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Industry Information

Guidance from the Grand Court of the Cayman Islands: The Role of Liquidation Committees in the Sanction of Liquidators' Costs and Expenses

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Following a recent hearing, the Grand Court of the Cayman Islands (the "**Grand Court**") has handed down a notable judgment (the "**Judgment**") approving the remuneration of the Principal Liquidators of Herald Fund SPC (In Official Liquidation) ("**Herald**")¹ incurred during a six-month period, the entire amount of which had been opposed by Herald's Liquidation Committee.

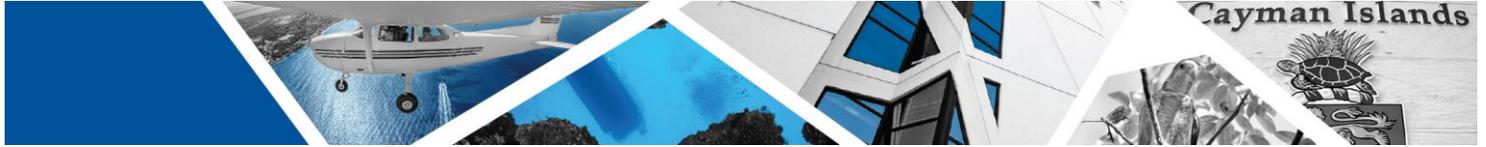
Although remuneration applications made by Cayman Islands insolvency office holders are a statutory requirement and therefore commonplace in the Grand Court, written decisions on them are handed down infrequently, and the Judgment provides useful guidance on "...the broader question of the extent to which Official Liquidators are required to seek the approval or tacit support of the Liquidation Committee when defining the scope of their operational functions and, consequently, incurring liquidation costs and expenses." Kawaley J's Judgment sets out an instructive exposition of the principles underpinning contested remuneration applications, and will therefore be of interest to insolvency practitioners and their advisors.

Kawaley J has reaffirmed and clarified a number of important points with regards to the role of a liquidation committee in the context of approving liquidators' fees and expenses including, amongst other things, that a liquidation committee has:

- no statutory power of sanction including the power to sanction the costs and expenses incurred by liquidators (unlike the position under Bermuda law);
- no express statutory role in sanctioning the exercise of liquidators' powers in the ordinary course of a liquidation - but does have standing to challenge the proposed exercise of liquidators' powers; and
- a statutory function to assess the reasonableness of liquidators' fees and expenses including the reasonableness of the proposed exercise of liquidators' powers such that their statutory role is limited to the "... high-level approval of work-streams coupled with practical commercial assessment of regular budgets and fee reports...";

Where a liquidation committee does not support or opposes operational level strategic decisions of liquidators, an application to the Grand Court for prospective sanction should be considered. In circumstances where a liquidation committee subsequently opposes the costs and expenses incurred by the liquidators, it will be justified in seeking to ensure that the liquidators deploy commercial judgement and not to act regardless of

¹ Walkers are acting for the Principal Liquidators of Herald Fund SPC (In Official Liquidation).



expense. However, importantly, the opinion of a liquidation committee as to the reasonableness or otherwise of costs incurred will not trump that of the liquidators where the liquidators have properly explained their work and cogently responded to any objections raised.

Kawaley J's comments on the assessment of the reasonableness of costs and expenses incurred by liquidators in prosecuting ongoing litigation on behalf of the liquidation estate, will also be of wider interest. The Learned Judge observed that whilst on the one hand, a liquidation committee will naturally want to tighten budgetary controls, on the other hand, caution must be exercised not to harm the company's prospects in litigation by doing so. Kawaley J noted that the *"...micro-management of complex high-value commercial litigation [by a liquidation committee] is only likely to undermine the efficacy of recovery actions against sophisticated defendants who can be expected to spare no expense in defending such claims."* The ultimate value of certain steps taken by liquidators in litigation, and associated costs, may be impossible to contemporaneously assess, and Kawaley J was of the view that *"...Official Liquidators and their lawyers cannot be second guessed on every minor operational judgment which they make..."*

In considering whether or not to grant the relief sought by the Principal Liquidators, Kawaley J found it helpful to have regard to the level of the Principal Liquidators' fees and expenses incurred as a proportion of the total recoveries made in the liquidation to date (approximately 7%), which he held to be *"...a powerful indicator that the Principal Liquidators have established a strong record of producing returns for the investors in a cost-efficient manner..."*.

It is evident that there is a balance to be struck by liquidators in taking into account the opinion of a liquidation committee, whilst exercising their own commercial judgment; and as the Judgment makes clear, this should ideally take place according to *"...a spirit of trust and confidence between the key human actors..."*. However, in circumstances where liquidators must often make a choice to prefer their own professional commercial judgment (including appropriate legal advice) and can demonstrate good reasons for doing so, they will welcome the reasoned judicial support for that position provided by the Judgment.

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