The Grand Court makes first restoration order in respect of fraudulently dissolved Cayman company

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While companies struck off the Register of Companies may be restored in certain circumstances pursuant to section 159 of the Companies Act (2022 Revision), there is no equivalent statutory jurisdiction for companies which have been dissolved.[1] In the absence of a statutory provision to set aside the dissolution of a company following its winding up, a party seeking to restore a company in the Cayman Islands must rely on common law principles and the inherent jurisdiction of the Court.

In *Re Real Estate and Finance Fund* (unreported, 6 July 2022, Kawaley J) the Grand Court, for the first time, acceded to an application to set aside the dissolution of an exempted company incorporated in the Cayman Islands, having found that a fraud had occurred in the voluntary liquidation which undermined the statutory purpose of the voluntary liquidation regime.

Background to the Real Estate and Finance Fund

The Real Estate and Finance Fund (**REFF**) was a Cayman Islands open ended mutual fund. It was dissolved in May 2019 following the "conclusion" of its voluntary liquidation. The voluntary liquidator of REFF was the holder of its sole management share, Giant Management Seychelles Limited (**GM Seychelles**).

GM Seychelles was ultimately controlled by three individuals (the **Syndicate**). Those three individuals were previously also in control of the petitioner in this case, Worldwide Opportunities Fund SPC (**Worldwide**). Worldwide, a segregated portfolio company, had been placed into liquidation by the Grand Court in May 2019 and is now under the control of its three joint official liquidators, John Batchelor, Andrew Morrison and David Griffin of FTI Consulting (**JOLs**). One of Worldwide's segregated portfolios, known as HKIF(2), held the majority of the shares in REFF.

The Syndicate, along with their friends, family members, and associates, allegedly carried out a wide-ranging and blatant fraud against Worldwide, REFF, and other entities. Between May 2016 and

December 2018 the NAV of HKIF(2) fell by more than 93%. Following extensive forensic investigations, the JOLs of Worldwide submitted evidence of various substantial transactions orchestrated by the Syndicate which appeared to have no commercial justification and were for the personal benefit of the Syndicate or their associates.

The application

In the circumstances of the fraud outlined above, the Worldwide JOLs presented a petition seeking, among other things, a declaration that the dissolution of REFF be declared void, an order that REFF be restored to the Register of Companies (**Register**), and an order that the liquidation of REFF be placed under the supervision of the Court and official liquidators appointed pursuant to section 131 of the Companies Act.

In support of its petition and as their central allegation, the Worldwide JOLs contended that a fraud had been committed in the voluntary winding up of REFF, that there were features of conduct in the case which were consistent only with dishonesty, and accordingly that the dissolution of REFF should be set aside by the Court, to allow it to pursue various claims against those who perpetrated the fraud, for the ultimate benefit of the creditors of REFF and Worldwide.

Common law principles

The development of common law principles governing the restoration of dissolved companies in the Cayman Islands was, prior to this case, in a foundational stage. There were two notable decisions from England and Wales from the late 19th century[2], both of which were cited and relied on, but given that England and Wales had since introduced a statutory mechanism by which dissolved companies can be restored, there had been no modern development of those early cases. One reported case in which a dissolution had been successfully set aside was a decision of the Supreme Court of the Bahamas; *In the Matter of Soothsayer Limited****[3]***. The Cayman Islands Court had also recently held that it had the jurisdiction to set aside a dissolution if the statement of solvency contained a fraudulent misrepresentation[4]], but ultimately determined that the threshold in that case had not been met.

The reasoning of Kawaley J

The Companies Act requires that the affairs of a company be "fully wound up" before it is dissolved[5]. Pursuant to that requirement, Kawaley J identified various procedural steps pertaining to the winding up of a company in the Companies Act which a liquidator must take to bring the proceeding to an end[6] and which must be substantially complied with in practical terms (though not complied with in terms of absolute perfection).

Thus the key question which arose for consideration was "*has a fatal non-compliance with a*

mandatory statutory provision… occurred which completely invalidates the purported conclusion of the voluntary winding-up proceeding?".

Accordingly, an honest liquidator must take *bona fide* steps to complete the winding-up process even if perfection is not achieved. In the absence of substantial compliance with the statutory requirements, however, a dissolution would potentially be liable to be declared void on the basis that the legislature cannot have intended a valid and binding dissolution to follow from a fundamentally flawed voluntary liquidation.

This raises the question as to what forms of non-compliance with the mandatory requirement that the affairs of the company should be "fully wound up" might result in the dissolution being set aside. The answer, in Kawaley J's view, was not simply "fraud". Kawaley J considered that this would include any form of non-compliance which so undermines the legislative purpose of section 127 and 151, that an inference can be drawn that there was not simply an imperfect winding-up, but rather no winding-up at all.

As to the jurisdictional basis for exercising the remedy sought, the Court found that it had the power to declare that the dissolution was void pursuant to section 11 of the Grand Court Act, which affords the Court a power to make binding declarations of right in any matter. Alternatively, Kawaley J considered that section 129 of the Companies Act, which allows a liquidator to refer questions to the Court, may be a source for the jurisdiction (but His Lordship did not decide the point in this case).

Decision

Having undertaken an extensive analysis of the facts and the relevant authorities, the Court was ultimately satisfied that:

- Worldwide had standing to seek relief on the basis that it and REFF were likely victims of fraud and there was a realistic prospect that some practical benefit was likely to flow from setting aside the impugned dissolution
- There had been no acquiescence or delay on the part of the petitioner in bringing the claim
- The relevant parties had been served with the petition and that the requirement to advertise the petition was properly dispensed with
- The merits of the application were remarkably clear in circumstances where it was alleged that a blatant fraud had been committed against the petitioner
- It was very strongly probable that the winding-up and dissolution of REFF was carried out in such a fraudulent way as to not amount to a winding-up at all

Kawaley J concluded that in all the circumstances it was appropriate that the company be

restored to the Register and its winding up placed under the supervision of the Court and the JOLs.

Conclusion

The case represents a significant jurisprudential development of the principles that the Grand Court will consider when determining an application to set aside a dissolution. It also sets an important precedent for liquidators and creditors of insolvent Cayman Islands companies who are victims of fraud and may be seeking to recover assets which have been misappropriated through now-dissolved entities. While the Court was clearly mindful to emphasise that the jurisdiction will only be exercised in exceptional cases, it demonstrates that that the Court will in appropriate circumstances grant practical relief to assist with unwinding fraudulent winding up proceedings, and thereby facilitate the recovery of assets which are alleged to have been fraudulently misappropriated.

Ogier acted for the Worldwide JOLs from FTI Consulting, in relation to this application. A key factor leading to the successful restoration of the company on this occasion was the extensive forensic investigation work undertaken by FTI Consulting, together with their Hong Kong counsel, Minter Ellison.

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[1] For an explanation as to the distinction between strike off and dissolution see Ogier's article: Termination of Cayman vehicles - advance planning to minimise 2022 fees | Ogier

[2] In re *London and Caledonian Marine Ins. Co.* (1878) 11 Ch. D 140 and *In re Pinto Silver Mining Company* (1878) 8 Ch. D. 273.

[3] *In the Matter of Soothsayer Limited and others v the Registrar General and others* 2017/CLE/gen/00684

[4] *In the Matter of Porton Capital Inc. and Porton Capital Ltd* (unreported, 24 March 2022, Doyle J)

[5] Section 127(1).

[6] Set out in sections 127 and 151.

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