



Loeb Smith

Insolvency in the Cayman Islands – setting aside antecedent transactions

In certain circumstances the official liquidator of a Cayman company may be able to take action to recover assets which have been transferred in the run up to the company's insolvency. It is important for those concerned with the affairs of a Cayman company in the twilight of insolvency to be aware of the statutory powers available to the official liquidator and the Grand Court in the Cayman Islands.

Voidable preferences

Section 145(1) of the Companies Law (2013 Revision) (the “**Law**”) provides that every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 with a view to giving such creditor a preference over other creditors shall be invalid if made, incurred, taken or suffered within six (6) months immediately preceding the commencement of a liquidation.

Section 93 provides that a company shall be deemed to be unable to pay its debts if:

- (a) it fails to comply with a statutory demand;
- (b) the company fails to satisfy a judgment debt; or
- (c) it is proven to the satisfaction of the Court that the company is unable to pay its debts.

Pursuant to section 100 of the Law, the compulsory winding up of a company is deemed to commence at the time of the presentation of the petition for the winding up or, in the case of a voluntary liquidation, at the time of the resolution or expiry of the relevant period or occurrence of an event provided by the company's Articles of Association upon which the company is to be wound up.

It is important to note that a payment to a related party of a company shall be deemed to have been made with a view to giving a creditor a preference if made within the preceding period of six (6) months. Section 145(3) provides that a creditor shall be treated as a “related party” if it has the ability to control the company or



Loeb Smith

exercises significant influence over the company in making financial and operating decisions.

Dispositions at an undervalue

Section 146(2) of the Law provides that every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator. The official liquidator bears the burden of establishing an intent to defraud and no action may be brought under this section after six years following the date of the relevant disposition. A number of important definitions are set out in section 146(1):

- (a) "disposition" has the meaning ascribed in Part VI of the Trusts Law (2011 Revision);
- (b) "intent to defraud" means an intention to willfully defeat an obligation owed to a creditor;
- (c) "obligation" means an obligation or liability (which includes a contingent liability) which existed on or prior to the date of the relevant disposition;
- (d) "transferee" means the person to whom a relevant disposition is made and shall include any successor in title; and
- (e) "undervalue" in relation to a disposition of a company's property means:
 - (i) the provision of no consideration for the disposition; or
 - (ii) a consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition.

However, the rights of the transferee are subject to some protection. Pursuant to section 145(5) of the Law in the event that any disposition is set aside under this section and the Court is subsequently satisfied that the



Loeb Smith

transferee has not acted in bad faith:

- (a) the transferee shall have a first and paramount charge over the property which is the subject of the disposition, of an amount equal to the entire costs properly incurred by the transferee in the defence of the action or proceedings; and
- (b) the relevant disposition shall be set aside subject to the proper fees, costs, pre-existing rights, claims and interests of the transferee (and of any predecessor transferee who has not acted in bad faith).

Fraudulent Trading

Pursuant to section 147, if in the course of a winding up of a Cayman company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the liquidator may apply to the Court for a declaration that any persons who were knowingly parties to the carrying on of the business in such a manner are liable to make such contributions, if any, to the company's assets as the Court thinks proper.

The Commercial Disputes and Litigation Team at Loeb Smith has a wealth of experience of advising on the setting aside of antecedent transactions and would be happy to assist with any queries you may have. For more specific advice on setting aside of antecedent transactions in the Cayman Islands, please contact:

David Harby

Head of Commercial Disputes and Litigation

+1 (345) 749 7494

david.harby@loebsmith.com