged bases:

- (1) Regulatory Breach: the Company had remained in breach of its licensing requirements for a considerable amount of time. Specifically, it had failed to make statutory filings for two consecutive years,

with no realistic prospect of this breach being rectified. In the BMA's view, the Company had not been operating prudently;

- (2) Governance Failures: At the time of filing the Petition, the Company had been operating without an independent auditor and was at imminent risk of operating without a principal representative;
- (3) Lack of Transparency: the BMA was unable to ascertain the Company's true financial position, and the Board had failed to cooperate with the BMA's investigations; and
- (4) Loss of Confidence: the BMA therefore had no confidence in the Board and believed that the policyholders were therefore at risk.

The JPLs were appointed in late November 2023 with full powers to displace the incumbent Board, and if possible, pursue a restructuring (the 'Restructuring') of the Company, if this option would be in the best interests of the stakeholders, being primarily the policyholders.

The law

Upon a company entering liquidation in Bermuda, it is essential that the appointed liquidators (including any joint provisional liquidators), *take into his custody and control all the property and things in action to which the company is or appears to be entitled*.¹ To achieve that objective, company officers must act swiftly and cooperate with the liquidators to ensure that immediate steps are taken to safeguard and preserve the company's remaining assets. Without this timely assistance the liquidators may have to reconstruct the company's books and records from scratch, which not only wastes valuable time and increases costs, but also puts any unsecured assets at considerable risk.

Notes

¹ Section 174 of the Companies Act 1981.

The founder and ultimate beneficial owner of the Company held office as the sole remaining director of the Company at the time of the appointment of the JPLs, having consented to their appointment on behalf of the Company (the ‘Director’). However, it became apparent soon after the JPLs’ appointment that the Director would not cooperate with or provide any meaningful assistance to the JPLs. This lack of engagement has significantly hindered the JPLs’ ability to carry out their duties efficiently, resulting in delays, increased costs, and the exposure of policyholder assets to unnecessary heightened risk.

Section 195 application

Under these circumstances, a liquidator or a provisional liquidator is entitled to apply to the Court, pursuant to section 195 of the Companies Act, for an order to summon any officer of the company or any persons known or suspected to have in their possession any property of the company, or any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company, to attend a private examination, and for such officer (or person suspected to hold company property) to produce any books and papers in their custody or power relating to the company in liquidation or provisional liquidation.

In April 2024, the JPLs successfully applied to the Court by summons seeking the private examination of the Director under section 195. The Court ordered the Director to appear before the Court for private examination in early May 2024. The private examination went on to be adjourned on four different occasions for various reasons such as (i) the Director failed to deliver up the information and make production of the documents as ordered, (ii) the Director failed to present himself before the Court for examination, and (iii) the Director requested further adjournments owing to his personal circumstances.

In June 2024, after the Director had communicated with the JPLs on the morning of the scheduled examination but subsequently failed to appear, the Court declared the Director to be held in contempt of court for (i) failing to produce the documents he had been ordered to produce; and (ii) for failing to appear for examination before the Court.

Extra-territorial effect

While the Court’s powers under section 195 of the Companies Act clearly apply within Bermuda, there are no reported cases of non-resident directors (or

other parties caught by section 195, as referenced above), being compelled to appear before the Court. In this case, the Director resides outside Bermuda and the key question for the Court was therefore whether the provisions of section 195 could be construed as having extra-territorial effect, such that the Court could compel the attendance of a non-resident Director for examination under its provisions.

Harneys argued, based on the case law discussed in detail below, that section 195 may be interpreted sufficiently broadly to permit the Court to compel the attendance of directors and officers wherever they reside. They submitted that the provision contains no territorial limitation, and that modern insolvency practice supports a pragmatic approach enabling effective supervision in cross-border matters. Although the Chief Justice did not issue written reasons at the time, he accepted these submissions in full and granted such an order.

