

Cayman Court Allows Interim Distributions in Saad Liquidation

The Grand Court of the Cayman Islands (the “**Court**”) has sanctioned a proposal enabling the Joint Official Liquidators (“**JOLs**”) of Saad Investments Company Limited (“**SICL**”) to make interim distributions to unsecured creditors, notwithstanding a pending Court of Appeal (“**CICA**”) decision regarding a third-party proprietary claim over the entire liquidation estate.

The judgment, delivered 1 October 2019, sought to strike a balance between the continuing prejudice suffered by admitted creditors in not receiving a distribution, and the prejudice potentially to be suffered by the third-party proprietary claimant should its appeal be successful. In the end, Chief Justice Smellie was satisfied the JOLs had put appropriate measures in place to protect the third-party claimant, and found that it was in the best interests of SICL that the JOLs be authorised to make the interim distributions.

Background

The background to this matter is well-rehearsed in the Cayman Islands. The JOLs were appointed to SICL in 2009 and realised very significant sums, but they were unable to make any distributions to SICL’s admitted creditors because of multi-billion dollar proceedings brought against SICL by Ahmad Hamad Algosaiibi and Brothers Company (“**AHAB**”), in which AHAB asserted proprietary claims over the entire SICL estate.

In 2018 the Chief Justice dismissed AHAB’s claims at first instance in a 1348-page judgment. AHAB’s appeal was heard by the CICA over six weeks in mid-2019 (the “**AHAB Appeal**”). The CICA judgment remains reserved, with a prospect of a further appeal to the Privy Council.

The Distribution Application

Although the JOLs considered the AHAB Appeal to have no prospect of success, they were bound to continue to recognise AHAB as a contingent creditor of the SICL estate until such time as the AHAB Appeal was determined by the CICA and/or the Privy Council.

In those circumstances, the JOLs found themselves stuck in insolvency purgatory. Making no decision on distributions until the final determination of the AHAB Appeal would cause continuing prejudice to admitted unsecured creditors who had already waited ten years for a distribution from the estate. But to make an interim distribution to those creditors while the AHAB Appeal remained pending would obviously prejudice AHAB if it ultimately succeeded in establishing its proprietary claim. Either route could open the prospect of personal claims against the JOLs for breach of duty.^[1]

While the Companies Law does not expressly address a liquidator's power to declare interim dividends without sanction[2], the JOLs were otherwise constrained by an earlier Court Order requiring them to retain the net proceeds of any realisations pending the resolution of AHAB's claims.

With the encouragement of a majority of the liquidation committee, the JOLs sought 'in-principle' sanction from the Court for a proposed distribution to be made, on the basis of various protections being put in place for the benefit of AHAB, any other proprietary claimants, and any unsecured creditors who elected not to receive an interim distribution on the proposed terms.

The Arguments

The JOLs' proposal required any intended recipient of an interim distribution to indemnify the estate so as to protect AHAB in the event the AHAB Appeal was successful. The interim distribution and indemnity was supported 'in-principle' by AHAB, and the majority of the SICL liquidation committee. However, one creditor objected, on the basis that:

1. non-recipients of the interim distribution (that is, any creditors who elected not to take up the option of an interim distribution) should not be prejudiced by the estate incurring costs in connection with the interim distribution process;
2. non-recipients should not lose the benefit of interest which would otherwise have accrued on the estate's assets;
3. the JOLs might be unable to recover distributed funds due to credit risk; and
4. the indemnity arrangement placed unnecessary operational risk at the feet of the non-recipients, and on the liquidation estate generally.

The JOLs sought to address these objections by:

1. 'ring-fencing' the costs of the interim distributions so that they were only borne by those creditors electing to receive the interim distribution;
2. using a simple annual interest rate to ensure that all unsecured creditors receive the same level of distribution; and
3. minimising the credit and operational risk of non-recovery by (a) requiring creditors to procure security for their indemnity obligation from a financial institution with a credit rating at least as strong as the ratings of the banks where the estate's funds were being held, and (b) continuing to monitor that credit rating and the estate's continuing rights under the indemnity and security documents.

The Decision

Overall, the Chief Justice was satisfied that the JOLs had adequately addressed each issue. Applying the 'well-established' principles of an *In re Benjamin Order*[3], the Court accepted it had the inherent jurisdiction to

authorise the JOLs to make a distribution out of a fund, notwithstanding that a third party had an unresolved proprietary claim against that fund. Granting sanction in these circumstances would not have the effect of destroying AHAB's beneficial interests pending the determination of the AHAB Appeal, but it would allow creditors to receive a distribution while protecting the JOLs from potential liability.

Key Takeaways

In recent years distributions from a number of Cayman Islands liquidation estates have been held up for extended periods by the assertion of substantial (and in some cases unmeritorious) proprietary or unsecured claims against the estate. While this problem is by no means unique to Cayman, it has understandably led to frustration, and to some loss of confidence in the Cayman liquidation process as a means for creditors to recover their losses. That is bad for creditors and bad for the jurisdiction. SICL is believed to be the first Cayman case where the Court has permitted distributions to be made to creditors without the liquidators having to make a full cash reserve in the estate for all disputed and unresolved claims. It is a pragmatic and commercial decision which may provide a blueprint for solving this difficult issue in future liquidations.

[1] *Guardian Trust and Executors of New Zealand v Public Trustee of New Zealand* [1942] AC 115.

[2] See, Part 1 & 2 of Schedule 3, Companies Law (2018 revision).

[3] *In re Benjamin* [1902] 1 Ch 723; applied in *In re Green's Will Trust* [1985] 3 All ER 455, 462; *Re MF Global UK Ltd (No 3)* [2013] 1 WLR 3874; *Finers v Miro* [1991] 1 W.L.R 35 (CA).



Guy Manning

Partner

+1 345 914 5868

gmanning@campbellslegal.com