Democracy or dictatorship: The relevance of majority creditor views in liquidators' decision making

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This article considers a judgment of the Royal Court of Guernsey in respect of a contested application by liquidators for a direction to bless their decision to enter into an agreement to sell assets of the company. The application was heavily contested by the majority creditor who asserted that it was not in the Company's interest to sell the assets under the terms of the proposed agreement. The Court held that whilst liquidators should take into consideration the wishes of the majority creditor they were not necessarily determinative, particular if there was an ulterior motive. Further, when considering the interests of a company liquidators are entitled to take their own position into account as creditors of the company with a priority interest.

It is, one would think, a fairly uncontroversial statement of a liquidator's duties that they should act in the best interests of creditors as a whole, exercising their own commercial judgement. But what happens when the liquidator's commercial judgement and the creditors' express wishes point in different directions? Is the 'weight' of creditor opposition relevant?

This was the issue (amongst several others) that confronted the Royal Court of Guernsey in its recent decision *In Re Canargo Limited (in liquidation)* [2020]GRC064. In untangling this issue, Lieutenant Bailiff Marshall QC considered a range of English authority in ultimately granting the directions sought by the liquidators over the objection of the major creditors.

Whilst the question has been considered in a handful of English authorities, this appears to have been the first reported case in which a Court has sided with the liquidators over the objections of the majority creditors.

Background

CanArgo Limited (**Company**) held joint venture interests in respect of oil and gas exploration and exploitation in Georgia, pursuant to Joint Venture Operating Agreements (**JVOAs**). It's JV counterparty was MND.

As part of a 2015 buyout, the Company granted 'trailing royalty rights', which were entrenched by obligations to preserve these rights in any subsequent disposal of the shares of JV interests.

The Company was placed into liquidation in 2018. Ben Rhodes and Alan Roberts of Grant Thornton were appointed liquidators (**Liquidators**). It had no cash and its only assets were its JV interests in the Subsidiaries. At the time of the liquidation, the royalty rights were held by Achernar Partners Group AG who had submitted a claim in the liquidation of the Company in the sum of $100million. Achernar Assets AG (together with Achernar Partners Group AG **Achernar**) had submitted a claim in the liquidation of $2.5million pursuant to an agreement. These claim amount to between 70% to 99% by value of the Company's debt.

Following a competitive and highly contentious bidding process in which MND (the JV partner) and Achernar (the major creditor) were the competing parties, the Liquidators sought a blessing of their decision to sell the JV interests to MND.

Achernar opposed the directions application and the sale to MND.

Arguments

Amongst a number of issues raised by Achernar, it was argued that the Liquidators should act in accordance with the express wishes of the major creditor (i.e. Achernar themselves), and disregard their own commercial view.

Achernar asserted that, as they constituted the vast majority creditor of the Company on any basis, they were the party who were most interested in the outcome of the liquidation. In effect, as majority creditor their interests were the interests of the Company and they were in the best position to know what was in their own best interests.

At the very least, it was argued, the Joint Liquidators should have given 'appropriate weight' to such a majority creditor's views and they had not done so.

The Liquidators' submitted that they are charged with winding up the Company. As such they have a duty to realise the assets of the Company. In this case, they had done so through a competitive bidding process generating a number of bids, and following which they had brought their professional, commercial judgement to bear upon whether and on what terms to make a sale.

They had given what they regarded as due weight to Achernar's views, as could be seen in the history of the bidding process and the consideration given to Achernar's offers.

The Liquidators argued that their role was to act in the best interests of the creditors of the Company as a whole. Whilst they should give weight to the views of all creditors, a majority creditor's views should not be binding on them. Particularly where there was a divergence between the subjective views of the majority creditor and the results of the Liquidator's commercial views, the liquidators should be particularly concerned to ensure that the decision taken was in the objective interests of creditor as a whole.

Decision

Marshall LB looked for guidance from several English authorities on the issues; in particular *Re Longmeade Ltd* [2016] EWHC 356. In that case, at [66] Snowden J set out a number of principles:

"*…(ii) the liquidators may, but are not obliged to, consult the creditors… who have an interest in the estate;*

(iii) in taking that decision, the liquidators should act in what they believe to be the best interests of the insolvent company and all those who have an interest in its estate;

(iv) the liquidators should normally give weight to the reasoned views of the majority of such creditors … provided that they are uninfluenced by extraneous considerations;

(v) if all those who are interested in the insolvent estate are fully informed and are unanimously of the same view, the liquidators should ordinarily give effect to their wishes…"

In terms of 'extraneous considerations' (as referred to in principle (iv)), Snowden J expanded at [51]:

"*If creditors are not promoting a view based on their capacity as such, but are doing so as the result of extraneous factors which are not shared by or are even contrary to the interests of the remainder of the class, then, such views should be discounted or not given effect.*"

In applying those principles and determining to bless the Liquidators' decision and give the directions sought, Marshall LB found [133 – 135]:

"133…I am satisfied that the Joint Liquidators cannot 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 cannot be characterised as perverse.

134. *I would endorse the view that Achernar's views do not appear to be those of a totally disinterested creditor. Advocate Williams in fact argued that their views should be accorded particular respect because of their greater knowledge, acquired through their previous involvement with the projects. This, however, is a double-edged argument, as it does raise the question whether that previous involvement suggests that factors outside the mere recovery of a debt may be at work. Indeed, Achernar's whole conduct in respect of this Application, in taking every available point, technical or otherwise, to seek to have it dismissed, at every juncture, has been so remarkable as to suggest a wider interest in its outcome than simply improving their perceived prospects of maximising recovery of their claimed debt.*
135. *In the end the additional final factor that the Joint Liquidators' decision defies the wishes of an apparent majority creditor, even of the magnitude of Achernar's claim, does not cause me to doubt that the Joint Liquidators have given due consideration to all material facts, including that one…"*

As an aside, LB Marshall QC also considered that the Liquidators in making their decision as to the best way to progress the liquidation were not obliged to ignore entirely their own interests in the liquidation. She confirmed that:

"*It seems to me that the Joint Liquidators are not, in making their decision as to the way they think it best to progress the liquidation, obliged to ignore entirely their own interests in this. As Liquidators, they in fact do have their own interest in the estate of the Company, in that their proper fees and expenses are recoverable from it, and even in priority, in the liquidation itself."*

Analysis

Re Canargo provides useful guidance and support for liquidators who find their judgment as to the merits of any particular step is contrary to the view of the majority of creditors.

What makes the judgement of particular utility is both the overwhelming 'majority' enjoyed by Achernar and the fact that, in the particular circumstances of this decision, the Court was willing to support the Liquidators' decision to act otherwise than in the majority creditors' expressed wishes. In the handful of other authorities considering the point[1], the Courts have found in favour of the majority creditors.

Quite clearly, a liquidator is not obliged to follow a majority view against their own better judgement, even if that majority is as high as 99% of the class (or indeed unanimous).

However, the judgement also should serve as a reminder to liquidators that major creditor views should not be dismissed out of hand. Liquidators can and should consult with creditors in respect of major decisions in the liquidation and give proper weight to their views as to what is in their own best interests. Whilst liquidations are not 'first past the post' democracy, neither are they are dictatorship.

[1] *See for example: McDermott and Potts as liquidators of Lonnex Pty Ltd (In Liquidation) [2019] VSCA 23; and Re Pacific Harbor Asia Fund I, Ltd (in Official Liquidation), Grand Court of the Cayman Islands, Cause No. FSD 139 of 2017*

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