Grand Court confirms test for liquidator independence

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Introduction

The Grand Court has recently provided helpful clarification as to the appropriate test to be applied when a dispute arises over the identity of the insolvency practitioners proposed to be appointed by a creditor or the company. In *Global Fidelity Bank Ltd (in Voluntary Liquidation)*[1] the Court confirmed the 3-stage test for determining independence and that in applying the test, significant weight should be afforded to the views of the creditors.

Background

Global Fidelity bank (the **Bank**) was placed into voluntary liquidation on 14 June 2021 following an urgent independent financial review and preparation of a report into the Bank's financial position. The Bank engaged Michael Pearson and Adam Keenan of FFP to conduct the financial review and on receipt of the report, appointed Mr Pearson and Mr Keenan as voluntary liquidators (**VLs**). In the knowledge that no declaration of solvency would be forthcoming from the directors of the Bank, the VLs made an application to bring the voluntary liquidation under the supervision of the Court under section 124(1) of the Companies Act (2021 Revision) and for the VLs to be appointed as joint official liquidators of the Bank. While there was no objection to the making of a supervision order, one of the Bank's largest creditors (the **Opposing Creditor**) objected to the appointment of the VLs as joint official liquidators.

The basis of the Opposing Creditor's objection to the nominated joint official liquidators was the fact that they had been nominated by the directors, and that the nominees had conducted the initial financial review of the Bank, prepared the financial report for the Bank and had subsequently been appointed as VLs. The Opposing Creditor contended that these prior engagements contravened the independence requirements set out in regulation 6 of the Insolvency Practitioner's Regulations (**IPR**)[2], creating "*an unavoidable and irremediable*

appearance of partiality towards the directors" and disqualified the VLs from being appointed as joint official liquidators. No other creditors expressed opposition to the appointment of the VLs and on the eve of the hearing, another significant creditor confirmed in evidence that it did not oppose their appointment.

Findings

Following a detailed review of the English and Cayman Islands authorities addressing the requirements of the independence test applicable to insolvency practitioners, Doyle J acceded to the application and appointed the VLs as joint official liquidators.

Observing that "the issue before the court was not finely balanced", the Judge had regard to the following considerations in appointing the VLs as joint official liquidators:

(a) The prior connection between the VLs and the Bank did not last long and was not sufficiently significant to reasonably cast proper doubt on the independence of the VLs;

(b) Their nomination by the directors and the limited prior involvement of the VLs did not strip them, as well regarded professionals, of their actual or perceived independence;

(c) It was not appropriate to have regard only (or even principally) to the views of one of the Bank's significant creditors. While the main focus of the Court in an insolvency situation is the views of creditors rather than contributories, the Court must also have regard to all of the relevant objective factors that are in play;

(d) In this case, those objective factors included the limited scope of the prior engagement, that the Opposing Creditor was the only one objecting to the appointment of the VLs, and that CIMA had adopted a neutral stance and expressed no concerns in respect of the identity of the joint official liquidators; and

(e) The prior engagement of the VLs may, in instances such as this, produce some advantage to creditors by way of costs savings and efficiencies.

Conclusion

The judgment in Global Fidelity Bank serves as a useful reminder of the long-standing principles underpinning the appointment of independent insolvency practitioners in the Cayman Islands. Doyle J recognised the importance of "*all stakeholders and indeed existing and future internal and external investors worldwide having confidence in the liquidation process of insolvent companies in the Cayman Islands and competent, skilled, cost effective and independent official liquidators have an important role to play in that process and the justifiable confidence placed in it.*" In order to maintain this confidence, the Court will have regard to the subjective views of

those with an economic stake in the liquidation, in the context of the objective facts and circumstances of the case.

[1] Unreported, Doyle J, 20 August 2021

[2] Regulation 6 of the IPR provides that: (1) A qualified insolvency practitioner shall not be appointed by the Court as an official liquidator of a company unless he can be properly regarded as independent as regards that company. (2) A qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation he, or the firm of which he is a partner or employee, or the company of which he is a director or employee, has acted in relation to the company as its auditor."

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