

Challenging a BVI liquidator's act, omission or decision

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This article considers how to challenge an act, omission or decision of an office-holder.

The right to bring a challenge derives from Section 273 of the BVI Insolvency Act 2003, which provides:

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

An office-holder means a company's administrator¹, liquidator, provisional liquidator or administrative receiver.

The section is all encompassing, and covers any "act, omission or decision" of an office-holder, with the result that a Court can hear a wide range of challenges. These could be, for example, challenging the sale of assets; the commencement of legal proceedings; the failure to bring legal proceedings; the rejection of an alleged creditor's claim or the admission of a creditor's claim².

The BVI Commercial Court regularly hears cases from parties seeking to persuade the Court to reverse or modify an act of an office-holder and from a number of recent decision, some important limitations can be drawn as to who, exactly, may bring a Section 273 application and what legal tests will be applied on the hearing of the application.

Standing: who can bring a Section 273 Application?

In order to have standing to bring a Section 273 application, the applicant must be a **person aggrieved** by the act, omission or decision of the office-holder to have standing to bring the application.

In *Stanford v Akers & McDonald (as Joint Liquidators of Chesterfield United Inc)*³ the Court of Appeal gave a useful summary of who is a person aggrieved, in finding that:

"We are of the view that section 273 of the Insolvency Act, 2003 requires the "person aggrieved" to be a contributory, a creditor, or a third narrow class of persons directly affected by the exercise of a power specifically given to liquidators, who would not otherwise have any right to challenge the exercise of that power. In this regard we are guided by the well-known principles in Deloitte & Touche AG v Christopher D. Johnson et al. We are in total agreement with the learned judge that all other persons are considered outsiders to the liquidation, who are not capable of being "aggrieved persons" and thus cannot apply under section 273 of the Insolvency Act, 2003." (emphasis added)

¹ although, as at the date of this Article - Part III of the BVI Insolvency Act, 2003, which deals with administrations, has not been brought into force.

² Section 210 of the BVI Insolvency Act, 2003 also gives creditors an avenue to apply to expunge or amend an admitted creditor's claim.

³ Appeal BVIHMAP 2017/0019, 12 July 2018

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Whether an *aggrieved person* has standing is not based on their relationship/connection to the insolvency process *per se*, but rather if:

- they can show that they have a legitimate interest in the relief sought. In the ordinary course, the persons likely to be impacted by acts, omissions or decisions of an office-holder are shareholders (in a solvent process) or creditors (in an insolvent process). Those with adverse interests (such as defendants to proceedings brought by the office-holder) will normally not have a legitimate interest; and
- they would not otherwise have any right to challenge the exercise of the office-holder's power.

The remoter the connection, the less likely a party is to have a legitimate interest in the insolvency process. Authority on the question of who fits into the *third narrow class of persons* includes the case of *Re Hans Place Ltd*⁴ where the English Court found that a landlord could challenge a liquidator's decision to disclaim a lease under Section 168(5) of the English Insolvency Act 1986⁵ (although, ultimately, the Court did not interfere with the liquidator's decision).

Conversely, the BVI Court found that the following persons **did not** have standing to bring a Section 273 application:

- *Stanford v Akers & McDonald (as Joint Liquidators of Chesterfield United Inc)*⁶: an alleged shareholder of a shareholder had no standing to challenge the liquidators' decision to enter into a global settlement agreement.
- *ABN AMRO Fund Services (Isle of Mann) 24 Nominees Limited (and Ors) v Krys and Caulfield (as Joint Liquidators of Fairfield Sentry Limited) and anr*⁷: defendants (who were also former shareholders) to proceedings brought by the liquidators in the US were strangers to the liquidation and had no legitimate interest in the relief sought. The defendants could also challenge the liquidator's decision within the US Proceedings.
- *Stevanovich v Wide & McDonald (as Joint Liquidators of Barrington Capital Group Limited)*⁸: a former director subject to a claim by the liquidators failed in his challenge to the liquidators' decision to admit the sole creditor's claim, in circumstances where the claim against him was predicated on the creditor's claim being admitted. The Court found that he lacked standing as he was, at best, only indirectly affected by the liquidators' decision to admit the claim and, further, he could challenge the decision to admit the claim in his defence to the proceedings.

