

Cayman Islands Liquidation Proceedings – Officeholder Independence

The Grand Court has provided useful and important guidance on when an insolvency officer holder will be considered to be independent. This guidance reflects the continuing trend of the Grand Court taking a more commercial and pragmatic approach to the question of officeholder independence.

Global Fidelity: Past Advice to the Company and Acting as Voluntary Liquidator Does Not Automatically Lead To a Lack of Independence

In *Global Fidelity Bank, Ltd* the Court ordered that the voluntary liquidation of Global Fidelity Bank (the "Bank") be continued under the supervision of the Court, and that the petitioners (individuals from FFP), who had been the joint voluntary liquidators ("JVLs") of the Bank, be appointed as the joint official liquidators ("JOLs").

One of the Bank's largest creditors ("AC") had opposed the appointment of the petitioners as JOLs, on the basis they could not properly be regarded as independent as regards the Bank. The opposition was based on the fact that: (i) the petitioners had been appointed as JVLs by the Bank's directors (supported by the shareholders); and (ii) FFP had been engaged by the Bank to produce an independent financial review of the Bank (this review was based on limited financial records, was expressly not an audit, was conducted over a week and, after which, the individuals from FFP were appointed as JVLs). Another of the Bank's largest creditors had written

to the Court stating that it had no objection to the petitioners being appointed JOLs.

In drawing together case law from across the common law world, the Court set out a useful summary of the various factors which should be considered in relation to whether an individual was "independent". These factors, importantly, include a three-stage test to be applied when considering the question of independence: the Court must: (i) identify the personal, professional or economic relationship that may lead to a conclusion that an insolvency practitioner cannot be regarded as independent; (ii) determine whether the relationship's existence and the circumstances of the case are capable of impairing the appearance of independence and, if so, determine (iii) whether it is sufficiently material to the liquidation in question that a reasonable, fair-minded and well-informed stakeholder would reasonably object to the appointment of the nominated practitioner in question. In making a determination:

- (a) Perception of a lack of independence is just as important as an actual lack of independence.
- (b) The Court will take into account the subjective views of all stakeholders. However, such subjective views will carry little weight if they are irrational, not held in good faith or on reasonable grounds (even from significant stakeholders). The Court may, despite the subjective views of significant creditors, conclude that, on an

objective analysis, no reasonable perception of a lack of independence has been established.

- (c) The correct approach is an objective one – it is not the subjective views of the stakeholders that are determinative but what the reasonable views of a fair minded and informed hypothetical stakeholder would be in light of the facts of the individual case. The Court must consider the law, the facts and circumstances of each case and reach the appropriate determination as to the identity of the liquidators. The Court is not a rubber stamp for the choice of officeholder proposed by the most significant stakeholders.
- (d) It is not good enough to say that the particular practitioners can be relied upon to perform their duties properly, but equally a fair-minded stakeholder would be well-informed and aware that, once appointed, official liquidators act as officers of the Court and have duties to act in the best interests of all the company's stakeholders irrespective of who sought their appointment. The mere fact that the Bank's management appointed the petitioners as JVLs, supported by the shareholders, could not of itself reasonably give rise to a perception of a lack of independence in the minds of fair-minded stakeholders.
- (e) In certain circumstances a prior connection which has resulted in the acquisition of knowledge can be an advantage rather than a disadvantage or disqualifying factor. The advantage being that time and costs may be saved by the fact that the individuals are already up the knowledge curve. However, if the proposed individuals cannot be properly regarded as

independent then any time and costs savings, however large, will be irrelevant.

Applying the above, it was held that, to an objective stakeholder, there could be no reasonable appearance of partiality attaching to the petitioners resulting from "their limited prior involvement in the hasty production of a brief report on the financial position of the Bank and their subsequent appointment as JVLs for a very short period of time", which "culminated in the Petitioners correctly applying for a supervision order and the appointment of JOLs". It was not a relationship which lasted long, such limited connection was not reasonably capable of impairing the appearance of independence and, even if it was, it was not sufficiently material to the liquidation such that a fair-minded stakeholder would reasonably object to the appointment of the petitioners as JOLs. AC's subjective perceptions did not represent what could properly be described as the reasonable perceptions of an objective stakeholder.

Adamas: An Appointment to One Company Within a Group Does Not Mean That the Individual Cannot Be Independent in Respect of an Appointment to Another Company Within the Same Group

Adamas Heracles Multi Strategy Fund and Adamas Asian Origin Fund SPC concerned the identity of the official liquidators to be appointed over two companies in the Adamas Group. In relation to both companies, the Court appointed the nominees of contingent creditors, over the objections of management. It was alleged that the nominees of the contingent creditors were conflicted, because they had already been appointed as the official liquidators of other companies in the Adamas Group. This objection was rejected with it being held that it "generally makes sense to have the same JOLs appointed over an entire group of companies in liquidation on the understanding that any conflicts arising in

relation to inter-group claims can be dealt with by appointing additional liquidators".

Further Information

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