

## Article

### Mistakes were made... What is a liquidator to do?

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**A fundamental principle of insolvency law in the Cayman Islands is that upon the commencement of a liquidation of a company, a line is drawn in the sand and the assets of an insolvent company should be distributed on a *pari passu* basis (e.g. each unsecured creditor should share equally in the available assets of the company). While subject to some exceptions (like any good fundamental principle of law), the concept that all unsecured creditors should be on “equal footing” is the basis for a wide array of insolvency legislation and case law. From voidable preference legislation to laws permitting the avoidance of undervalue dispositions, from the extensive investigative powers bestowed upon Court-appointed liquidators to the particularised proof of debt process, great care has been taken to ensure that the *pari passu* principle is respected to the extent possible.**

Section 110(1) of the Cayman Islands Companies Act (“Act”) confirms that it is the function of an official liquidator “to collect, realise and distribute the assets of the company to its creditors...”.

Given the importance of the *pari passu* principle, it is always worth noting when a liquidator, with the Court’s approval, departs from this norm.

Chief Justice Smellie’s recent Ruling in *In the matter of Premier Assurance Group SPC Ltd. (In Official Liquidation)* (unreported, 7 April 2022) is one such departure, in an interesting case involving the receipt of mistaken payments after the commencement of a winding up.

#### Mistakes were made

The joint official liquidators of Premier Assurance Group SPC Ltd (the “Company”) found themselves in a slightly odd situation, where it appeared that a large volume of payments had been paid to one of the Company’s segregated portfolios (the “SP”) after the commencement of the liquidation of the Company (in this case, the commencement of the liquidation being the date the winding up petition was presented).

The Company was registered as an exempted segregated portfolio company in the Cayman Islands and was previously issued with an unrestricted Class ‘B’ License. The SP had offered unit-linked life insurance products globally (with the exception of the United States and Cayman Islands). Since the commencement of the liquidation of the Company, the SP had received around 6,000 premium payments which totalled in the region of US\$5 million (the “Mistaken Payments”).

The Court found that the Mistaken Payments were paid following the presentation of the winding up petition in respect of the Company and after the Company’s operations had effectively been suspended given that no benefits were being paid to the participants who held policies with the Company referable to the SP. In the circumstances, no benefit would have accrued to a payer in respect of a Mistaken Payment and the Company would have been fixed with this knowledge at the time of receipt.

#### What is a liquidator to do?

As above, the general position is that any asset of an insolvent company should be distributed by an official liquidator on a *pari passu* basis. In this case, application of that principle might have led to the result that the individuals who had mistakenly paid funds might only receive a fraction of their funds back, while other creditors (who had not made such payments) might benefit from the payers’ mistake.

The JOLs considered that this would be an unjust result and applied to Court for sanction under section 110(2) of the Companies Act to return the Mistaken Payments to the payers as monies held on trust. The JOLs’ application was not opposed (and it did not, therefore,

receive the benefit of full adversarial argument), but the Chief Justice agreed that it was self-evident that the decision of the JOLs to return the Mistaken Payments to the payers was entirely proper and one which should receive the approval of the Court.

The Court found that a constructive trust had been imposed in respect of the premium payments received by the Company after the presentation of the winding up petition in favour of each of the respective payers. Applying the decision of *In the matter of Caledonian Bank Limited (in Official Liquidation)* [2015 (2) CILR 8] (which involved mistaken payments by depositors to an insolvent bank), the Chief Justice found that it was or must have been obvious to the Company that premium payments made after the presentation of the winding up petition were by fundamental mistake, in that it is inconceivable that a participant would have made it, if he or she had been aware that a winding up petition had been presented against the company. In those circumstances it would be unconscionable for the Company to retain the monies as assets of its own, against the claims of the payers.

Although not cited in the Chief Justice's judgment, the decision is consistent with English case law regarding the special status of Court-appointed liquidators. A joint official liquidator is an officer of the court by virtue of his or her appointment and is subject to a special duty to deal fairly, and in an exemplary manner, in all respects of the performance of his or her functions.

## Conclusion

Once upon a time, there may have been more opportunity to catch a mistaken payment before it was made to a company against whom a winding up petition was pending.

As reliance on internet banking increases, with large sums being transferred at the click of a button (and with many payments being made automatically without any click of a button), it would seem that the number of mistaken payments is destined to increase.

The judgment provides helpful guidance in relation to mistaken payments generally, and in relation to the powers and duties of official liquidators when payments are made, or received, by mistake, after the commencement of a Company's liquidation.

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