

Royal Court appoints Additional Liquidators for first time to resolve conflict

The Royal Court has for the first time considered the jurisdiction to appoint Additional Liquidators, in circumstances where the existing liquidators are not realistically able (because of a conflict or otherwise) to investigate a claim against a proposed defendant

The Factual Scenario

Kidd and ors v All Services Group Holdings Limited and ors [2019] JRC 221 concerned a Jersey company (“ASGHL”) which had been placed into a creditors’ winding up at the instigation of a lender (the “Lender”). The Lender had lent US\$40m to ASGHL secured on its only asset, the shares in its subsidiary (“RSS”). The Lender enforced against the shares in RSS, and then appropriated them, valuing RSS at around US\$25m (the “Valuation”). The shareholders of ASGHL did not receive contemporaneous notice of the Valuation. The Lender effected the liquidation of ASGHL and asserted in the liquidation that it was still owed some US\$15m.

The Liquidators brought proceedings against the shareholders to claw back certain dividends they alleged had been invalidly made. The shareholders defended that action, but also asserted, having been informed of the Valuation, that it was a drastic undervalue and that the fair market value of RSS had been greater than the US\$40m outstanding at that time (the “Undervalue Claim”). The Undervalue Claim, if meritorious, lay against the Lender at the instance of ASGHL, and had the potential to render the liquidation solvent; however, the Liquidators’ view was that it had no merit. The shareholders’ case was that the Liquidators were not in a position to approach that question independently, because of their relationship with the Lender. Accordingly, the shareholders applied for additional liquidators to be appointed to investigate, and if appropriate bring, the Undervalue Claim against the Lender.

The Application

At an early stage the Royal Court stayed the dividend proceedings pending resolution of the application. The Royal Court took a practical approach to the application, concluding that the key issues were:

BRIEFING NOTE

1. Whether there was a realistic prospect of the Undervalue Claim generating a surplus over the sums due to the Lender (because if not, the liquidation would not be balance sheet solvent and the shareholders would not have a legitimate interest in the relief sought); and
2. If there was such a realistic prospect, who should investigate and, if appropriate, bring, the Undervalue Claim?

The Decision

The Royal Court, on consideration of the evidence and particularly the expert valuation evidence, took the view that:

1. There was a realistic prospect of a surplus value being achieved, such that the liquidation would in fact be solvent. Where a liquidation is arguably balance sheet solvent, shareholders have a legitimate interest in who should be the liquidator.
2. The existing Liquidators were not the appropriate persons to investigate the Undervalue Claim, because they were being funded by the Lender, and had set their face against the Undervalue Claim.
3. However, it would not be appropriate for liquidators nominated by the shareholders to be appointed over the entire of ASGHL – and in particular the dividend proceedings – because if the Undervalue Claim did not produce a surplus, the shareholders had no *legitimate* interest in relation to the dividend proceedings (which were against them).
4. The appropriate order, taking as a guide the English authority *In the matter of Angel Group Limited* [2015] EWHC 3624, was therefore to appoint the shareholders' nominated liquidators as additional liquidators, with charge of the Undervalue Claim only.

This solution required careful orders to be made in relation to the administration of the liquidation going forward. The result underlines the importance for liquidators of maintaining their independence at all times; and also confirms the Royal Court's commitment to embracing flexible and unusual solutions where they are necessary to do justice.

Dickinson Gleeson acted for the successful shareholders in this application.



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