

## Making it official: the Cayman Grand Court outlines the principles for converting a voluntary liquidation into an official liquidation

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In *Re Touradji Private Equity Master Fund Ltd*, the Grand Court of the Cayman Islands made a supervision order in respect of three funds in voluntary liquidation, following applications by certain aggrieved investors and the joint voluntary liquidators, and over the objections of the investment manager.

The decision provides guidance on the principles that the Court will apply to such applications, and is an example of the kind of circumstances in which a Court will consider it more effective, economic and expeditious for a voluntary liquidation to be converted into an official liquidation under section 131(b) of the Companies Act.

### The principles applicable to supervision orders

A supervision order involves the appointment by the Court of one or more qualified insolvency practitioners as official liquidators over a company in voluntary liquidation. [1] The order takes effect as if it were an order that the company be wound up by the Court. [2] Practically speaking, once a supervision order is made, the liquidators have significantly enhanced powers while the residual powers of the company's shareholders which exist during a voluntary liquidation are displaced. [3]

Under the Companies Act, there are a number of bases upon which a Court will grant a supervision order in respect of a voluntary liquidation, including where:

1. the directors have failed to provide a declaration of solvency within 28 days (section 124) [4]
2. the company is or is likely to be insolvent (section 131(a)) [5]
3. the supervision of the Court will "facilitate a more effective, economic or expeditious

liquidation of the company in the interests of the contributories and creditors" (section 131(b)) [6]

The principles that govern the jurisdiction to convert a voluntary liquidation into an official one under section 131(b) of the Companies Act were outlined by the Cayman Islands Court of Appeal in the 2020 decision *Re Asia Private Credit Fund* [7] and were summarised by Kawaley J in *Touradji* as follows: [8]

- the Court must be satisfied that the petitioners have established that it is a proper case to grant relief under section 131(b), based on one or more of the statutory grounds, following an evaluative analysis of the evidence available
- the jurisdictional ground(s) relied upon must be established as at the date of the hearing
- it is not necessary that the Court be satisfied that any or all of the powers of an official liquidator need to be immediately exercised. However, it must be demonstrated that there at least will be "an immediate potential" for "a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors" resulting from the supervision sought [9]
- in evaluating the evidence, the Court may take into account the practical implications of the general legal framework of an official liquidation, such as the elimination of the management shareholder's power to remove a voluntary liquidator

## Facts of the *Touradji* case

*Touradji* involved three separate funds which had been in voluntary liquidation since August 2018 following the expiry of their terms. The funds' investment manager was initially appointed as voluntary liquidator of the funds. [10] Following complaints from certain investors in the funds about the progress of the voluntary liquidation, the investment manager agreed to resign and appoint independent joint voluntary liquidators (the **JVLs**).

However, both the investors and the JVLs alleged that the appointment of the JVLs did little to improve the progress of the liquidations primarily due to a lack of cooperation from the investment manager, including its failure to provide information and documents to the JVLs. Due to the continued lack of progress, the investors and the JVLs presented separate petitions seeking a supervision order under section 131(b) of the Companies Act and for the appointment of the JVLs as official liquidators.

## The petitioners' application

At the hearing of the petitions, it was common ground that the funds should be wound up. However, the investment manager's position was that the Court should not make a supervision order and the funds should remain in voluntary liquidation.

Kawaley J noted the following factors as relevant to his discretion as to whether a supervision order should be made:

- the evidence given by the investment managers reflected "a desire to retain as much control as possible of the funds' affairs" [11] and a belief that "the JVLs should be content to rely on [the investment manager's] ongoing collaboration and support rather than acting in an autonomous and independent manner" [12]
- The funds had been in voluntary liquidation for four years and there were no reliable recent financial records and no up to date register of members. [13] The JVLs gave evidence that it was presently unclear to them whether the funds were solvent or insolvent [14]
- There was a need to independently investigate the funds' financial affairs including substantial payments made shortly before the appointment of the JVLs and the evidence of the investment manager could effectively be construed as them saying: "I don't think you need to investigate what I have done." [15] The investment manager's retention of the power to remove the JVLs was in the circumstances "more of a hindrance than a help" to the conduct of the liquidation [16]
- The JVLs had formed the professional view that the liquidation would be more economic and effective if they were granted the powers of official liquidators. [17] This view was supported by all economic stakeholders in the funds who chose to formally communicate their views. [18] Although the investment manager had co-operated in the days leading up to the hearing of the petitions, this did not reduce the JVLs belief that a supervision order should be made [19]
- The JVLs' ability to gather information abroad from third parties would depend entirely on voluntary cooperation absent recognition of their status as official liquidators or, alternatively, cooperation from the investment manager [20]

Kawaley J ultimately agreed that a supervision order should be made and held:

"[v]oluntary liquidations usually run smoothly when the process is a simple or clearly defined one with not too many rough edges. Where a voluntary liquidation of a fund has been administered by the manager and gone adrift as in the present case, the ship can only be steadied if professional liquidators are allowed to man the bridge and the manager is able to cede control to the minimum extent necessary. Depending on the personalities involved, and the complexities of the commercial context, many managers will be unable to cede control of what they understandably view as "their" ship." [21]

## Conclusion

The voluntary liquidation process in the Cayman Islands is a simple one with limited reporting requirements and no supervision by the Court. In addition, shareholders retain a residual power

to remove a voluntary liquidator by ordinary resolution. While this serves stakeholders well in most circumstances, it generally relies on a degree of trust and confidence between the liquidators, shareholders and creditors.

This case is an example of where that trust and confidence has broken down and provides welcome guidance to investors, insolvency practitioners and creditors alike on the circumstances in which a Court may be willing to bring the liquidation under the supervision of the Court for the benefit of all stakeholders.

[1] Section 105 of the Companies Act shall apply as if the Court has made a winding up order: Companies Act, section 132.

[2] Except that the date of commencement of the winding up is deemed to be the time that the voluntary liquidation commenced and the prior actions of the voluntary liquidator are valid and binding: Companies Act, section 133.

[3] This includes the power for a majority of shareholders to remove a voluntary liquidator by ordinary resolution under section 121 of the Companies Act.

[4] Upon the application of the liquidator, such an application being mandatory if no declaration is provided ("the liquidator shall apply...").

[5] Upon application by the liquidator, or any creditor or contributory.

[6] Upon application by the liquidator, or any creditor or contributory.

[7] [2020] (1) CILR 134.

[8] *Touradji* at [6].

[9] Where the appointment of an official liquidator may increase the costs of the liquidation the Court may refuse to grant a supervision order: see *Re Consistent Return Limited* [2012] (1) CILR 445.

[10] Another independent voluntary liquidator was initially jointly appointed with the Manager, although that liquidator resigned in early 2022.

[11] *Touradji* at [11].

[12] *Touradji* at [17(b)].

[13] *Touradji* at [18(a)].

[14] *Touradji* at [9], [18(c)].

[15] *Touradji* at [13], [18(b)], [19(a)].

[16] *Touradji* at [19(b)].

[17] *Touradji* at [18(d)].

[18] *Touradji* at [18(g)].

[19] *Touradji* at [18(e)].

[20] *Touradji* at [18(f)].

[21] *Touradji* at [17].

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