

Bringing claims against Cayman Islands entities subject to insolvency processes

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Rumours that a company is in the zone of insolvency may create a race to the assets, with potential creditors or interested parties commencing proceedings in an attempt to secure payment from the company before its assets are fully dissipated or tied up in the insolvency process. This can destroy the collective value in the enterprise or scupper a restructuring and result in significant duplicative costs.

To ensure an orderly and collective resolution of the company's affairs, section 97(1) of the Cayman Companies Law imposes a moratorium on commencing or proceeding with any suit, action or other proceedings against the company once Liquidators are appointed by the Court (including on a provisional basis). Once these office holders are appointed, proceedings can only be commenced or proceeded with against the company in question with the leave of the Grand Court, subject to such terms as the Court may impose.[1]

The main purposes of section 97 are:

1. to avoid a race to the assets in which competing proceedings seek to extract value from an insolvent or near insolvent Company and steal a march on other stakeholders;
2. to oblige stakeholders to utilise the more cost effective statutory proof of debt process administered by the liquidators and the consequent fair distribution of remaining assets; and
3. where Provisional Liquidators have been appointed, to give them the opportunity to explore possible restructuring opportunities without being burdened by excessive litigation (limiting the ability of parties opposed to a restructuring deal to ruin or delay the restructuring other than by properly engaging in the process).

In order to secure leave from the Grand Court to commence or continue proceedings against a company subject to section 97, a party must demonstrate:

1. that they have a good arguable case;

2. that it is right and fair to all the parties in the circumstances (including the interests of the creditors of the company as a whole) that the proceeding against the company be permitted; and
3. that the proposed action could not conveniently or justly be decided in the course of the winding up (that is, by the liquidators through the proof of debt process).

An example where the Grand Court held that proceedings should be allowed to proceed irrespective of the existence of the insolvency process, is where a party had a proprietary claim against a company arising out of an alleged fraud. In that instance it was found that the issues could only be conveniently determined in a writ action (with all the procedural and substantive safeguards that route affords) rather than via a contested proof of debt process. However, in other cases where the issues in dispute are relatively straightforward, it may prove difficult to persuade the Grand Court that the estate of the insolvent entity ought to incur the expense of defending legal proceedings.

Section 97 has been held by the Cayman Islands Courts to have extra-territorial effect. That is, it also imposes a moratorium against proceedings and attachments against assets in jurisdictions other than the Cayman Islands. While the Grand Court cannot directly put a stop to proceedings commenced abroad, it is likely to take a dim view of attempts to enforce any judgments against the company obtained in breach of section 97. Liquidators may seek recognition of their appointment, and of the moratorium, where foreign cases are not otherwise stayed, but the Cayman Court may be persuaded to allow foreign proceedings to continue if they involve substantive determinations of foreign law, or the company is a necessary party to preserve litigants' rights, subject again to any terms the Court may impose.

Under Cayman law the moratorium does not prevent a secured creditor from enforcing its security without leave of the Court and without reference to the liquidator at any time. There is no moratorium where the liquidation process is voluntary, and all claims must be resolved before the liquidation may be concluded.

Ogier has significant experience in both seeking and resisting leave to commence or continue proceedings against companies subject to the section 97 moratorium. For further information please contact the authors, or your usual Ogier contact.

[1] Similarly, once a winding up order has been made, section 97(2) renders any attachment, distress or execution put in force against the estate or the effects of the company after the commencement of the winding up (the date the relevant winding up petition was originally presented in respect of the company) void.

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