

Can a person commence proceedings against a Cayman company in winding up without leave?

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This article was updated in April 2022 to include a reference to In the Matter of Adenium Energy Capital, Ltd. (In Official Liquidation) Cause No: FSD 54 of 2020 (CRJ), (unreported) 26 April 2022, Cheryll Richards J.

"It is [not always] easier to beg forgiveness than to seek permission:"^[1] can a person commence proceedings against a company in winding up without leave and, if so, when would it be appropriate to do so?

A person requires the leave of the Court to commence or continue proceedings against a company in winding up. Proceedings begun without leave are not a nullity and the Court has power to grant leave retrospectively, but in what circumstances would it be right to sue first and seek leave later? This article identifies the English and Cayman cases in which it has been held that leave can be granted retrospectively and considers a recent Cayman case in which guidance was given as to when it would be right to issue proceedings before seeking leave.

Section 97(1) of the Companies Act (2021 Revision)

Section 97(1) of the Companies Act (2021 Revision) says:

"(1) When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose."

Power to grant leave retrospectively

But what happens if a person inadvertently commences proceedings against a company in winding up before obtaining leave or feels that there are compelling reasons to do so. Are the

proceedings a nullity, or does the Court have power to give leave retrospectively?

English authorities

In two earlier English cases it was held, on the basis of what was described in the second case as, "the natural construction of the words of the section," [2] that proceedings issued against a company in winding up without leave were a nullity: *Wilson v Banner Scaffolding Ltd.*, The Times, 22 June 1982, per Milmo J; and *In re National Employers Mutual General Insurance Association Ltd.* [1995] 1 B.C.L.C. 232, per Rattee J. One can have some sympathy with the judges in those case and, indeed, with anyone who thought that the natural construction of section 97 was to the same effect.

However, in another English case, *In re Saunders (A Bankrupt)* [1997] Ch., 60 Lindsay J, having been referred to numerous cases going back to 1866, as well as to Commonwealth authorities and other English cases on different Acts where leave was required before proceedings could be commenced, held that proceedings commenced against a bankrupt without leave [3] were not a nullity and that leave could be given retrospectively. Further, in *Bank of Ireland v Colliers International UK Plc (In Administration)* [2012] EWHC 2942 (Ch.); [2012] Ch. 422, after an extensive review of the English, UK and Commonwealth cases, David Richards J said:

"35. I have come to the clear conclusion that *Re Saunders* was correctly decided and that retrospective permission can be given for the commencement of proceedings, whether under section 130(2) or section 285(3) of the Insolvency Act 1986 or under paragraph 43(6) of Schedule B1".

Section 130(2) is in substantially the same terms as section 97 of the Companies Law, so *Bank of Ireland v Colliers International UK Plc (In Administration)* provides strong support for the view that retrospective leave can be given under section 97 as well.

Cayman authority

In fact, the Cayman Court has already come to that conclusion on the basis of *Re Saunders*. In *In the Matter of Euro Bank Corporation* [2001] CILR 517 Smellie J held at paragraphs [30] to [32] that proceedings that had been commenced against a company in liquidation were not a nullity and that the court had power to give retrospective leave in an appropriate case. In the recent case of *In the Matter of Adenium Energy Capital, Ltd. (In Official Liquidation)* Cause No: FSD 54 of 2020 (CRJ), (unreported) 26 April 2022, Cheryll Richards J said: "There is no dispute that leave can be granted retrospectively," citing McPherson's Law of Company Liquidation, paragraph 7.81, as authority. [4]

When and how to seek leave retrospectively

The normal way to seek leave, whether before or after proceedings have been issued, is by way

of summons in the company's liquidation. However, in *BDO Cayman Ltd v Ardent Harmony Fund Inc (in Official Liquidation)* Cause No: FSD 74 of 2020 (MRHJ) (unreported) 19 November 2020, Ramsay-Hale J, the plaintiff sought section 97 leave in the very proceeding for which leave was being sought. Leave was refused and, at the subsequent costs hearing,^[5] the plaintiff submitted that it was:

"... standard practice, where there are no viable grounds for opposing section 97(1) leave, for the question of leave to be determined in a "rolled up" hearing of the application for leave and the application for substantive relief."^[6]

In the Matter of Euro Bank Corporation would certainly give the court power to grant section 97 leave at a rolled up hearing, but if there ever was such a practice it would seem to have been significantly curtailed by *BDO Cayman Ltd v Ardent Harmony Fund Inc (in Official Liquidation)* FSD 74 of 2020 (MRHJ), (unreported) 27 April 2021, where Ramsay-Hale J, in response to the plaintiff's submission, said:

"39. That approach might be appropriate where the JOLs do not oppose the grant of leave but, in the ordinary case, such an approach is contrary to the rationale for the requirement for leave which is that a company in liquidation is not to be harassed and have its assets wasted by unnecessary litigation. The leave of the Court is the safeguard which ensures that the prospective claim is an arguable one."

Conclusion

It is respectfully submitted that the judge's approach in *BDO Cayman Ltd v Ardent Harmony Fund Inc (in Official Liquidation)* FSD 74 of 2020 (MRHJ), (unreported) 27 April 2021 was clearly right because if the leave application was "rolled up" with the hearing of the substantive proceedings, other than in cases in which leave was not opposed, it would compel the liquidators to incur the costs of defending the substantive proceedings, just in case leave was granted.^[7] Whereas the whole purpose of requiring leave is to determine whether they should have to incur such costs or not. There may be other cases in which leave would be granted retrospectively, but the circumstances in which it would be right to sue first and seek leave later are likely to be rare and in most cases a person would be well-advised to seek leave before commencing proceedings (and to do so by summons in the liquidation).

^[1] With apologies to St Benedict of Nursia.

^[2] Section 213 of the Companies Act 1948 and section 130(2) of the Insolvency Act 1986 respectively.

^[3] Under section 285(3) of the Insolvency Act 1986.

^[4] Paragraph [83]. The fact that leave was being sought retrospectively did not seem to raise

any difficulties on the unusual facts of that case, and it was not otherwise discussed.

[5] Cause No: FSD 74 of 2020 (MRHJ), (unreported) 19 November 2020, although a note of the case is reported at [2020 (2) CILR Note 22].

[6] Paragraph [38].

[7] Or risk being unprepared should leave be granted.

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