

Don't stop at the Caribbean!

Companies in offshore jurisdictions are often used in complex structures and are frequently encountered by parties who have commenced litigation or asset tracing exercises in onshore jurisdictions.

Due to the perception that no information is available in offshore jurisdictions or that the cost of obtaining it is prohibitive, parties may decide not to take steps to pursue matters after a Caribbean incorporated company is encountered.

This is a mistaken view, as this article demonstrates, a Liquidator, or a Receiver in the case of Nevis, has considerable powers available to enable investigations to be undertaken into a company's affairs and those of individuals or entities associated with the company and therefore creditors should not stop their investigations when they encounter these jurisdictions.

This article concentrates on three jurisdictions within the Eastern Caribbean, the British Virgin Islands, Anguilla and Nevis and looks at:

- what information is publicly available from various sources;
- a brief overview of the Court driven processes of winding up a company; and
- the investigative powers available to a Liquidator in the BVI and Anguilla, and a Receiver in Nevis.

Whilst companies can be wound up on a solvent or insolvent basis by their members, this article concentrates on a company being wound up on an insolvent basis by a creditor.

It should be noted that other options may be available to creditors, such as the appointment of a Provisional Liquidator or a Receiver; these options are however not explored in this article, with the exception of a Receiver in Nevis.

This article does not explore other options available to parties such as *Norwich Pharmacal* orders or *Bankers Trust Co v Shapira* orders.

Publicly available information

The table over the page provides an indication of the information which is publicly available, from various sources, in the three jurisdictions.

As demonstrated below, the amount of publicly available information is relatively limited, and is unlikely to assist a party to pursue a debtor.

A Liquidator in BVI and Anguilla and a Receiver in Nevis have many powers available to them which enable them to obtain more information than is publicly available.

Information Source	Type of Information	Jurisdiction		
		BVI	Anguilla	Nevis
Companies Registry				
	Details of shareholders	✗	✓	✗
	Details of directors	✗	✓	✗
	Memorandum and Articles of Association (and subsequent amendments)	✓	✓	✓
	Register of charges	✓	✓	✗
	Financial accounts	✗	✗	✗
	Details of mergers and acquisitions	✓	✓	✗
	Certificate of redomiciling	✓	✓	✓
	Details of any prior insolvency proceedings	✓	✓	✗
	Details of registered office	✓	✓	✓
	Details of status of the company	✓	✓	✗
	Annual returns	✗	✓	✗
	Details of the ultimate beneficial owner	✗	✗	✗
	Minutes of meetings and / or resolutions	✗	✗	✗
Court Registry				
	Originating applications the company is a party to	✓	✓	✓
	Details of death estate executor	✓	✓	✗
Land Registry				
	Details of land held by the company	✓	✓	✓
	Details of charges / lien on land	✓	✓	✗
Gazette				
	Statutory notices in relation to the company	✓	✓	✗

The BVI

Appointment of liquidator

An application to wind up a BVI company may be brought by various parties including, but not limited to, a creditor, the shareholders and/or the directors of the company.

There are two main grounds for applying to wind up a company:

1. inability to pay debts as they fall due; or
2. it is just and equitable to do so.

This article concentrates on winding up a company as a result of it being unable to pay its debts as they fall due.

The process typically is to:

- issue and serve a statutory demand;
- if the statutory demand is not satisfied or set aside within 21 days, then an application is made to the Court for an Order placing the company into liquidation; and
- the applicant is required to advertise the application.

It is not always necessary to issue a statutory demand, circumstances where it would not normally be issued include where there is already a judgment or there is no doubt that a debt is due and payable. The cost of issuing a statutory demand is approximately \$1.5k.

The cost of preparing and presenting the application for a Winding Up Order, assuming it is not a contested process, will usually be between US\$10,000 - US\$15,000 (although these can vary matter to matter); if the matter is contested, costs will be higher and depend

on the level of resistance encountered. The application will usually be heard approximately 6 - 8 weeks from presentation.

