

Snapshot: Cayman Islands Antecedent Transactions

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When a Cayman Islands company (**CayCo**) goes into official liquidation, various antecedent transactions entered into in the lead up to that liquidation may be set aside, thereby allowing the recovery of assets of the CayCo to maximise the return to its stakeholders. This snapshot sets out a summary of challenges that may be made to antecedent transactions in the Cayman Islands. These may also apply to Limited Liability Companies, Partnerships, Exempted Limited Partnerships and, in certain circumstances, to foreign companies, but this snapshot focuses on CayCos.

Certain antecedent transactions effected by CayCo are automatically void whereas others are voidable on the application of (variously): (i) a liquidator appointed by order, or under the supervision, of the Grand Court of the Cayman Islands (**Court and Official Liquidator**); (ii) a liquidator appointed without the intervention of the Court (**Voluntary Liquidator**) or (iii) a creditor prejudiced by the transaction. Other transactions may give rise to a liability to contribute to the assets of the CayCo.

(i) Void *ab initio*

When a winding up order has been made, any disposition of CayCo's property and any transfer of shares or alteration in the status of the CayCo's members made after the commencement of the winding up is, unless the Court directs otherwise, void. The deemed commencement of an official liquidation is either the presentation of the winding up petition or, if preceded by a form of voluntary liquidation, the passing of that resolution (**Commencement Date**). This can give rise to a period of uncertainty for those dealing with a CayCo fending off a winding up petition and care should be taken to seek a validation order prior to entering into any arrangement affecting the property of the CayCo during this period.

Where a CayCo has commenced liquidation voluntarily (which has not come under the supervision of the Court), then any transfer of shares without the sanction of the Voluntary

Liquidator, and any alteration in the status of the company's members, made after the commencement of the voluntary winding up is void. However, unlike a compulsory liquidation, no transfer of CayCo's property is automatically void. There is not normally the same uncertainty with voluntary liquidations as, on the appointment of a Voluntary Liquidator, all of the powers of the directors cease and are displaced by the Voluntary Liquidator (except so far as the CayCo in a general meeting or the Voluntary Liquidator sanctions their continuance). As such, the transfer of property is not automatically void but care should be taken that any transfer of property effected by CayCo after the appointment of Voluntary Liquidators has the requisite authority.

(ii) Voidable

a. Voidable preference

Every conveyance or transfer of property, or charge thereon, or money which is made by the CayCo in favour of a creditor at a time when the CayCo is unable to pay its debts as they fall due (i.e. on the cash flow basis), made with a view to preferring such a creditor, is void if made within six months immediately preceding the Commencement Date. The intention to prefer the creditor has to be the dominant intention of the person effecting the transaction (i.e. CayCo), although that intention may be inferred, with the intention being to put the recipient in a better position than it would otherwise have been in an insolvent liquidation of the CayCo.

If the preference is made to a 'related party' (defined as if it has the ability "*to control the company or exercise significant influence over the company in making financial and operation decisions*") then the payment is deemed to have been made with a view to preferring such creditor or creditors ahead of other creditors.

b. Dispositions at an undervalue or fraudulent dispositions

Every disposition of property made for no value or for value that is significantly less than the value of the property by, or on behalf of, CayCo with intent to defraud its creditors is voidable at the request of an Official Liquidator.

The Official Liquidator must establish intent to defraud for the purposes of this section, which is defined as an intention to wilfully defeat an obligation owed to a creditor. The intention to defeat a creditor needs only be "a" purpose and not the sole or dominant purpose. This is still a difficult burden for the Official Liquidator to satisfy and the Official Liquidator may not commence proceedings more than six years after the transaction in question.

Separately, a creditor prejudiced by a disposition of property may seek an order from the Court that the disposition is void if it was for no value or for value that is significantly less than the value of the property. The creditor must again establish intent to defraud (defined as above and

not required to be the dominant purpose) for the purposes of this section, which can be even more difficult without the powers of an Official Liquidator to investigate the CayCo's books and records. The relevant disposition must have occurred not more than six years prior to the application of the creditor.

Even if such a claim commenced by a creditor succeeds, the disposition is only set aside to the extent necessary to satisfy the creditors prejudiced by the disposition, although recent authority suggests that for an insolvent company, this may go beyond the value of the claim of the creditor seeking the order, to ensure all creditors are made as whole as possible even with a *pari passu* distribution.

Where a transferee is found not to have acted in bad faith in either case, the Court may provide for the proper fees, costs, pre-existing rights, claims and interests of the transferee.

(iii) Liability to Contribute

Where any business of the CayCo has been carried on with intent to defraud creditors of the CayCo or creditors of any other person, or for any fraudulent purpose, a liquidator (either Official or Voluntary) may also apply to the Court for a declaration that any persons who were knowingly parties to the carrying on of the business in that manner are liable to make such contributions to CayCo's assets as the Court thinks proper. Usually, each director will be "knowingly" a party to the ways in which the business of the CayCo is carried on and therefore potentially liable if that business is carried on fraudulently. There is no applicable limitation period for this offence.

Ogier has acted for creditors, debtors and office-holders across the spectrum of contentious insolvencies. Please contact your usual Ogier contact if you require any further information.

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