Decision

In his decision, the Chief Justice accepted the submissions made on behalf of the JPLs that section 195 of the Companies Act does indeed have extraterritorial effect, notwithstanding: (a) the presumption that legislation is generally not intended to have extra-territorial effect (see *R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2 at para 21 per Lord Lloyd-Jones) and; (b) an English Court of Appeal decision² (*Re Tucker*) which confirmed that the equivalent English private examination provision does not have extra-territorial effect.

In reaching this conclusion, the Chief Justice endorsed the views and adopted the more recent pragmatic approach taken by the British Virgin Islands (‘BVI’) and Abu Dhabi Global Market courts (‘ADGM’) in *BVIHC (COM) 2022/0119, Russell Crumpler and Christopher Farmer as Joint Liquidators of Three Arrows Capital Ltd (in liquidation) -and- (1) Zhu Su (2) Kyle Davies (‘Three Arrows’) and NMC Healthcare Ltd (In Administration) (Subject To A Deed Of Company Arrangement) And Others* [2023] ADGMCFI 0022 (‘NMC’) respectively.

The Chief Justice accepted that *Re Tucker* was distinguishable because: (a) unlike the position in the UK, there was no provision in section 195 of the Companies Act that expressly restricted the jurisdiction of the Court to persons residing within Bermuda; (b) notwithstanding such a restriction in the UK legislation, there were still conflicting decisions that supported an extra-territorial view in the English courts.

Furthermore, and by applying the rationale in *Three Arrows* (in which the Court confirmed that it should

Notes

² *In re Tucker (RC) (a Bankrupt)* [1990] Ch 148.

depart from one of its prior judgments in *Ocean Sino Limited (in Liquidation) Chu Kong v John Greenwood and Roy Bailey* ('Chu'),³ the Chief Justice accepted that: (a) the Court can exercise personal jurisdiction over any person who (i) is resident within the jurisdiction; (ii) whom proceedings can be served out; or (iii) has submitted to the jurisdiction.

The gateways for service outside of the jurisdiction in Bermuda are provided for in Order 11/1 of the Rules of the Supreme Court 1985. The application fell within gateway 11/1 1(1)(ff), which permits service where the claim concerns a person who is or was a director of a company registered in Bermuda, and the subject matter of the claim relates to the rights and duties of that director. It was also argued that the Director, in his capacity as such, had effectively submitted to the jurisdiction of the Court, as he was a director at the time of the appointment of the JPLs, and had moreover consented to their appointment on behalf of the Company. By accepting and continuing in the office of director, the Director, it was argued, is deemed to have submitted to the jurisdiction of the Court for the purposes of any enquiry into the Company's affairs.

Lastly, the Court accepted counsel's argument that section 195 can properly be construed as having extra-territorial effect based on the following factors:

- (1) Bermuda is an offshore jurisdiction;
- (2) In most cases, directors of offshore companies are mostly resident overseas and may never enter the jurisdiction (as was the case with the Director); and

- (3) Bermuda-registered external companies mostly have no other physical connection with the offshore jurisdiction other than locating their registered agent and office there for statutory compliance purposes, with no actual assets situated within the jurisdiction.

The Court was therefore satisfied that, in appropriate cases, persons resident abroad may well fall within the ambit of section 195 of the Companies Act. It was also noted that such an interpretation poses no practical difficulty as a non-resident officer or person, can readily be summoned to appear for examination via remote electronic platforms such as Zoom or Teams, with minimal inconvenience.

Conclusion

This decision is likely to have a significant impact across the industry. Most notably, it confers on Bermuda liquidators a broad and previously unavailable power to obtain information and recover property belonging to exempt companies from those caught by section 195 who are resident outside of Bermuda. This development is expected to streamline the restructuring and liquidation process by reducing the need to seek corresponding relief through foreign courts (such as under the Chapter 15 regime in the United States), particularly where non-compliant individuals are located outside the jurisdiction. The judgment was delivered by the Chief Justice without full written reasons, which are awaited; this briefing note will be updated once they are received.

Notes

3 In which it was held that the BVI equivalent provision did not have extra-territorial effect.

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International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialised enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

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