Liquidator's powers

In our article 'Cross Border Issues Facing a BVI Liquidator' (a copy of which can be found within this newsletter at 'Related Publications') we reported on the investigative powers of a Liquidator and the initial sources of information, these are not repeated in full here, but to summarise, the powers include:

- Requiring the delivery of assets and documents;
- Requiring a sworn statement of affairs to be submitted;
- Obtaining information from specified persons;
- The Liquidator examining parties to obtain information; and
- Applying to Court to examine persons before the Court.

Anguilla

Appointment of liquidator

An application for compulsory liquidation may be made by the Registrar of Companies or any other 'interested person'.

There are three grounds for applying to wind up a company:

1. the company is unable to pay its debts as they fall due;
2. it is just and equitable to do so; or

3. there is unanimous shareholder agreement requiring dissolution after the occurrence of a specified event.

There is no requirement to file a statutory demand and the petition is filed by an application to the Court verified by an affidavit.

The cost of preparing and presenting the application, assuming it is not a contested process, will be a minimum of US\$5,000. If the matter is contested, costs will be higher and will depend on the level of opposition to the application and the complexity of the estate. Depending on whether the application is contested or not, it will be heard within 3 to 6 months or 1 to 3 months, respectively, from presentation.

Liquidator's powers

The powers of a Liquidator are outlined in section 222 of the Anguilla Companies Act. The main investigative power is:

- the right to apply to Court to examine before the Court, any party who is thought to have in his possession or under his control property of the company.

The legal commentary above has been provided by Tara Ruan, a solicitor at Caribbean Juris Chambers, Anguilla.

Nevis

Appointment of Liquidator

The position in Nevis is very different to that in the BVI and Anguilla, a recent decision of the High Court Judge, Justice Albert Redhead in

Wang Ruiyn v. GEM Global Yield Fund Limited in November 2011 confirms that a creditor of a Nevis company does not have any jurisdiction to wind up that company on the basis that there is no mechanism under Nevis law to permit this.

This applies to both International Business Corporations and Limited Liability Companies incorporated pursuant to the Nevis Business Ordinance, 1984 and the Nevis Limited Liability Company Ordinance, 1995 (both as amended), respectively.

The learned Judge, in arriving at his decision, considered whether the absence of express provisions relating to the ability of a creditor to wind up a company incorporated under Nevis law justified the importation of UK laws and procedure (pursuant to which creditors can petition for a company to be wound up), as permitted by the Eastern Caribbean Supreme Court (St. Kitts and Nevis) Act, Cap. 3.11. However the Judge determined that it was not appropriate for UK law to be imported because he did not feel that the absence of such express provisions meant that there is a lacuna or perceived lacuna in the laws.

Parties within St. Kitts and Nevis remain optimistic that their Parliament will amend the Nevis Business Corporation Ordinance, 1984, to provide the necessary relief, akin to the position in the BVI, to allow a creditor to petition the Nevis Court to wind up a company.

Appointment of a Receiver

There is a remedy available to a creditor who has obtained a judgment in the Nevis Court, under statute, case law and the rules of the Court itself a judgment creditor can enforce the judgment by seeking an order appointing a Receiver - effectively providing similar benefits to that of a creditor in a creditors' winding up.

The Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act deals with the appointment of a receiver and provides the statutory jurisdiction upon which a Court may appoint a receiver. Specifically, Section 26(1) reads:

“A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a Judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the Court or Judge thinks just.”

It is clear from the above that the statutory test for the grant of an Order appointing a receiver is whether having considered all the facts of the case available at the date of the hearing, it is just and/or convenient that the order should be made.

In the decision of *Norgulf Holdings Limited, Incomeborts Limited v. Michael Wilson & Partners* (a BVI case) the Court of Appeal provided some indication as to what is meant by ‘just and convenient’:

- there must be evidence relating to the risk of dissipation of assets of the respondent. That is to say, there must be evidence showing that the subject matter of the proceedings would be in danger if left under the control of the party to which the receiver was being appointed; and
- that if the order was not granted, the applicant would be in a worse position.

