

## Enforcing security over shares of a Cayman company

Insights - 05/07/2023

This client briefing summarises, in general terms, the enforcement options available to a secured party pursuant to a Cayman-law governed equitable charge over shares in a Cayman exempted company.

For information relating to the types of security that can be granted over shares in a Cayman exempted company please see our briefing [Security over shares of a Cayman company](#).

### Security

There are two ways of taking security over shares of an exempted company: a **legal charge** or an **equitable charge**. In practice, security by way of an equitable charge would usually be the preferred route for a secured party, therefore this client briefing will focus primarily on typical enforcement options under a Cayman-law governed equitable charge, these being (subject to anything to the contrary in the security documentation):

- receivership
- express power of sale
- taking possession
- foreclosure

If the security documentation is governed by the laws of a jurisdiction other than the Cayman Islands then the enforcement options available to the secured party will be determined in accordance with the laws of that jurisdiction.

### Receivership

The appointment of a receiver pursuant to the contractual rights of the secured party contained

in the security documentation is the most commonly used method of enforcing an equitable charge over shares in the Cayman Islands. The secured party may appoint one or more receivers, who would typically be delegated all rights and powers exercisable by the secured party under the security documentation, including, without limitation, the ability to: (i) sell, charge or otherwise dispose of the charged shares; (ii) exercise any voting or other rights in relation to the charged shares; (iii) make any arrangement or compromise on behalf of the chargor; and (iv) rank and claim in the insolvency or liquidation of the charged company. There are no statutory requirements in relation to such an appointment and it may be effected by contract without the need to apply to the Court for relief. While the receiver is appointed by the secured party, it is typically expressed to be the agent of the chargor (ensuring that the secured party cannot be considered responsible and/or liable for the acts or omissions of the receiver during its receivership). There is no statutory time limit in relation to either the receiver's appointment or the exercise of its powers and these will usually be expressed to be at the discretion of the secured party. Once appointed, a receiver will typically liquidate the underlying assets (e.g. the secured shares) in order to repay the outstanding amount owed to the secured party.

## **Express power of sale**

There is no statutory power of sale in the Cayman Islands. In light of this, the security documentation will typically expressly provide the secured party with a power of sale once the security becomes enforceable. This power should be broadly worded so as to give the secured party the power to sell all or some of the charged shares on such terms and in such manner as it deems appropriate and with no requirement to obtain any prior authorisation from any court in advance of exercising such power of sale. However the secured party is subject, under common law, to:

- a duty to act in good faith and to take reasonable steps to obtain the best price for the charged shares reasonably obtainable at the time
- a prohibition from utilising this contractual power of sale to sell the secured shares to itself without first obtaining a court order permitting same

## **Taking possession**

The security documentation will typically include further assurance and power of attorney provisions from the chargor in favour of the secured party. Where a secured party is looking to enforce its security it may rely on these provisions in the security documentation, together with the suite of enforcement-enabling deliverables typically collected as part of completion of the financing to take legal possession of the charged shares, become the shareholder of the Cayman company and thereby receive all benefits derived from and exercise all rights attaching to the charged shares. For further information relating to the completion deliverables

mentioned above please see our briefing [Security over shares of a Cayman company](#).

Where the charged shares represent the whole of (or a majority of) the issued share capital of the Cayman company, taking possession of the legal title to the charged shares may result in the Cayman company being treated as the subsidiary of the secured party. This may result in various tax, legal, regulatory and/or accounting implications for a secured party. Therefore, careful consideration of the potential implications of utilising this option should be considered before proceeding.

## **Foreclosure**

Exercising a secured party's right of foreclosure pursuant to an equitable charge involves applying to the Grand Court of the Cayman Islands for a court order expressly determining that (i) the chargor has no further rights in relation to the charged shares; and (ii) the secured party may exercise their rights in relation to the charged shares. This remedy does not affect the chargor's obligation to pay any unpaid sum under the security documentation. For equitable reasons, this court order would only be granted where the secured sum is greater than the value of the charged shares. Given this, as well as the timing and cost implications of procuring such a court order, and given the alternative remedies discussed above, this enforcement method is rarely used.

This client briefing is intended to provide a general summary of the position in law as at the date shown above, and is not to be taken as specific legal advice applicable to particular issues or circumstances.

If you would like more information, please contact one of our banking and finance specialists as detailed on this page.

### **About Ogier**

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

### **Disclaimer**

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

## Meet the Author



James Heinicke

Partner

Cayman Islands

E: [James.Heinicke@ogier.com](mailto:James.Heinicke@ogier.com)

T: +1 345 815 1768

## Key Contacts



Mark Santangeli

Partner

Cayman Islands

E: [mark.santangeli@ogier.com](mailto:mark.santangeli@ogier.com)

T: +1 345 815 1766



Gemma Bellfield (nee Lardner)

Partner

Cayman Islands

E: [gemma.bellfield@ogier.com](mailto:gemma.bellfield@ogier.com)

T: [+1 345 815 1880](tel:+13458151880)



Thomas Sims

Associate

Cayman Islands

E: [thomas.sims@ogier.com](mailto:thomas.sims@ogier.com)

T: [+1 345 815 1914](tel:+13458151914)

## Related Services

Banking and Finance

## Related Sectors

Restructuring and Insolvency