

The principle of incumbency and conflicts of interest

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The circumstances leading to the liquidation of a company are often contentious. One bone of contention which often arises is who should be appointed as the official liquidator(s) (**Identity Question**), which can arise when the initial appointment of liquidators is made, and when there is an application to move a company from voluntary or provisional to official liquidation.

The recent decision of Kawaley J in *Global Fixed Income Fund 1 Limited (Global Fixed Income)* (unreported decision 18 August 2023) examines the legal principles relevant to the Identity Question when a company moves from provisional to official liquidation, balancing the deference that is to be shown to the incumbent officeholders against the interests of the stakeholders having an interest in the outcome of the liquidation.

Background

Joint provisional liquidators (**JPLs**) were appointed to three Cayman funds, one of which was Global Fixed Income 1 Limited (**GFIF**). An appointment was also made over a BVI fund, which was under common management along with the Cayman funds. In each case the appointment of the JPLs to each of the funds was instigated by a Mr Bruno Wang (**Petitioner**) who was the majority investor in each of the funds, save for GFIF.

Some two years later the Petitioner sought to place the Cayman funds, including GFIF, into official liquidation and have the JPLs appointed as Joint official liquidators (**JOLs**). The appointment of the JPLs as JOLs was objected to by the majority investors of GFIF and the Series 8 Investor, supported by a smaller but not insignificant investor, the Series 7 Investors (**Challenging Investors**). In place of the incumbent JPLs, the Challenging Investors proposed alternative insolvency practitioners to take the appointment as JOLs of GFIF.

The principle arguments advanced by the Challenging Investors were founded on the views held by the Challenging Investors that the conduct of the JPLs and their relationship with the Petitioner had created the impression that primacy had been given to the Petitioner's interests and gave rise to the appearance that the JPLs lacked the requisite independence to be appointed as JOLs to GFIF.

Notwithstanding that the Challenging Investors were the majority stakeholders of the GFIF liquidation, the Challenging Investors were unsuccessful. The reasoned judgment of Kawaley J helpfully surveys the legal principles relevant to the Identity Question, in circumstances where the incumbent officeholders were challenged from taking office "permanent liquidators".

Principle of Incumbency

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In such cases the starting assumption is that absent clear and cogent reasons the incumbent officeholders (in *Global Fixed Income* the JPLs) should be appointed as JOLs (*Parmalat* [2006] CILR 171;). The “conventional course” (*Green & Anor v SCL Group Ltd & Ors* [2019] 2 BCLC 664) is for incumbent JPLs who have been in office for a substantial period of time to remain as officeholders, on the basis that it is preferable to avoid the delay and expense that would be caused if new liquidators were to take over. This is the principle of incumbency articulated by Lord Hoffman, sitting as a member of the Board of the Privy Council in *Parmalat Capital Finance Limited v Food Holdings Limited and Dairy Holdings Limited* [2008] CILR 202.

The principle of incumbency formulated by Lord Hoffman does not ignore the possibility that incumbent officeholders may be placed in a position of conflict although “*The attitude of the court has been that any conflict of interest can be dealt with by the court (on the application of the liquidators) when they arise*” [12]. In the majority of cases where a conflict arises in the course of a liquidation, the ability of the Court to appoint a conflict liquidator under its supervisory jurisdiction will be sufficient.

While the bar for a creditor seeking to challenge the proposed appointment of liquidators is necessarily a high one, requiring clear and cogent evidence, his Lordship intimated in his reasoning that “*the bar for deciding whether to appoint alternative JOLs to the JPLs ought in principle to be lowered than the bar for removing a liquidator at any stage for cause*” (*Global Fixed Income*, [9]). As regard the position of the Challenging Investors, his Lordship remarked that the majority stakeholders had “*mounted opposition to the JPLs being appointed on a permanent basis. This must lower the bar to some extent*” (*Global Fixed Income*, [9]).

Lacking the appearance of independence

In opposing the JPLs' appointment as JOLs, the Challenging Investors invoked the 3-stage process set out in the decision of Doyle J in *Global Fidelity Bank, Ltd (in voluntary liquidation)* (unreported, FSD 168 of 2021) to determine whether there was an actual or perceived lack of independence on the part of the incumbent officeholders because of their prior involvement with the debtor company. Doyle J held that the Court must:

1. Identify the factual circumstances of the relationship and prior involvement of the proposed officeholders;
2. Conclude whether that prior relationship and all the circumstances of the case are such that the appearance of independence is impaired; and
3. Conclude whether the impairment of independence is sufficiently material to the liquidation, that a fair-minded stakeholder would reasonably object to the appointment of the nominated officeholders.

The Challenging Investors also invoked the principle that the views of the majority stakeholders of a liquidation are entitled to considerable deference, providing the views held are objectively reasonable in all the circumstances of the case (*Sciens Alternative Assets Recovery Fund II (in voluntary liquidation)* (unreported decision 29 June 2022).

His Lordship accepted that the application of the principles set down in *Global Fidelity* and *Sciens* and opined that “*the key question is whether a fair-minded stakeholder would reasonably object to the proposed appointment*” (*Global Fixed Income*, [13] (d)).

Conclusion

On the facts before the Court his Lordship was not persuaded that a fair-minded stakeholder would reasonably object to the appointment of the JPLs as JOLs. The Challenging Investors levied complaints against the JPLs for appearing to advance only the interests of the Petitioner during the course of the provisional liquidation.

In dismissing the Challenging Investors claims, his Lordship considered the wider commercial context of GFIF in which the Petitioner *"was once the majority stakeholder of GFIF, and now held a significant minority stake. It accords with commercial and legal rationality that JPLs act in furtherance of the interests of the majority stakeholders. That is no more than the law requires. Overall, the JPLs would have been acting improperly in regard to the four funds... if they did not in practical terms act to advance primarily"* the Petitioner's interests (*Global Fixed Income Fund*, para. [25]).

The decision of *Global Fixed Income* illustrates the balance which the court will seek to strike between the deference that is to be shown to incumbent officeholders of the Court, and the deference to be afforded to the objectively justifiable concerns of the majority stakeholders of a liquidation.

For more information please contact:



Stephen Leontsinis

Managing Partner // Cayman

t: +1 345 914 9605 // e: Stephen.Leontsinis@collascrill.com



Rocco Cecere

Partner // Cayman

t: +1 345 914 9630 // e: rocco.cecere@collascrill.com



Matthew Dors

Partner // Cayman

t: +1 345 914 9631 // e: matthew.dors@collascrill.com



Kirsten Bailey

Senior Associate // Cayman

t: +1 (00) 345 914 9658 // e: kirsten.bailey@collascrill.com



Ronan O'Doherty

Senior Associate // Cayman

t: +1 345 914 9660 // e: ronan.odoherty@collascrill.com

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