

Grand Court considers the scope of liquidators' statutory powers to collect in a company's documents

In a recent judgment in *Primeo Fund (in official liquidation)*^[1] that will be of concern to liquidators of Cayman Islands companies, and of interest to auditors and other persons from whom liquidators seek information, the Grand Court has clarified and arguably restricted the scope of liquidators' statutory powers to collect documents under sections 103 and 138 of the Companies Law.

In particular, the Court has:

- reiterated that auditors are not a “*relevant person*” within the meaning of section 103, such that they cannot be ordered to produce documents belonging to the company under that section (nor, it would follow, are they subject to a statutory duty to cooperate with liquidators or capable of being ordered to be examined)^[2]; and
- found, more controversially, that liquidators may not use their section 138 powers to collect documents to which the company appears to be entitled (or, by analogy, documents belonging to the company using their section 103 powers) from *any* person, if their purpose in doing so is to use those documents in litigation against *another* person. This conclusion appears to go beyond the existing line of authorities, in which liquidators have been prevented from using their statutory powers to collect documents for use in litigation, but only where the person in possession of the documents sought is itself the litigation defendant or potential target.

Background

The statutory auditors of Primeo Fund (“**Primeo**”) were Ernst & Young Ltd in the Cayman Islands (“**EY Cayman**”). Although EY Cayman was the statutory auditor, the audit fieldwork in respect of Primeo was carried out by a separate Ernst & Young entity in Luxembourg (“**EY Luxembourg**”), from which jurisdiction Primeo was administered.

The liquidators of Primeo sought an order, pursuant to sections 103 and/or 138 of the Companies Law, compelling EY Cayman to use its best endeavours to obtain from EY Luxembourg certain categories of documents and provide them to Primeo. There was no question in this application of Primeo seeking to obtain documents from EY Luxembourg directly, for example by way of a letter of request procedure (whether under section 103(7) of the Companies Law or otherwise). It was alleged, and found, that the documents were being sought by Primeo's liquidators for use in separate proceedings brought by the liquidators in the Cayman Islands against HSBC group entities.

EY Cayman resisted the application.

Statutory Provisions

Section 103(3) provides that “*While a company is being wound up, the official liquidator may at any time before its dissolution apply to the Court for an order... (b) that a relevant person transfer or deliver up to the liquidator any property or documents belonging to the company*”

A “*relevant person*” is defined as including, amongst others, “*a professional service provider to the company*”.

Section 138(1) provides that “*Where any person has in his possession any property or documents to which the company appears to be entitled, the Court may require that person to pay, transfer or deliver such property or documents to the official liquidator*”.

Primeo’s Submissions

Primeo argued that the Court should order EY Cayman to use its best endeavours to obtain the documents from EY Luxembourg and deliver them up to Primeo because the documents:

- were within EY Cayman’s possession, in that EY Cayman had an implied or express contractual right to obtain possession of them from EY Luxembourg; and
- either belonged to Primeo (section 103(3)) or were documents to which Primeo was entitled (section 138).

Decision: Section 103

The argument in relation to section 103 was rejected on the grounds that the section was not engaged. The Court followed Mr Justice Jones QC’s decision in *ICP Strategic Credit Income Fund* [2012] (1) CILR 383, in which it was held that a “*relevant person*” did not include outsiders whose only relationship with the company was that they had been in business with it or contracted with it to provide goods or services – *e.g.* external auditors. In particular, Mr Justice McMillan held that EY Cayman was not a “*professional service provider*”, which is defined in section 89 as a person providing “*general managerial or administrative services to a company*”.

This conclusion is consistent with the Companies (Amendment) Bill, 2007 that preceded the introduction of sections 89 and 103 into the Companies Law. The Bill (which was surprisingly not cited in either *ICP Strategic* or *Primeo*) explained that the term “*professional service provider*” was “*intended to catch, e.g. mutual fund administrators and investment managers, but not lawyers and auditors*”.

Decision: Section 138

Section 138 is wider in scope than section 103. An order may be made under section 138 against “*any person*”, irrespective of their relationship to the company, but only insofar as that person “*has in his possession*” property or documents to which the company “*appears to be entitled*”.

The section has been relied on successfully by liquidators to obtain documents from auditors, including auditors' working papers on the grounds that although the auditors owned the documents comprising the working papers, the liquidators were entitled to copies to the extent that they contained information which derived from or was provided by the company.[3]

However, the section 138 argument advanced by the liquidators of Primeo failed on several grounds.