Perversity Test or Legal Issue Test?

Once a challenger establishes standing to bring a Section 273 Application, they must then attempt to persuade the Court to confirm, reverse or modify the act, omission or decision of the office holder based on the merits of their case.

The legal hurdles they must overcome depend on the nature of the challenge. On a challenge to an office-holder's commercial decisions, the applicant must satisfy the "*perversity test*", whereas challengers on purely legal issues must satisfy the court that the office-holder's application of the law was wrong.

Perversity Test

The Court will only interfere with a decision of an office-holder if it was taken in bad faith or if it was so perverse as to demonstrate that no office-holder properly advised could have taken it.

The threshold test is therefore a (very) high one. In approaching 273 Applications, the Court accepts that an office-holder must make commercial decisions and in doing so, is often faced with a number of options in which they can take different (reasonable) approaches. The Court will therefore only intervene if the decision is so unreasonable that that no liquidator properly advised could have taken it.

Legal Issues, the exception to the Perversity Test

Where the office-holder's act is based on a purely legal issue, it was noted in the *Stevanovich* case that as a matter of principle the determination of legal issues falls outside of the scope of the perversity test. The Court therefore recognised the distinction to be drawn between a challenge to an office-holder's commercial decision and a challenge to a purely legal decision.

One of the most common challenges BVI liquidators face concerns their decisions to admit or reject creditor claims (proofs of debt) (as in the *Stevanovich* case). It is noteworthy that in England, challenges to liquidator's decision are not made under Section 186(5) of the English Insolvency Act (the equivalent to Section 273 of the Act) but under Rule 14.8 of the English Insolvency Rules 2016 (and its predecessor rules) which provides a period of 21 days to make an application to challenge the decision. When assessing a proof of debt, a liquidator acts in a quasi-judicial capacity and on an application to challenge a decision to, say, reject a proof, the

⁴ [1993] B.C.L.C. 768

⁵ this section is in similar terms to Section 273 of the Act, although the English Act only refers to an "act or decision" and excludes the word "omissions".

⁶ *Ibid*, 3 above

⁷ Appeal BVIHCMAP: 11-16, 23-28 of 2018, 20 November 2017

⁸ BVI CHM 2013/0043, 5 December 2018

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court is bound to decide the rights of the claimant in light of the evidence which is before the court (even where additional evidence that was not before the office-holder has been adduced) and not merely to express a view as to whether the liquidator was right or wrong in rejecting the proof when he rejected it. The court must approach the question *de novo*.

Time Limit?

Whilst Section 273 of the Act has no express time limit, the BVI Court in the context of an application to challenge a rejected claim in *FSC Asian Millennium Ltd⁸* found that, in this respect, the Act is defective and *casus omissus* (omitted from or not provided for by statute and therefore governed by the common law). Applicants should therefore act timeously if they intend to bring a 273 Application.

Conclusion

In order to succeed on a Section 273 Application, a challenger must first establish that they have standing to bring the application by showing that they are a contributory, a creditor, or a third narrow class of persons directly affected by the exercise of a power specifically given to liquidators, who would not otherwise have any right to challenge the exercise of that power **and** that they have a legitimate interest in the relief sought.

Once standing is established, the Court will need to persuade the Court that the office-holder acted perversely in the exercise of their commercial judgment and/or that they are wrong as a matter of law in their act, omission or decision that concerns a purely legal issue.

Carey Olsen acted on behalf of the successful liquidators at first instance and before the Court of Appeal in *Stanford v Akers & McDonald (as Joint Liquidators of Chesterfield United Inc)*.



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