

## Case Update: Polarcus – a declaratory relief for Cayman Islands official liquidators

Insights - 21/07/2022

The Grand Court of the Cayman Islands has confirmed that the Court has the jurisdiction to grant declaratory relief within winding-up proceedings (*In the Matter of Polarcus Limited (In Official Liquidation)* (Unreported, Justice Kawaley, 23 June 2022 Cause No: FSD 31 of 2021 (IKJ)).

This is welcome clarity for insolvency practitioners and other stakeholders in winding-up proceedings where such declaratory relief may be required and the relief cannot for some reason be included in a standard sanction application.

### Background

Joint Official Liquidators (JOLs) were appointed to the Company on 21 June 2021. The JOLs sought sanction from the Court to enter into a sale and purchase agreement concerning the purchase of shares in foreign connected entities (**Transaction**). The Grand Court of the Cayman Islands (**Court**) granted such sanction pursuant to an order dated 14 December 2021 (**Sanction Order**). Notwithstanding the Sanction Order, the JOLs were subsequently required to demonstrate to a foreign regulator that they had the requisite power to enter into the Transaction on behalf of the company in liquidation. Accordingly, the JOLs sought a further order from the Court to provide that confirmation.

### Finding

Justice Kawaley acknowledged the lacuna arising from the fact that the Companies Winding Up Rules (2018 Revision) (**CWR**) did not grant an express power to provide declaratory relief in winding-up proceedings and that the provisions of the Grand Court Rules (**GCR**) Order 15, rule 16 (providing the Court's jurisdiction to make binding declarations of right whether or not any consequential relief is or could be claimed) did not apply to winding-up proceedings.

In a helpful judgment that recapped the approach taken by the Court, Justice Kawaley noted that the Court had been prepared to use its inherent jurisdiction to fill gaps in the CWR (*HSH Cayman I GP Limited et al* [2010 (1) CILR 114] (Cayman Islands Court of Appeal) and that the express statutory power to grant declaratory relief (by way of section 11 of the Grand Court Act) was not limited by its own terms. The Court had also previously found that its jurisdiction to grant declaratory relief was as wide as that of the English courts (*Insurco Intl Ltd v Gowan Company* [1994 CILR 210]).

While reflecting that the parameters of the Court's jurisdiction to supervise official liquidators is expressed in "somewhat compressed terms", Justice Kawaley drew assistance from the ability of a voluntary liquidator to seek relief (under section 129 of the Companies Act) holding that "It would lead to absurd results if section 129(2) was construed as conferring a broader jurisdiction to grant relief to voluntary liquidators seeking ad hoc assistance from the Court than it could grant to official liquidators appointed for the specific purpose of benefitting from continuing Court supervision. "

Justice Kawaley also noted the practice of seeking declaratory relief within the guise of sanction applications (directing whether and how liquidators may exercise their powers) and that confirmation as to the powers of official liquidators to facilitate the recognition of such powers abroad are frequently sought by way of letters of request, for which the Court's jurisdiction has never been doubted on an ex parte basis nor successfully challenged. However, sanction having already been obtained for the Transaction, the application was for declaratory relief to implement the broad Sanction Order rather than a fresh sanction application and there was no express power to issue a letter of request to a foreign court generally in the manner required by the foreign regulator to approve the Transaction.

Accordingly, Justice Kawaley considered that the declaration sought fell within the broad ambit of section 11 of the Grand Court Act, was consistent with the Court's power to control the exercise of official liquidators' powers and could also be made pursuant to the inherent jurisdiction of the Court to fill a lacuna in the CWR and facilitate the implementation of the Sanction Order.

## **Conclusion**

The need for a further application provides a useful reminder that all steps necessary to implement a transaction should be carefully considered in order that any necessary ancillary relief can be sought as part of the sanction application. However, in circumstances where unexpected requirements arise, the multiple bases upon which Justice Kawaley granted the relief provides further confirmation of the helpful gateways to obtaining a necessary order and demonstrates the ongoing willingness of the Court to assist their appointed office holders.

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## Meet the Author



Jeremy Snead

Partner

London

Cayman Islands

British Virgin Islands

E: [jeremy.snead@ogier.com](mailto:jeremy.snead@ogier.com)

T: [+44 20 3835 9470](tel:+442038359470)

## Key Contacts



Gemma Bellfield (nee Lardner)

Partner

Cayman Islands

E: [gemma.bellfield@ogier.com](mailto:gemma.bellfield@ogier.com)

T: +1 345 815 1880



Oliver Payne 

Partner 

Hong Kong

E: [oliver.payne@ogier.com](mailto:oliver.payne@ogier.com)

T: +852 3656 6044

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