No basis on which to require the use of best endeavours to deliver documents

The Court held that section 138 conferred no power on the Court to order that a person “*use best endeavours*” to obtain and deliver property or documents to which the company appeared to be entitled. Rather, the power is limited to requiring that a person transfer or deliver property and documents. Alternatively, it would be contrary to the interests of justice to require a party to use best endeavours when the exact meaning of the phrase in this context was unclear and undefined.

The auditors were not in possession of the documents

Added to that was another jurisdictional failing, namely that the liquidators had not persuaded the Court that EY Cayman had in its possession the documentation sought. By “*possession*”, the Court appears to have accepted that either physical possession or a right to physical possession would be sufficient. The Court found, however, that there was insufficient evidence of any contractual or agency relationship between EY Cayman and EY Luxembourg pursuant to which EY Cayman had a right to receive documents in EY Luxembourg's possession.

Improper Purpose

EY Cayman also argued that the liquidators:

- were seeking to use section 138 to obtain third party discovery for the purposes of Primeo's litigation with entities within the HSBC Group, and that this was not a proper purpose for the exercise of the statutory power; and
- were purporting to use their powers at the behest of another party (viz. the HSBC Group defendants) effectively to obtain third party discovery, which was said to be unprecedented and wrong.

The Court agreed with EY Cayman on the first point and did not address the second point. The Court referred to the familiar English authorities of *In re Spiraflite* [1979] WLR 1096, *Re Atlantic Computers* [1998] BCC 200 and *Re BCCI SA (No 12)* [1997] 1 BCLC 526, and the leading Grand Court decision in *Re Basis Yield Alpha Fund* [2008] CILR 50, and held that section 138(1) was “*not an appropriate or lawful mechanism for general and ongoing civil discovery*”. Rather, the purpose of the section was the “*getting in of the company's property*”, and it was “*not in the interests of justice to have recourse to section 138(1) for the purpose which the [liquidators] have identified*”.

Comment

The Court has helpfully clarified two points relating to liquidators' powers under sections 103 and 138:

- At first instance, at least, it must now be settled that an auditor will not fall within the scope of section 103, unless it was also an officer of the company. That provision is aimed at 'insiders' not 'outsiders'.
- The meaning of "*possession*" in section 138 includes a right to physical possession. This is sensible, since section 138 is used to get in the company's property from, for example, service providers who may well outsource work within their group. If section 138 were limited to documents actually possessed by the specific entity retained by the company that would emasculate the power.

In relation to the use of the section 138 power, the authorities show that liquidators of a company should not be in a position to use their statutory powers to obtain wider discovery than an ordinary litigant. But it may be argued that the mischief is confined to situations in which the liquidators seek to use those powers to extract wider discovery from *the person against whom the company is, or is contemplating, litigating*. Those were the facts in all of the previous English and Cayman cases referred to by the Judge.

In this case, Primeo's liquidators sought documents which it was said the company was entitled to from the company's former auditor for use in litigation against the company's former administrator and custodian. It is difficult to understand why this was thought to be objectionable in principle. Section 138 requires a liquidator to demonstrate that the company appears to be entitled to the documents sought, i.e. that the company has a proprietary or contractual entitlement to the documents in question.^[4] Similarly, section 103 requires the liquidator to demonstrate that the documents sought belong to the company. This was not the case in any of the earlier English and Cayman cases referred to by the Judge, all of which concerned a much broader statutory power (no longer available in Cayman under the Companies Law) by which liquidators could obtain any documents relating to a company's affairs irrespective of whether the company had a proprietary or contractual right to them. That being the case, why should Primeo's liquidators be prevented from obtaining from any person documents that the company owns or is contractually entitled to, simply because the liquidators wish to use those documents in litigation against a third party? An ordinary litigant would not be restricted from commencing separate proceedings to enforce its proprietary or contractual rights to documents in those circumstances.

Unfortunately it does not appear from the judgment that these distinctions were drawn to the Judge's attention, but the failure to do so does at least leave scope for further argument on the next occasion that this issue comes before the Court.

[1] McMillan J, unreported, 21 November 2016. [2] There was no evidence in this case that the auditors were officers of the company. Had they been, as a matter of construction of Primeo's articles of association and/or the terms of their engagement, they would have constituted a "relevant person" for the purpose of section 103. [3] See *In re China Milk Products Group Limited*, Jones J, unreported, 4 June 2015. [4] See *China Milk*, *ibid*, at [10].



Hamid Khanbhai
Associate

+1 345 914 5834

hkhanbhai@campbellslegal.com



Guy Manning
Partner

+1 345 914 5868

gmanning@campbellslegal.com



Andrew Pullinger
Partner

+1 345 914 5865

apullinger@campbellslegal.com