HARNEYS

British Virgin Islands a liquidator's year

The British Virgin Islands (***BVI***) has always produced a rich seam of case law, necessarily diverging from its English common law roots as it interpreted its own statutes and developed themes of its own to fit the unique jurisdiction. The BVI is home to some 400,000 active companies deployed all across the world and utilised for a myriad of purposes. This, paired with a robust commercial court, has fuelled the available jurisprudence.

The last 12 months have not been any different. An increased appetite to explore restructuring options as well as a more dogged determination to trace assets has resulted in litigants pushing the envelope and creating some interesting new law. This article takes a look at some of the key changes and developments for liquidators and looks forward to what comes next for the world's leading asset holding jurisdiction.

A new line in restructuring

The landmark change this year was in *Constellation Overseas Limited*. Constellation is a troubled Brazilian oil and gas drilling group that had entered a reorganizational judicial process, *recuperação judicial*, in Brazil, where it was headquartered. The debt structure was very familiar to restructuring professionals with large swathes of debt held by bondholders and principally governed by New York law. Akin to the other large Latin American restructurings, the process sought Chapter 15 recognition in the USA. This time however, to close any gaps in the moratorium, the appointment of provisional liquidators was sought in the BVI over several vehicles to guard against "predatory creditor claims", the positions held by aggressive debt holders seeking to leverage their position in the restructuring.

The BVI court looked to established precedent in Cayman and Bermuda and found that the BVI Court "had a very wide common law jurisdiction" to appoint provisional liquidators for restructuring purposes. It also sought to distinguish the Hong Kong authorities that suggested a more traditional approach in support of liquidations.

The judgment moved away from the troublesome dynamics caused in *OAS and Oi*, two large Latin American restructurings that had fallen foul of agitating stakeholders. With creditor approval and no opposition the appointments went through. This, despite the unhelpful wording of the BVI Insolvency Act differing considerably to its Cayman counterpart, which provides specific provisional relief in furtherance of restructuring proposals. The debtor in possession dynamic also sits rather uncomfortably with directors' residual powers post appointment.

Notwithstanding the "square peg round hole" deployment of provisional liquidators in such circumstances, the restructuring could complete shortly. This in itself is a lesson that it is time for the BVI to embrace solid restructuring legislation rather than to rely on provisions designed to protect creditors pending a winding-up. Both industry and various committees are committed to pursuing a cutting-edge code required to fit BVI companies' position in the global market place.

Liquidator Flex

It would just be strange if a case round-up did not include a reference to the fallout from the Madoff scandal. Images of Madoff in his trademark Yankees cap outside of his Upper East side pile are now over a decade old. Many junior bankruptcy associates were yet to graduate from High School when news of the vast Ponzi scheme hit the press, yet law is still being made and clarified by estates' administration. Battles have waged over the recalibration of NAVs, seen in the recent Cayman decision in *Weavering* following on from *Fairfield Sentry*. The ability to amend the share register of entities in liquidation to seek to impose a "fair result" has also been under the microscope.

In a more understated review of liquidator powers, the BVI Court recently affirmed liquidators' powers to authorise the transfer of paid-up shares. *In the Matter of Futures One Innovative Fund*, the BVI Commercial Court found that there is no good reason "not to leave the transfer of shares to the good sense of the liquidator." What Jack J could not find, however, was the authority to give the liquidator a general pass to provide authorisation for future share transfers without court oversight. This raises some questions of consistency and, in some cases, transparency. There is a large, ongoing liquidation that

has provided the liquidator with the ability to require conditions on any future transfers of shares. Whilst the Court will be keen to protect the estate's position with respect to claw-back claims and set-offs, potential transferors have, in some cases, struggled to understand the actual order and reasoning, due to the sealing of the court file. Whilst this has implications for secondary market activity, it can also provide an uncomfortable dynamic for stakeholders.

Playing away

Returning to Madoff, the Privy Council was recently engaged again in the *Fairfield Sentry matter (see UBS AG New York v Fairfield Sentry* [2019] UKPC 20). This time, a collective of investors sought to block the liquidators of Fairfield from bringing claims in the United States under the voidable transaction provisions of the BVI Insolvency Act. The BVI Court gave leave to the liquidators to initiate the proceedings both under the Act and at common law. The claw-back claims were aimed at investors who had redeemed their positions at falsely inflated valuations. UBS, leading the charge for the investors, had sought an anti-suit injunction restraining Sentry's liquidators from pursuing proceedings in the United States. Their principal argument was that it was the BVI Court alone that should deploy BVI insolvency law. The Privy Council, however, held this to be a misconceived position. The BVI Court had given its blessing to the claims and it was now a matter for the US courts to gauge whether they should apply foreign law.

