

The Cayman Grand Court confirms its wide discretion on a Supervision Application

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On 6 October 2023, Parker J handed down his reasons for dismissing an application to bring the voluntary liquidation of Port Link GP Ltd, General Partner (GP) of The Port Fund L.P. (TPF) under the supervision of the Grand Court pursuant to section 124 of the Companies Act. (**Section 124**)

Section 124(1) provides that where a company is being wound up voluntarily its liquidator shall apply to the Court for an order that the liquidation continue under the supervision of the Court unless, within twenty-eight days of the commencement of the liquidation, the directors have signed a declaration of solvency (a Section 124 application).

This was the first time the Cayman Court had considered an opposed Section 124 Application in circumstances where the failure to provide the declaration of solvency arose out of incapacity (the Company having no directors) and where there was no good evidence of insolvency one way or the other before the Court.

| The central question

The central question for the Court was whether or not the Court retained a discretion not to make a Supervision Order once the mandatory requirement to file a Section 124 Application had been triggered and such application has been filed.

| The background

The Court's determination of that question, in this case, was made against the backdrop of a recent successful application by the Kuwait Ports Authority (KPA) and the Public Institution for Social Security (PIFSS) (the majority limited partners of TPF in terms of value and the Plaintiffs in proceedings against the GP and various third parties) for the appointment of Joint Receivers (the **Receivers**) over the GP in circumstances where the GP's former directors had resigned

leaving it unable to prosecute or defend the claims to which it is a party.

On 25 May 2023, the Court appointed the Receivers to the GP to manage all litigation in which the GP and TPF was involved (the GP's sole asset) having decided in its judgment that it was not appropriate, necessary or desirable to appoint a liquidator instead. On 2 May 2023, subsequent to, and notwithstanding, the hearing of the Plaintiffs' application to appoint Receivers but prior to the Court's determination of the application, the GP's sole shareholder took it upon itself to pass resolutions to inter alia appoint Joint Voluntary Liquidators (the **JVLs**) of the GP.

In the absence of there being directors able to sign a declaration of solvency on behalf of the GP, and notwithstanding the Court appointment of the Receivers, the JVLs were obliged to make the application pursuant to Section 124.

In support of the Section 124 Application in this case, the JVLs stated that the application had been made in compliance with the mandatory requirements of the Companies Act, and that it was made "not to seek to infringe upon or otherwise duplicate the efforts (or costs) of the [JRs] but simply to comply with section 124(1) of the [Companies Act]".

Positions of the parties

At the Supervision hearing, which was held at the same time as a hearing to review the Receivership, the JVLs submitted that, whilst the Court retained discretion to dismiss the Section 124 Application, it was a narrow discretion, limited to questions of proof on whether the GP was insolvent or not.

The Plaintiffs' primary position at the Supervision hearing was that that the Court should dismiss the Section 124 Application, (alternatively adjourn or stay the application) on the basis that the Court retains a wide discretion on the hearing of a Section 124 Application, including dismissing the petition, having analogous powers as those it has on a winding up petition presented in the ordinary way since the key question was whether the Company ought to be placed into official liquidation or not.^[1]

The Plaintiffs also relied on the proper construction of Section 124 which, whilst mandating the filing of an application for Supervision in the circumstances provided for by Section 124, does not mandate the granting of a Supervision Order. As the obiter dicta of Quin J puts it in *OVS Capital Management (Cayman) Limited 2017 (1) CILR 232 (OVS)* ^[2]

"The court has a discretion, after reviewing all the facts and surrounding circumstances, to decide whether or not to make a supervision order. Furthermore, if the court had no discretion one would expect to find some mandatory language contained within Section 124 of the Companies Law removing the court's discretion."

The decision

Parker J concluded with reference to the competing obiter judgments in OVS and AWJ, that:

- the purpose and effect of a Section 124(1) petition, is to all intents and purposes, the same as a winding-up petition and the Court has analogous powers on the hearing an application for a supervision order under Section 124(1), as those that it has on a winding up petition presented in the ordinary way;
- it does not follow on a plain reading of Section 124 that the Court's discretion is removed and the Court has no option other than to make an order appointing official liquidators
- in the Court's view the court has jurisdiction and it retains a broad discretion to achieve an outcome which would be in the best interests, of the Company's stakeholders and its creditors. It is not, as the JVLs contended, a narrow discretion to assess the rebuttable issue of insolvency;and
- In its clear view a just an expeditious outcome and one which provides the best regime to allow the FSD 236 litigation to efficiently progress would be served by dismissing the supervision application, with the conduct of the litigation remaining under the control of the Receivers acting on behalf of the GP.

Parker J's judgment has clarified the law in this area and confirms that the granting of a Supervision Order pursuant to an application made under Section 124 is not a foregone conclusion should the facts of the particular case justify an approach other than that of the appointment of official liquidators, as in this case.

Ogier acted for KPA and PIFSS in their successful opposition of the supervision application.

[1] Section 95 of the Companies Act

[2] Quin J referred to the earlier case *In Re AWJ Master Fund II Limited 2011 (1) CILR 363* in which Jones J stated obiter that, where there is no declaration of solvency "the court must make a supervision order. It has no discretion on this matter".

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