

When can proceedings be issued against a Cayman Islands-incorporated company in liquidation?

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The Grand Court of the Cayman Islands has provided further helpful guidance to insolvency practitioners as to the circumstances in which leave will be granted to commence or continue proceedings against a company in liquidation. *Adenium Energy Capital Limited (in official liquidation) (Adenium)* is the latest in a line of cases in the Cayman Islands in which leave has been sought to commence proceedings under s 97(1) of the Companies Act against a Cayman Islands-incorporated company in liquidation.

The Court's findings in *Adenium* are instructive for creditors and insolvency practitioners alike as leave to commence proceedings was granted to a secured creditor against the backdrop of the Court having previously denied leave in *BDO Cayman Ltd. v Ardent Harmony Fund Inc. (In Official Liquidation)*^[1] (*BDO*) and *Abraaj Investment Management Limited (In Official Liquidation)*^[2] (*Abraaj*).

The statutory moratorium

Section 97(1) of the Companies Act provides a statutory moratorium on legal proceedings commenced or continued against companies in liquidation:

"When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose."

The statutory moratorium provides 'breathing space' to a company in liquidation and its appointed liquidators by preventing the company from being distracted by unnecessary legal proceedings, with all extant claims usually dealt with by the liquidators via the proof of debt process. However, the court retains a gatekeeper role, with the discretion to permit parties to issue proceedings against insolvent companies through the grant of leave.

Facts

On 27 July 2020, joint official liquidators (**JOLs**) were appointed to Adenium Energy Capital Limited (in Official Liquidation) (the **Company**) following the presentation of a winding up petition by one of its creditors based on its failure to pay an arbitral award.

Following the presentation of the winding up petition but before the appointment of the JOLs, the Company had made three transfers of the Company's property (being shares held in three separate entities) (the **Transfers**) to a third party, KSB Capital (Offshore) SAL (**KSB**). The Transfers were said to be made in partial enforcement of a Debenture Agreement entered into between the Company and related entities of KSB, to secure loans of US\$6 million which were advanced to the Company under various facility agreements. The Debenture Agreement was entered into prior to the commencement of the winding up. However, the JOLs raised concerns with both KSB and the Court about the validity of the Debenture Agreement and the associated security agreements.

By virtue of s 100(2) of the Companies Act, the winding up of the Company was taken to commence at the time of the presentation of the winding up petition. As such, the JOLs filed a summons seeking declarations that the Transfers were void pursuant to s 99 of the Companies Act (**JOL Summons**).^[3] In response, KSB filed two summonses: the first sought declarations that the Transfers were not dispositions of the Company's property pursuant to s 99 of the Companies Act (the **First KSB Summons**) and the second sought orders that the JOL Summons be struck out and that leave be granted retrospectively under s 97 of the Companies Act to commence and proceed with the First Summons (the **Second KSB Summons**).

Requirement for leave

Richards J confirmed in *Adenium* that defendants to proceedings where the claimant is a company in liquidation are entitled to take "defensive steps",^[4] without needing to apply for leave to continue under s 97. However, she did not accept the claimants' arguments in this case that First and Second KSB Summonses were essentially defensive in nature such that leave to continue was not required. As the relief sought in the First and Second KSB Summons had gone beyond a defensive response, seeking costs orders and orders that the JOL Summons be struck out., she found that leave under s 97 was required for KSB to pursue its summonses.

In considering the consequential application for leave, Richards J had regard to the considerations for the grant of leave to commence proceedings against companies in official liquidation as set out by the Court in *BDO* as follows:

- (1) The applicant for leave must first establish an arguable case to be litigated
- (2) If it establishes an arguable case, the Court then has to consider whether it would be fair, in the context of the liquidation as a whole, for the JOLs to have to deal with the burden of that litigation. The Court's discretion is wide and unfettered - there is no presumption in

favour of or against giving leave - and each case turns on its own facts; and

(3) In deciding what would be fair, the Court can grant leave subject to conditions and subject to a consideration of what would be fair, in the context of the liquidation as a whole^[5]

In circumstances where the applicants in this case were secured creditors seeking to assert a proprietary interest (unlike the creditors in *BDO* and *Abraaj*), Richards J's analysis started from the proposition that, where a secured creditor seeks leave to enforce a claim in respect of what is no more than their own property, leave to proceed ought to be granted as a matter of course subject to two narrow circumstances: (1) where the applicant for leave is offered everything to which they are entitled without needing to bring an action; and (2) where the applicant could obtain identical protection of its position in the winding up.

In concluding that it would be appropriate to grant leave to continue under s 97, the following matters were relevant to the Court:

- a. This was not a case where KSB could obtain the same relief in the winding up (as part of the adjudication of proofs of debt) as the the JOLs were questioning the authenticity of the Debenture Agreement and associated security arrangements, and were therefore not offering to put KSB in the same position it would be in if it were to obtain a judgment. Richards J found that such questions were better resolved in an action brought by KSB and there was no basis for refusing to grant leave under s 97
- b. There was a serious question to be tried that KSB was entitled to enforce its security over the shares, despite the fact that the JOLs raised concerns about the validity of the Debenture Agreement
- c. There was no evidence before the Court to the effect that the action by KSB would have an adverse effect on the interests of the creditors as a whole (as there had been in *Abraaj*).

Conclusion

The decision in *Adenium* is helpful for both creditors and insolvency practitioners as it provides further clarity as to the circumstances in which an application for leave to commence proceedings against a company in liquidation will need to be made by a creditor and when such relief might be granted. It remains the case that the Court will continue to balance the interests of creditors seeking to enforce personal rights against the interests of the liquidation estate as a whole.

[1] (Unreported, Ramsay Hale J, November 2020). See [our article](#) on the *BDO* decision.

[2] (Unreported, McMillan J, 25 February 2021).

[3] Section 99 of the Companies Act provides: "*When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the*

company's members made after the commencement of the winding up is, unless the Court otherwise orders, void.

[4] For example filing a defence or bringing a counterclaim which is pleaded solely to raise a defence by way of set off.

[5] *BDO* at [24].

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