The process to appoint a Receiver is typically:

- issue and serve a statutory demand;

- if the defendant does not acknowledge receipt of the demand (within 14 days of receipt), apply for a default judgment; and
- Once default judgment is obtained, the judgment creditor makes an application to the Court for the company to be placed into receivership.

If the defendant does not acknowledge receipt of the demand within 14 days of receipt then the statutory demand can usually be obtained within a month of issuance and (subject to the Court’s schedule) the receivership order can be granted within 14 days of filing the application. The costs of preparing the demand and the subsequent Court application will depend upon a number of factors and therefore it is not possible to provide an indication of the possible costs. Upon a review of the background and the relevant documentation cost estimates can be obtained.

Receiver’s powers

The powers of Receivers appointed pursuant to an order of the Court are set out in the order appointing them. They are normally wide ranging but also specific to the matter, typically parties will seek the following powers:

- To enter any premises of the company for the purpose of identifying and receiving assets of the company;
- Take all steps to identify and secure assets of the company and to investigate the affairs of the company for the purpose of discharging their/his/her duty under the order of appointment;
- Do all acts and things necessary for the purpose of complying with the order and carry out their functions which may include:

- requiring any director or officer of the company or former director or officer of the company to supply all and any information and documents to them concerning the affairs of the company; and
- to take control of all bank accounts and any other property included within the company's assets and undertaking wherever situated and whether or not held in that company's name or by others, including any documentary records of the company including communication with third parties (subject to the rules relating to privilege);
- To take such steps as the Receiver considers necessary for the purposes of obtaining control and or custody of and recovering all of the company's assets including commencing recognition proceedings in any jurisdiction; and
- To exercise all of the corporate powers of the company which is vested in the company's board of directors, save otherwise restricted by the particular Order.

The legal commentary above has been provided by Dahlia Joseph and Midge Morton, Partner and Associate respectively at Daniel, Brantley & Associates, Nevis.

Registered Agents

Once a Liquidator or Receiver has been appointed, Registered Agents ("RA") are usually the starting point for information as

they are obligated to produce to the Liquidator or Receiver the company's statutory books and records. The records should include:

- registers of directors and members;
- minutes of directors' or shareholders' meetings and resolutions; and
- the RA is required to hold (or be able to obtain on request from its client) appropriate due diligence on the company's ultimate beneficial owner.

In some instances RA's may hold further information such as copies of contracts the company has entered into which can be helpful in identifying bank accounts in the company's name and other useful information. This is unusual as there is no requirement for RA's to hold this information.

Conclusion

This article shows that, although the procedure and legislation will clearly differ across the Caribbean, there are routes to pursue information and to trace assets using insolvency related enforcement action. The legislation in each jurisdiction envisages such action in a manner that is similar to onshore jurisdictions and the courts are willing and ready to hear such actions. As we have set out, there are many potential sources for information as a result of taking this action and the costs will not be prohibitive as long as a targeted and efficient approach is adopted. Therefore, parties should certainly not stop their investigations when they lead to companies based in the Caribbean.

Zolfo Cooper is keen to assist petitioning creditors providing a phased approach to these

types of liquidation whereby a modest fixed amount is charged to act as Liquidator (or Receiver) to undertake initial enquiries into the company's affairs. The results of these enquiries are then reported back to the creditor(s) and any additional work identified as being required or desirable can be costed and agreed before it is undertaken.

In many cases we are provided with no information at all in respect of the company before an appointment as office holder but by undertaking initial investigations, we frequently identify significant assets or information that could, when pursued, lead to the disclosure of contracts or bank accounts. In one such case, a review of the records held by the Registered Agent revealed that the company owned a very valuable private jet aircraft, the steps we took to secure it resulted in a settlement favourable to the petitioning creditor.

Confidential Discussion?

Should you have any matters which you would like to discuss, or need any more information about the topic dealt with in this article, please contact Stuart Mackellar, Matthew Richardson or Paul Pretlove.

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