

Sanction applications: Balancing the views of office holders and creditors

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In an application by Joint Official Liquidators for sanction of an agreement to sell the assets of a Company over the objections of creditors, the Court has confirmed the importance of establishing a clear and transparent sale process, which enjoys the confidence of the interested parties, in order to establish that the sale agreement is in the best interests of creditors.

Background

The joint official liquidators (the "JOLs") of Pacific Harbor Asia Fund I, Ltd (In Official Liquidation) (the "**Company**") sought the sanction of the Court to cause the Company to enter into a Purchase and Sale Deed in respect of the sale of all of the Company's non-cash assets to Muldoon Associates Limited, an affiliate of Stonehill Capital Management, LLC (referred to in the judgment as "**Stonehill**").

The Company was a feeder fund to Pacific Harbor Asia Master Fund (Cayman) L.P. (the "**Master Fund**"), a closed-ended investment vehicle for its two limited partners, the Company and Pacific Harbor LP. The Company's main asset is its 77% partnership interest in the Master Fund.

The JOLs' application for sanction was opposed by the majority of the Company's creditors on the grounds that, in their view, the proposed sale agreement was not in the best interests of the creditors. The creditors further argued that Stonehill had been selected as the successful bidder following a flawed sale process where, among other things:

- there was no clear start date for the bidding process, such that the Liquidation Committee and at least one of the bidders did not know that a bidding process was underway before 31 January 2020;

- the JOLs requested best and final bids 3 working days after the parties were informed of the existence of the bidding process on 31 January 2020; and
- there was a dispute as to whether parties were provided with the same information in the course of the bidding process.

The Court had to balance these concerns against the fact that the proceeds of the proposed sale could have provided a means by which the JOLs and their advisers could be remunerated, in circumstances where the official liquidation had been unfunded since 2017 and thus the JOLs and their external advisers remained unpaid. As at 31 March 2020, the unpaid liquidation expenses amounted to in excess of US\$4 million.

The Issues

In making its decision, the Court reviewed the well-established authorities on the Court's jurisdiction to sanction the conduct of liquidators' powers and asked whether, independently of the JOLs' views, the evidence revealed any substantial reasons why the Court in the circumstances of the case should decline sanction, particularly having regard to the following key issues:

1. the weight to be given to the interests of those who have a "real interest" in the assets of the company in liquidation, who, as the case law establishes, are likely to be good judges of where their best interests lie if uninfluenced by extraneous factors;
2. the weight to be given to the views of the liquidators who may, and normally will, be in the best position to take an informed and objective view;
3. whether certain criticisms of the bidding process rise to the level where a sense not merely of disappointment but also of grievance can be engendered on the part of at least a segment of the creditors, whether they be conflicted or not;
4. the desirability and even the necessity of ensuring an adequate fee recovery for the JOLs in what may objectively be described as challenging and difficult circumstances; and
5. the risk of a worse outcome, or no further recoveries at all, if the proposed sale agreement were not to be sanctioned.

McMillan J considered and applied the general principles which govern the exercise of the Court's discretion as to whether or not to grant sanction as set out in the well-established English and

Cayman Islands authorities, including *Re Greenhaven Motors Ltd* [1999] 1 BCLC 635, *Edenote Ltd (No 2)* [1992] 2 BCLC 89 and *In re DD Growth Premium 2X Fund 2013 (2)* CILR 361. McMillan J also emphasised that this was not an ordinary application, particularly in circumstances where there was a high level of opposition to the application and that the wishes of creditors were inevitably influenced by a duality of roles.

Findings

While the Court expressed the view that the JOLs were right to bring forward their application for sanction on the basis that they considered, in their professional judgment, that it was in substance the best outcome available, the Court declined to grant sanction. The Court determined the application by finding that:

1. It should give considerable weight to the JOLs' views and it did so; due weight should also be given to the wishes of the creditors, bearing in mind the degree to which at least some of them may be influenced by extraneous considerations ^[1];
2. It was not satisfied that the proposal was in the commercial best interests of the Company or that the clarity and transparency of the bidding process was broadly sufficient ^[2];
3. While payment of court officers' fees is an important consideration where further prospective recoveries are unpromising, ultimately outstanding fees are not in themselves dispositive of the merits of a sanction application and that where concerns are present, even of a procedural nature, those concerns are not submerged or minimised by the fact that the sanction sought, if approved, would provide a clear gateway to full fees recovery ^[3];
4. All of these finely balanced factors underline the need for a sale process which enjoys the confidence of all interested parties and about which the Court has no reservations or concerns ^[4]. In this instance, the sale process operated in a way that could be perceived as unfair and even potentially disadvantageous ^[5].
5. Ultimately in determining whether the relief sought by a liquidator on a sanction application is in the best interests of creditors, the Court will primarily be looking for a sale process which can fairly and objectively be said to be beyond the scope of controversy ^[6].

Ogier represented three of the creditors who successfully opposed the sanction application.

[1] Paragraph 79.

[2] Paragraph 80

[3] Paragraph 46.

[4] Paragraph 49.

[5] Paragraph 72.

[6] Paragraph 33.

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