

# International Corporate Rescue



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## Acts of Perversity: When a Liquidator's Decision May Be Overturned in the British Virgin Islands

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### Synopsis

The appointment of a liquidator is a significant occurrence in the life of a BVI company. Aside from the obvious implication that the life of the company will ultimately be brought to an end, a significant power shift occurs in the management of the company.

Once appointed, the liquidator assumes control and custody of the assets of the company. The directors, though they remain in office, are divested of their powers and have no powers, functions or duties other than those expressly preserved by the BVI Insolvency Act, 2003 (the 'Act'). Creditors of the company assume primacy in place of the members and members are prohibited from exercising any of the powers granted to them under the company's memorandum and articles of association.

In contrast to the limitations imposed on the directors and members of the company, the liquidator is granted very broad powers under schedule 2 of the Act in order to allow him to fulfil the duties imposed upon him by the Act to take possession, protect and realise the company's assets, to discharge the company's liabilities and to return any surplus to members.

As would be expected, such a situation is ripe for creating dissatisfaction. In the exercise of his powers a liquidator may find himself at odds with directors, creditors, members and other stakeholders interested in or connected to the company. From time to time, such dissatisfaction reaches a sufficient pitch to cause such aggrieved persons to invoke the assistance of the Court.

A liquidator in the BVI must be the holder of an Insolvency Practitioner's licence. He is invested by statute with wide powers and duties and is credited with broad discretion to perform his functions. That being so, the case law shows that the Courts are loath to interfere with a liquidator's exercise of his powers or to act as a review panel in relation to his acts or omissions and, fraud or misconduct aside, will do so only in exceptional circumstances.

### Legal framework for challenge

Section 273 of the Act provides the statutory basis for the Court's jurisdiction to intervene in the exercise by a liquidator of his powers:

'A person aggrieved by an act, omission or decision of an officer holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the officer holder.'

The Court also has an inherent jurisdiction to control the conduct of liquidators as officers of the Court.

The precise interplay between the scope of the Court's inherent jurisdiction and its statutory jurisdiction is not clearly defined. However, a recent decision of the Eastern Caribbean Court of Appeal (on appeal from the Territory of the Virgin Islands) demonstrates that there is little room for the exercise of the inherent jurisdiction where the statutory regime expressly deals with the matter. In *Chu Kong v David Yen Ching Wai, Chan Pui Sze, Roy Bailey and John Greenwood as Joint Liquidators of Ocean Sino Limited (In liquidation), Lau Wing Yan* BVIHCMAP2018/0019 ('Ocean Sino') the Eastern Caribbean Court of Appeal considered the circumstances in which the Court will exercise its inherent jurisdiction to supervise its officers where an express statutory regime exists to deal with a particular matter. The Court agreed with the proposition that the inherent jurisdiction is inapplicable where it is inconsistent with a parallel statutory regime, on the basis that it is wrong to use the inherent jurisdiction as a means of adopting a different approach to arrive at a different outcome from that which would result from an application of the statute.

### A 'person aggrieved'

The Eastern Caribbean Supreme Court, Virgin Islands (the 'BVI Court') will only exercise its powers, whether under section 273 of the Act or under its inherent jurisdiction, if the applicant has a sufficient interest in the liquidation to afford him *locus standi* to make the application.

The Act confers standing on a ‘person aggrieved’, a term which, at first glance, appears wide enough to encompass any person who is dissatisfied with a liquidator’s act or omission. However, decisions of the BVI Court have considerably narrowed and clarified the understanding of the term ‘person aggrieved’.

Firstly, an applicant under section 273 must be a proper person to make the application. This does not simply mean that he has an interest in the application or may be affected by its outcome; rather, it means he has a legitimate interest in the relief being sought so that he qualifies as a ‘person aggrieved’.

It has been established, therefore, that a ‘person aggrieved’ must be a contributory, creditor or a third narrow class of persons directly affected by the exercise of power specifically given to liquidators, who would not otherwise have any right to challenge the exercise of that power. An ‘outsider’ to the liquidation or a ‘meddlesome busybody’ will not be permitted to attack the decisions of the liquidator. So, in *John Greenwood et al. v FuturesOne Diversified Fund SPCLtd et al.* BVIHCM (COM) 2012/0113, 0116, 0114 and 0115 (‘FuturesOne’), Bannister J sitting in the BVI Commercial Court, held that Brick Kane of Robb Evans and Associates LLC, appointed as equity receiver by the United States District Court, had no standing to bring an application under section 273 of the Act as the liquidators’ appointments had not prejudiced the receiver and had no effect on the property of the funds or its beneficial owners. Though the liquidators’ appointments ensured that the funds had management, which could assert claims to any property which rightfully belonged to the funds and could challenge attacks by the receiver on such property, that did not make the receiver a person aggrieved in the sense in which the term is used in section 273.

Similarly, in *Kevin Gerald Stanford v Stephen John Akers and Mark McDonald* BVIHCMAP 2017/0019 (‘Stanford’) the Eastern Caribbean Court of Appeal (BVI) held that, as the applicant was a mere shareholder of a shareholder of the insolvent company he did not have a legitimate interest in the relief sought and therefore had no standing to bring an application under section 273. The Court held that, as a general proposition, a court that is asked to exercise a statutory power, or its inherent jurisdiction, will act only on the application of a party with a sufficient interest to make it. An applicant seeking to challenge the exercise by a liquidator of his power must therefore show that he is a proper person to make the application and that he has a legitimate interest in the relief sought since an outsider to a liquidation cannot attack decisions of a liquidator.

