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Ritchie, Lancelot and the limitation game

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The moratorium on legal proceedings, commenced or continued, against a company in liquidation, is a tenet of an equitable and orderly winding up process, intended to distribute a company's assets equally and rateably between its stakeholders.

The moratorium is enshrined in section 97(1) of the Cayman Islands' Companies Act (2023 Revision) (the **Companies Act**) which states as follows:

'When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company except with leave of the Court and subject to such terms as the Court may impose.'

At this point, an unsecured creditor who has already brought proceedings against a company, or is contemplating doing so, will typically have two options:

1. File a proof of debt in the liquidation for the liquidator to adjudicate, or
2. Apply to the Grand Court of the Cayman Islands (the Grand Court) for permission to continue their extant litigation against the company; or, to seek to enforce their claim against the company in liquidation, in ordinary legal proceedings.

The question then arises as to how long the unsecured creditor has to commence the proceedings.

Limitation in the Cayman Islands is governed by the Limitation Act (1996 Revision) (the **Limitation Act**), which sets down various time periods within which claims must be brought unless there are exceptional circumstances. For example, contract and tort claims have limitation periods of six years, respectively. In general terms, if a claim is not brought within the specified period, it is liable to be struck out on the application of the defendant.

Filing a proof of debt

It is well established that the passage of time does not prevent claims which were not barred by the Limitation Act at the date of insolvency from being proved in the insolvency thereafter, even though the limitation period had expired at the time of filing the proof of debt.

This principle derives from the English authority Re General Rolling Stock Ltd (1872) LR 7 Ch App 179 (**Rolling Stock**), which held that there is no mischief in creditors filing proofs of debt late as

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1. upon a winding up a statutory trust arises under which the assets of the company are to be applied in satisfaction of all liabilities existing at the inception of the liquidation, and
2. the creditor risks not benefiting from any dividend that was paid to creditors in the meantime.

Ordinary proceedings

Whether limitation periods continue to run in respect of ordinary proceedings against the company in liquidation has proved (pun intended) to be a much more contentious issue.

The Cayman Islands Court of Appeal (the **CICA**) has recently clarified the position, in Ritchie Capital & Ors v Lancelot Investors Fund (In Official Liquidation) CICA 005 of 2023. On 8 January 2019, Ritchie was given leave pursuant to section 97(1) of the Companies Act to commence proceedings against Lancelot. Lancelot successfully applied to strike out Ritchie's proceedings on the grounds that they were statute barred and that the Grand Court ordering a liquidation process did not justify departing from the Limitation Act. Ritchie appealed the decision to the CICA.

The CICA took a different view and overturned the Grand Court's decision. In doing so, the CICA held that there is no difference between a proof of debt and ordinary proceedings, with both simply being mechanisms to establish liabilities in a liquidation. Consequently, it would be artificial to draw a distinction between them.

As to the tension with the Limitation Act, the CICA held that the policy of the insolvency legislation prevails over the policy of the Limitation Act for three principal reasons:

1. the relevant provisions of the Limitation Act only impose a procedural bar to progressing proceedings; they do not extinguish the underlying cause of action. On the other hand, the liquidation imposes a system of rateable distribution that has a practical effect on the substance of the underlying claim through limiting recovery;
2. the policy of insolvency legislation is already known to prevail over the Limitation Act in relation to proofs of debt, with there being no distinction between a proof of debt and ordinary proceedings in a liquidation context; and
3. insofar as the test for resolution of the conflict is necessity, it is necessary for the proper operation of the statutory trust resulting from the insolvency legislation that liabilities existing at the relevant date should be included in the statutory scheme, irrespective of the mechanism used.

Conclusion

Absent an appeal to the Privy Council and it deciding differently, the position in the Cayman Islands should result in a collective sigh of relief from creditors. As long as the limitation period has not expired at the outset of the liquidation proceedings, a limitation defence will be unavailable irrespective of the mechanism used to establish the liability. However, the practical (and commercial) advantage of establishing that liability in time to benefit from the maximum dividend available remains.

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References

(1) Section 140(1) of the Companies Act.

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