Not just a rubber stamp: principles for liquidators to get decisions blessed by the Guernsey Royal Court

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Introduction

The Royal Court recently handed down judgment in In the matter of CanArgo Limited (in liquidation) [2020] GRC064, bringing to an end an important chapter in a long-running dispute regarding control of the exploration and exploitation of the oil and gas reserves of Georgia. This judgment makes it clear that liquidators can approach the court to approve a significant decision that they have taken to enter into a transaction and that such decision is akin to a Public Trustee v Cooper blessing of a momentous decision in a trusts context. While the court will not allow liquidators to surrender their decision making powers to the court, especially in a commercial context, it does have a supervisory jurisdiction over its officers and is available to bless the decision that the liquidators have taken even in the face of opposition from creditors.

Advocate Mathew Newman acted for MND Georgia B.V. (**MND**), the First Respondent in the proceedings, which party was supportive of the Joint Liquidators' application made pursuant to section 426 of the Companies (Guernsey) Law, 2008 (**Companies Law**) for the Court's approval of an agreement made between the Company, the Joint Liquidators and MND for the purchase by MND of certain assets of the Company (**Application**).

The Application was supported not only by MND, but also by two joint venture companies (**JV Respondents**) owned jointly by the Company and MND and which also were creditors of the Company. Conversely, the application was vehemently opposed by two other creditors of the Company, namely Achernar Assets AG and Achernar Partners Limited (together **Achernar**).

The Application was heard by Lieutenant Bailiff Marshall QC over the course of some six hearings in July, August and September this year, with judgment being handed down on 23 October 2020, in which LB Marshall comprehensively set out her reasons for granting the Application.

Background

The Company had been placed into compulsory liquidation and the Joint Liquidators appointed to office by way of order of the Royal Court dated 6 February 2018, all of which is the subject of an earlier judgment of the Royal Court (In re Canargo Limited Royal Court Judgment 13/2018). (Ogier also acted for the applicant (a related company) in that earlier application, the basis for which was the failure by the Company to file audited financial accounts in accordance with its duties under section 251 of the Companies Law, the first and only time this ground has been engaged in the context of a winding up application in Guernsey.)

Having been appointed to office it soon became clear to the Joint Liquidators that the Company had little in the way of liquid assets, but rather its material assets consisted of its shares in the two JV Respondents and a third JV company (the **Third JV Company** and together with the JV Respondents the **JV Companies**) and certain loan notes made between the Company and the JV Companies (the **Assets**).

In addition to the Assets, and key to its opposition to the Application, Achernar alleged that the Company also had a further asset, namely a claim that Achernar alleged the Company had against MND for non-payment of deferred consideration, namely certain finance requests alleged to be payable in respect of the Third JV Company (**Funding Claim**). Among other things, Achernar argued that the sale of the shares in the Third JV Company to MND would prejudice the Company's ability to bring the alleged Funding Claim.

The Joint Liquidators wrote to all interested stakeholders (namely the shareholders and the creditors, including MND, Achernar and the JV Respondents) to commence a bidding process for the purchase of the Assets, which process, ultimately, MND was successful in. The Joint Liquidators and MND then set about agreeing terms for the purchase by MND of the Assets, which ultimately was formalised by way of a conditional asset purchase agreement (**CAPA**), the conditional element being that MND agreed to fund the Joint Liquidators' Application to seek the approval of the Royal Court to their entering into the CAPA.

The Judgment

LB Marshall's 28-page judgment closely analyses the history of the matter, on the evidence before the Court, including, importantly, the negotiations which led up to the signing of the CAPA. The judgment then looks closely at the arguments of the parties made in the proceedings, the question of whether the Application was competent, the relevant test to be applied, the decision to be blessed, the progress of the Application before the Court and the parties' ultimate contentions.

While the detailed judgment requires reading in full to gain a proper understanding of the progress of the Application and its various twists and turns, suffice it to say that (as noted by LB Marshall) the strength of Archernar's opposition to the Application was quite remarkable, with Achernar taking every available point (technical or otherwise) at every juncture to seek to have it dismissed, leading the judge to comment that this suggested Achernar had a wider interest in the outcome than simply improving its perceived prospects of maximising recovery of its claimed debt.

LB Marshall noted that the Joint Liquidators had summarised the position that there had been a bidding process which had taken almost a year; they had carefully evaluated the offers which had been made; they were obliged to implement the pari passu principle of distribution; and they had no funds with which either to undertake a valuation exercise of the Company's assets, or to obtain legal advice as to the Company's position, so as to take their knowledge of the value of their assets further. They further submitted that getting a proper and reliable valuation would in any event be an almost impossible task in the light of the competing assertions with regard to the Company's ability to sell the Assets or to obtain payment of the Loan Notes. Any valuation of the Assets would be deeply discounted to reflect the legal uncertainties. There was also, on any basis, a very limited pool of potential purchasers for such specialist assets. Examination of such financial information with regard to the three JV Companies' affairs as was available showed clearly that their respective financial positions were, prima facie, "deeply negative". Realistically, there was never going to be outside interest in the purchase; only those already involved with the enterprise would have any interest in making an offer.

A key consideration in the proceedings was the alleged Funding Claim mentioned above, which Achernar said they had drawn to the Joint Liquidators' attention prior to the CAPA being entered into with MND. Achernar argued that the Joint Liquidators had not properly investigated what Achernar alleged was a valuable claim. The Joint Liquidators' response was that they did not have the funds to investigate or seek professional advice in respect of the

alleged claim, the merits of which were strongly refuted by MND.

