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Re Porton Capital: Applications to set aside company dissolutions obtained by fraud

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The Grand Court of the Cayman Islands' recent judgment in *Re Porton Capital Inc and Porton Capital Limited* provides useful guidance on the Court's jurisdiction to set aside company dissolutions obtained by fraud and the burden and standard of proof that must be discharged on such applications.

Porton Capital, Inc. and Porton Capital Limited (**Companies**) were both voluntarily wound-up and dissolved in 2018. The petitioner applied, some three years after the fact, to have the dissolutions set aside on the basis they were obtained by fraud. The crux of the petitioner's allegation was that the Companies' sole director and beneficial owner made a number fraudulent misrepresentations during the voluntary liquidation process as to the Companies' solvency and ability to pay their debts. Specifically, the petitioner alleged that the former sole director had concealed the existence of contingent claims and liabilities of the Companies. In light of those misrepresentations, the petitioner contended that the dissolutions of the Companies should be set aside as being procured by fraud, the Companies restored to the Register of Companies and official liquidators appointed to investigate the petitioner's claims.

The Court ultimately rejected the application on the basis that the petitioner failed to establish the former director had acted fraudulently. In doing so, it gave the following general guidance on applications to set aside company dissolutions:

1. There is no statutory jurisdiction in the Cayman Islands to set aside a company's dissolution, however the Court has jurisdiction to do so in situations where the dissolution was procured by fraud.
2. The Court should however only exercise that jurisdiction with "great caution"[1]. This is especially so as the Cayman legislature has not enacted a statutory scheme by which dissolutions can be set aside, and there are competing policy considerations in regard to certainty and finality that weigh against such a scheme[2]. Relying on previous Court of Appeal authority[3], the Court concluded that:

   > *...the local legislature of the Cayman Islands is to be taken to have made a deliberate decision not to introduce a statutory power to restore companies deemed to have been dissolved and to have preferred, in the interests of certainty and at the risk of occasional injustice, that dissolutions once concluded should not be disturbed*[4].

3. The burden of proof is on the petitioner/applicant to make good on the allegations of fraud.
4. The standard of proof the applicant is required to meet is the civil standard, balance of probabilities, and in any case the Court requires cogent evidence. The fact that the allegation is one of fraud does not impose a

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> higher standard of proof on an applicant, but the Court does proceed on the assumption that the more serious an allegation is, the less likely it is that it would have occurred[5]. It follows that the more serious the allegations made, the more credible the evidence will need to be to establish that the alleged fraud was more likely to have occurred than not.

The application also raised important questions as to (a) whether an applicant must suffer loss in order to set aside a dissolution and (b) whether an application of this nature can be barred by the applicant's acquiescence once fraud has been established. However, as the application had already failed because of the petitioner's inability to establish fraud, the Court left these questions of standing and acquiescence open for future consideration. The question as to acquiescence will be of particular interest given the Court's observations on the tension between certainty and finality on the one hand, and possible injustice on the other.

To read the Grand Court of the Cayman Islands' judgment click here.

[1] *Re Porton Capital Inc. and Porton Capital Limited* at para 17.

[2] *Ibid* "..."*fraud unravels all" but attention must also be given to the policy principles of certainty and finality*".

[3] *Schram and Hiscox Syndicate 33 v Financial Secretary* 2004-05 CILR 39 (see paragraph 8).

[4] *Re Porton Capital* at para 19.

[5] See *Re B (Children)* [2009] AC 11 at para 70: "*Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies*". See also *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408 at para 117.

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