



## Insolvency Updates

Chief Justice *Sir Michael Barnett* recently heard petitions of a voluntary liquidator of two Panamanian companies, *BC Capital Group SA* and *BC Capital Group International SA* ("BC Capital entities") for the Supreme Court of The Bahamas ("Supreme Court") to supervise the respective voluntary liquidations. The BC Capital entities nexus with The Bahamas were assets within and business conducted from the jurisdiction. They were part of an international group of related entities ("BC Capital Group"). Allegations were made that the BC Capital Group were part of a Ponzi scheme and the United States District Court had, prior to the hearing of the petitions, appointed a Receiver ("US Receiver") in the United States of America to take control of its assets worldwide. The US Receiver had an application pending for recognition in The Bahamas.

The Chief Justice delivered his Ruling on 12 November 2012 out of which several insolvency law updates of note arise:

**Foreign companies ordered wound up by Bahamian Court:** Chief Justice Barnett ordered that the voluntary liquidation of the BC Capital entities be continued under the supervision of the Supreme Court. In doing so the Chief Justice utilized one of the several new statutory provisions introduced by the *Companies (Winding Up Amendment Act) 2011* ("new insolvency regime"). The former regime had only expressed jurisdiction for the Supreme Court to wind up companies registered under one or other of the Bahamian companies' legislation.

However, section 185 of the new insolvency regime provides that:

"The court has jurisdiction to make winding up orders in respect of -

- (a) an existing company;
- (b) a company incorporated and registered under this Act;
- (c) a body incorporated under any other law; and
- (d) a foreign company which -

(i) has property located in The Bahamas

(ii) is carrying on business in The Bahamas

(iii) is registered under Part VI [of the Companies Act]



**Requirements of a "foreign practitioner":** The Chief Justice availed the court of jurisdiction under section 226 of the new insolvency regime to appoint qualified insolvency practitioners in The Bahamas together with a foreign practitioner.

The new insolvency regime introduced into the companies legislation nomenclatures of "qualified insolvency practitioner" and "foreign practitioner". A foreign practitioner is defined as a person "who is qualified under the law of a foreign country to perform functions equivalent to those performed by official liquidators under [the new insolvency regime] or trustees in bankruptcy under the Bankruptcy Act". Further the Insolvency Practitioners Regulations ("Regulations") requires that a foreign practitioner meets the independence and insurance requirements of those Regulations for eligibility for appointment jointly with a qualified insolvency practitioner.

The Chief Justice also held that a foreign person who had been appointed by a foreign court as a Receiver of an insolvent company within five years meets the requirement of Regulations once he had, in addition, satisfied the Regulations' requirements regarding independence and insurance.

**Cooperation with US Receiver in Appointment of Joint Official Liquidators:** The foreign practitioner appointed was in fact a senior officer of the firm appointed by the US District Court as the US Receiver. In making that appointment the Chief Justice rejected arguments in opposition that alleged a conflict between the roles of the US Receiver and that of Bahamian appointed liquidators. Finding a common primary duty of both the US Receiver and a Bahamian liquidator to collect assets, the Chief Justice favoured "cooperation between the work of the [US] Receiver and that of the [official] liquidator." In so doing, the Chief Justice stated, amongst other things:

"The creditors are not served by two different persons seeking to recover the same assets one in the capacity of a Receiver and another in the capacity as a Liquidator."

In the result, two qualified insolvency practitioners in The Bahamas together with a foreign practitioner, (the senior officer of the US Receiver) were appointed joint official liquidators of the BC Capital entities.

The pairing of a foreign practitioner who is also authorized under a US Receivership with local qualified insolvency practitioners by jointly appointing them as official liquidators effectively represents both a practical approach of combining efforts and a high level of international judicial cooperation between the US District Court and the Supreme Court in the investigation and administration of the estates of entities alleged to have been part of an international Ponzi scheme. The Grand Court of the Cayman Islands had acted



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similarly in its appointment of joint official liquidators of companies in that jurisdiction regarding the Cash4Titles Ponzi scheme.

The joint official liquidators are *Kevin D Seymour* and *Kevin G Cambridge* of *PricewaterhouseCoopers Advisory (Bahamas) Limited*, Bahamas, and *Brick Kane* of *Robb Evans & Associates LLC*, California, USA.

Delaney Partners are counsel and attorneys to the joint official liquidators.

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