However, the mere fact that a person has ‘technical capacity’ (as a creditor or shareholder/contributory) on its own is not sufficient if the circumstances demonstrate that the relief is sought not in that capacity but some other. In *UBS AG New York et al. v Kenneth Krysz et al.* BVIHCMAP 2016/0027 former shareholders of Fairfield Sentry Limited (in liquidation) brought an

action, *inter alia*, under section 273 of the Act seeking to move the BVI Court to restrain the liquidators from bringing proceedings against them (and others) in courts in the United States of America. It was argued on behalf of the applicants, *inter alia*, that they were ‘alleged debtors’ and therefore had standing to bring the application. However, it was held that the appellants were not invoking section 273 in their capacity as creditors but, in essence, as defendants in the US proceedings. In such a capacity they were strangers to the liquidation and had no legitimate interest in the relief sought.

Likewise, in *Gold & Appel Transfer SA Iceberg Transport SA et al. v Meade Malone (In his capacity as Liquidator of Gold & Appel Transfer SA)* BVIHCV 2004/0130 (delivered 23 March 2006, unreported) the liquidator was pursuing avoidance actions in the United States of America and the defendants applied under section 273 of the Act to stop those proceedings. Although one of the defendants was a creditor and another a member, it was held that they were not seeking the section 273 remedy in those capacities and were thus held to be ‘outsiders to the liquidation’. Accordingly, Hariprashad Charles J found that they had no standing to make an application under section 273.

## Acts complained of

Section 273 specifically deals with the BVI Court confirming, reversing or modifying specific acts, omissions or decisions of the liquidator. Accordingly, to found a claim under that section, an aggrieved person must identify and act or decision which the Liquidator has taken or an omission of which he has been guilty. There is no relief available under section 273 for an applicant who is simply aggrieved by the liquidator’s existence. In *FuturesOne* the BVI Court noted that the applicant was unable to point to any act, or omission of the liquidators by which he was aggrieved. The complaint was in relation to the liquidators’ appointment itself, which the applicant complained was wrong. The BVI Court found that the liquidators had been validly appointed. However, in any event, such a complaint was not in the purview of section 273.

In *Ocean Sino* the Court held that a stakeholder who believes that liquidators are deliberately stalling or refusing to decide on a proposal put to them for the efficient liquidation of a company might write to the liquidators seeking a reasonable timeframe by which to expect a response and warning that a failure to respond would be met by recourse to the Court. If the liquidators reject the proposal, the stakeholder may move the court under section 273 to reverse that decision. If, after the expiration of a reasonable period, the liquidators have failed to respond, this could be considered an omission for the purposes of section 273.

However, the Court cannot intervene on the basis of section 273 to direct some future action of the

liquidator nor does the inherent jurisdiction assist in such a case. In *Ocean Sino* the complaint made was that the Liquidators had failed to implement a proposal put forward by the applicant and the Court was invited to direct them accordingly. The Court found that any residuary or complementary jurisdiction that it has to control the conduct of the liquidators, outside the scope of the Act, cannot be invoked to control the future, unknown conduct of the Liquidators.

Accordingly, where there had been no complaint about any specific act, omission or decision of a liquidator, any interference by the Court may be deemed an unwarranted interference with the powers granted to liquidators under the Act.

### Acts of perversity

The legal test for whether 'an act, omission or decision of an office holder' should be set aside under section 273, is commonly referred to as the 'perversity test'.

As explained by the Court of Appeal in *Stanford*, aside from bad faith or fraud, a court will only interfere with the actions of a liquidator if he has done something so perverse and manifestly absurd that no reasonable person would have done it.

The threshold is deliberately a high one. In *Stanford* it was stressed that it is not open to the BVI Court to seek to substitute its opinion for that of the liquidator or to question whether the liquidator has chosen the best approach. The position, as explained in *ABN AMRO*

*Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited) and Others v Kenneth Kryss et al.*, BVIHCMAP 11-16, 23-28 of 2016 is that the Court's role is to prevent a liquidator from taking steps that are so manifestly absurd or perverse that they fall completely outside the permissible range of options. The BVI Court must therefore ascertain whether the decision in question is so absurd that no reasonable liquidator could have arrived at it. It is only then that the BVI Court will intervene.

### Conclusion

The bar to a successful challenge to a liquidator's decision has been set deliberately high and the task of overturning the decision of a liquidator is a challenging one. It is not the scheme of the insolvency regime in the BVI to provide a ready channel for that conflict by facilitating Court challenges to a liquidator's decision other than in an exceptional case. So, not only must a person wishing to challenge the decision of a liquidator satisfy the Court that he has a sufficient interest in the liquidation to qualify him to make such a challenge, he must be able to point to a specific act or omission of the liquidator and to demonstrate that it is so manifestly absurd or perverse that no reasonable liquidator could have acted in that manner. The cases in which a challenge succeeds on that basis will necessarily be, and the cases show that they are, rare.

## **International Corporate Rescue**

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