Ultimately, Archernar's concerns regarding the alleged Funding Claim were addressed in the course of the proceedings by way of an amendment to the CAPA resulting in what became known as the "Third CAPA", as agreed between the parties to the CAPA and which became the subject of the Application before the Court, with Achernar having had time to consider it in the course of the proceedings. The effect of the Third CAPA was simply to remove the sale of those assets pertaining to the Third JV Company, which the Joint Liquidators and MND argued protected the value of the alleged Funding Claim and kept it within the Joint Liquidator's control, enabling Achernar to facilitate the realisation of the value of that claim.

Decision

Ultimately LB Marshall was satisfied that the Joint Liquidators could not be said to have failed to give due weight as required by law to Achernar's views, nor to have failed to consider them insofar as they otherwise ought reasonably to do, and that their final decision to enter into the Third CAPA could not be characterised as perverse.

The Court endorsed the view that Achernar's views did not appear to be those of a totally disinterested creditor and, in the end, the additional factor that the Joint Liquidators' decision could be said to defy the wishes of an apparent majority creditor (which Achernar asserted it was) did not cause LB Marshall to doubt that the Joint Liquidators had given due consideration to all material facts.

One interesting side note, which will no doubt be welcomed by insolvency practitioners, is that LB Marshall stated her view that it seemed to her the Joint Liquidators were not, in making their decision as to the way they thought it best to progress the litigation, obliged to ignore entirely their own interests. As Liquidators, she considered that they do have their own interest in the estate of the Company, in that their proper fees and expenses are recoverable from it, even in priority, in the liquidation itself.

General Principles

LB Marshall concluded her judgment by setting out some general principles which arose to be considered in the case, as follows:

(1) Section 426 of the Companies Law, whilst authorising a liquidator to seek the court's "directions," is wide enough in its scope to include an application to the court to approve a liquidator's intended course of action, either by persuasive analogy with the English decision on the equivalent English companies jurisdiction as exemplified in Re Nortel Networks UK Limited [2016] EWHC 2769 (Ch) or, if necessary, under the court's inherent jurisdiction.

(2) Such an application will be considered on the same principles as a request by a trustee to "bless" a momentous decision, according to the second category of trustee applications recognised in Public Trustee v Cooper [2001] WTLR 901 at 922-4, but, naturally, taking account of the different purposes of a trust and of a liquidation. The apparent serious likelihood of the liquidator's decision provoking litigation may well be enough to make the decision sufficiently "momentous" to justify such an application.

(3) The application is analogous to a Beddoe application in a trusts context, and can be conducted in private between the court and the applicant. However if it is sought to bind any party to the result of the application, that party will need to be convened and heard on the matter.

(4) The nature of the exercise on such an application is all-important. It is to satisfy the court that the liquidator's decision has been properly taken (or to seek directions as to how to take

it properly); it is not for the court to give direct approbation of the merits of the decision.

(5) Although a "proper" decision must mean a properly and fully informed decision, there is no absolute rule that a failure to take potentially helpful legal (or other professional) advice would cause the court to refuse to "bless" the decision. If the possibility of doing so had been genuinely investigated and it had been found impossible or impractical, e.g. through lack of available funds or funding, the Court could accept that the decision was the best which could be taken in the material circumstances, including lack of such advice.

(6) If the court does not give its "blessing", this does not mean that the particular decision cannot be implemented by the liquidator if he chooses to do so. It merely means that the liquidator would have to defend such decision, if it came to it, without the benefit of the court's endorsement that he had been found to have acted properly in the situation disclosed to the court at the relevant time.

(7) To obtain the "insurance policy" of the court's blessing, the liquidator must, of course, fully explain the situation, the facts and matters which have been considered, and his reasoning process in arriving at the decision which he asks the court to bless. This material will all need to be put into evidence to the court. Since the applicant is taking advantage of the court's powers he must act in good faith and is required to make full and complete disclosure to the court of any matters which might be germane to the decision taken, even if these might apparently be adverse. The court would need to know, and is entitled to know, why the applicant still regards the relevant decision as being the appropriate way forward, despite any such factors.

(8) Three particular points may need consideration, therefore, arising from the above requirement, especially where the issue relates to a commercial transaction:-

i. If a liquidator enters into a contractual obligation to endeavour to obtain the court's approval to a proposed transaction (as in the present case), the liquidator should be careful to ensure that this is worded so as not to impede his obligation and ability to make full disclosure to the court, rather than place himself in any difficulty as future circumstances may emerge;

ii. Similarly, the liquidator should take care to ensure that any contractual obligations such as "exclusivity of dealing" clauses are framed so as not to fetter his possible obligation to consider and act on all possible information, or indeed opportunity, which may come to him, and which he may therefore be required, as a matter of duty to the court, to put before the court when asking the court to bless his actual decision.

iii. If relevant material comes to the liquidator's knowledge only on a confidential basis, then the liquidator must at least reveal this fact to the court, and that such material has had an effect on his decision. The court will then have to consider whether it can, in those circumstances, "bless" the decision without knowledge of the content of the confidential material, or not. If not, then the difficulty may be capable of resolution by the party to whom the confidence is owed agreeing to its disclosure to the court alone, or by certain parts of the hearing or argument being conducted in private or with particular parties asked to withdraw.

Conclusion

While 'blessing' applications made by trustees (known colloquially as Public Trustee & Cooper applications) are well trodden territory in Guernsey and further afield, LB Marshall's judgment in CanArgo, and in particular her commentary on the general principles relating to analogous applications made pursuant to section 426 of the Companies Law in an insolvency context, should prove to be helpful guidance for both lawyers and insolvency practitioners when contemplating engaging the Court's jurisdiction in this way.

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