In further good news for liquidators, it would seem that time travel is not beyond them either, as the BVI Court of Appeal confirmed the ability of liquidators to seek retrospective sanction to enter into transactions disposing of estate assets. In *K&P Managerial Limited v Mr Paul Pretlove, Liquidator of Hadar And Invest Limited (In Liquidation)*, the company held a Moscow property via a wholly owned subsidiary. With no prospect of funding and against a back drop of defaulting loans, the liquidator entered into an agreement with a shareholder with pre-emption rights. The applicants challenged the sale on the basis that it was not at a suitable commercial rate and that there was no jurisdiction for the BVI Court to grant sanction retrospectively. The Court of Appeal agreed with Green J and found that the relevant factors had been taken into account when the transaction was blessed and that was something that the Act clearly provided for retrospectively. Liquidators can take some comfort from this and that it is thematically different from the view the BVI Courts took in the *Farnum Place* decisions. In that instance the liquidators had to seek the shelter of the US courts to disapprove a transaction, struck at a time prior to the huge injection of Picower estate cash into the Madoff SIPA Claim. So, all in all, a good year for liquidators… unless appointed pursuant to a just and equitable winding-up order (as discussed below).

Just and Equitable?

The just and equitable ground which is usually pleaded as standard in England but rarely used had developed a voice of its own in the BVI in recent years. There was a trend to expand the traditional categories pursuant to which an order could be made under the just and equitable grounds under English law. The early statutory introduction of minority oppression remedies (in 2004) provided the BVI Courts with a host of alternative remedies at their disposal. Further protection is supplied by the BVI Insolvency Act that provides that a liquidation order will only normally be made where there is no alternative remedy available. Traditionally, in cases such *Aris Multi-Strategy Lending Fund Ltd v Quantek Opportunity Fund Ltd*, the BVI Courts have been reluctant to wind-up companies on the basis of their operational function.

However, as part of the Pacific Andes litigation, in *Parkmond Group Limited (in liquidation) v Richtown Development Limited (in liquidation)* (decided in 2017), Justice Kaye acceded to an application on just and equitable grounds on the basis that the directors ought to have been able to provide books and records pursuant to section 98 of the Business Companies Act 2004 particularly in light of allegations of fraud that had been circulating for several years concerning the company. Richtown was described by its directors as performing the treasury facility for the group as a whole. The winding-up petition was based on three grounds, cash-flow and balance sheet insolvency as well as just and equitable grounds.

The applicants were able to show that the company was insolvent on both insolvency tests. The Court then went further to consider the inability of the company's directors to provide accounts and underlying documents to show the true financial position of the company (in accordance with section 98 of the BVI Business Companies Act). It was this failure combined with previous issues of conduct that was enough to provide the basis for a winding-up on just and equitable grounds.

Similarly, in *Re Green Elite Ltd* (decided in 2018), the BVI Court of Appeal overruled the first instance judge and held that there was a loss of substratum sufficient to merit a winding on just and equitable grounds in circumstances where the purpose of the company (to hold shares for an IPO) had been exhausted.

However in the recent case of *Re Ocean Sino Ltd* (January 2020), the Court of Appeal appears to have reverted to tradition and overruled Justice Kaye's decision to place the company into liquidation on just and equitable grounds albeit 3 years after the original order was made. The Court of Appeal reiterated that a winding up petition was not to be resorted to merely because of dissension within a company. Further since the company's constitution, articles and memorandum provided for an exit for a shareholder in the event of deadlock, there could not reasonably have been a finding of deadlock sufficient to satisfy the making of a winding up order on the just and equitable grounds. It remains to be seen what the Privy Council's view will be on this case.

Recognition of Just and Equitable Winding Ups in England

In further news relevant to the recognition of just and equitable winding up order made in the BVI, the English High Court was content in May of last year to recognise the provisional liquidators of Sturgeon Central Asia Balance Fund Ltd as a foreign main proceeding pursuant to the CrossBorder Insolvency Regulations (2006) (CBIR).

The recognition was one of the first for a solvent liquidation in England, the JPLs having been appointed following a Bermuda Court of Appeal decision to wind the fund up on just and equitable grounds. However, following an application by a director for the termination of the recognition order made under CBIR, the English High Court reviewed the definition of a "foreign proceeding" contained in the Model Law. To coin a much used phrase on conference calls these days, Chief ICC Judge Briggs carefully "unpacked" the definition. He found that given the background to the CBIR, the commentary and recent guidance, the words "for the purpose" should be read as meaning for the purpose of insolvency (liquidation) or severe financial distress (reorganisation).

It would be contrary to the stated purpose and object of the Model Law to interpret the term "foreign proceeding" to include solvent debtors and more particularly to include actions that are subject to a law relating to insolvency but that have the purpose of producing a return to members not creditors.

This isn't the best news for BVI liquidators and certainly represents something of a clash between old case law and the new world of cross-border recognition.

On the whole, however, liquidators are in good shape in the BVI. Whilst heavyweight legislative reforms are debated, the Commercial Court has formed a pragmatic and flexible approach for their deployment and practice. This bodes well for any forthcoming recession which, as Economics Laureate Paul Sameulson once quipped, has been correctly predicted nine times out of the last five.

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