



Application Granted for Sanction to Enter into a Litigation Funding Agreement

批准订立诉讼融资协议的申请

In the recent decision of in *In the Matter of the Companies Law (2018 Revision)* and *In the Matter of Platinum Partners Value Arbitrage Fund L.P. (In Official Liquidation)* the Grand Court of the Cayman Islands granted an application seeking sanction to enter into a litigation funding agreement.

Background

The application was brought by the joint official liquidators (the “JOLs”) of Platinum Partners Arbitrage Fund L.P (the “Master Fund”) for sanction to enter a litigation funding agreement with LL Finance LLC (“LLF”). Some of the creditors of the Master Fund purport to hold non possessory security interests in the Master Fund’s assets (the “PSCs”) in respect of liabilities which are considerably greater than net realisations to date. The JOLs informed the Court that funding was required in order to carry out investigations and to pursue litigation for the benefit of the Master Fund’s stakeholders. There was a real possibility that, without litigation, no distributions would be made to the unsecured stakeholders of the Master Fund.

An unusual aspect of the application was that the JOLs sought an order that amounts due to LLF would be paid as an expense of the liquidation (thus granting those amounts due statutory priority) save for when amounts may be due to the PSCs. In such an occurrence, the JOLs said, the sums due to LLF should be paid as an expense incurred in realising the proceeds of the litigation. This was necessary as the JOLs had been unable to determine whether certain claims belonged to the secured or unsecured estate.

开曼群岛大法院近期在 *公司法 (2018 修订版)* 一案及 *Platinum Partners Value Arbitrage Fund L.P. (正式清盘中)* 一案中作出了批准订立诉讼融资协议申请的决定。

背景

Platinum Partners Arbitrage Fund L.P (下称“母基金”) 的共同法定清盘人申请批准与 LL Finance LLC (下称“LLF”) 订立诉讼融资协议。母基金的若干债权人 (下称“PSC”) 声称持有母基金资产的非占有担保权益，而目前相关的负债远大于资产的可变现净额。共同法定清盘人向法院表示，需要融资进行调查和诉讼，以维护母基金份额持有人的利益。若不提出诉讼，则母基金的无担保份额持有人很可能不会获得分派。

该申请的不寻常之处在于，共同法定清盘人寻求的命令是，除应付 PSC 的款项外，欠付 LLF 的款项应计入清盘费用 (即赋予该等款项适当的法定优先权)。共同法定清盘人表示，在此情况下，欠付 LLF 的款项应视作为获得诉讼资金而产生的开支予以支付。由于共同法定清盘人无法确定各项申索涉及有担保还是无担保财产，故上述安排实属必要。

White Rock Properties LLC Dispute

The application was opposed by White Rock Properties LLC (“White Rock”), one of the PSCs. The submissions filed were brief and were not supported by evidence. They noted that White Rock did not oppose the principle of funding being obtained by the JOLs to enable them to pursue litigation; rather their concerns related to certain terms of the Funding Agreement and the failure, in their view, of the JOLs to provide sufficient information to allow White Rock to satisfy itself that its rights and position as a PSC were adequately protected.

The Court was advised that the other PSCs were on notice of the proceedings and did not support White Rock’s opposition or appear at the hearing, but they also did not consent to or support the JOLs’ application.

The Issues Arising on the Application

The following issues were considered by the Court;

- i. The impact and effect of the Funding Agreement on those who claim to have security interests over some or all of the Claims covered by the Funding Agreement (the PSCs) and whether the Court should sanction the Funding Agreement in the absence of the consent of the PSCs or where they object (the “PSC issue”).
- ii. Secondly, which powers the JOLs seek to exercise and whether in the circumstances the JOLs have satisfied the Court that it should exercise its discretion to sanction the exercise of these powers having regard to the applicable principles, in particular the principles set out in the Judgment of the Chief Justice in *Re DD Growth*¹ (the “Discretion to Sanction Issue”).
- iii. Thirdly, whether the Funding Agreement is unlawful by reason of champerty and maintenance (the “Champerty and Maintenance Issue”).

Grand Court Ruling

The Court found in favour of the JOLs on all of the above issues.

¹ [2013] CILR (2) 361]

White Rock Properties LLC 争议

申请遭到 PSC 之一的 White Rock Properties LLC（下称“White Rock”）反对，但其提交的呈述内容简略，且缺乏证据支持。呈述中表明 White Rock 并不反对共同法定清盘人获取资金进行诉讼这一原则，而是对融资协议的若干条款心存忧虑，担心共同法定清盘人无法提供充分的资料令其确信自己作为 PSC 的权利及地位会受到充分保护。

法院获悉，其他 PSC 已被告知诉讼一事，既无支持 White Rock 的反对意见也未出席聆讯，但亦未表明同意或支持共同法定清盘人的申请。

申请所引发的争议

法院考虑的争议点如下：

- i. 首先，融资协议对声称在融资协议所涉的部分或全部债权中拥有担保权益之人士（下称“PSC”）的影响及作用，以及法院在 PSC 没有表示同意或 PSC 表示反对的情况下应否批准融资协议（下称“PSC 争议”）。
- ii. 第二，共同法定清盘人拟行使哪些权力，及共同法定清盘人是否令法院信纳在有关情况下应基于适用原则（尤其是 *DD Growth*¹ 一案中首席法官在判决书中所述的原则）行使酌情权，批准共同法定清盘人行使有关权力（下称“酌情批准权争议”）。
- iii. 第三，融资协议是否因属于包揽诉讼及助讼而不合法（下称“包揽诉讼及助讼争议”）。

大法院的裁决

关于上述所有争议点，法院裁断共同法定清盘人胜诉。

¹ [2013] CILR (2) 361]

PSC Issue

The application relied both on the Court's general jurisdiction and on Section 142 (2) of the *Companies Law (2018 Revision)* which provides that;

“where the liquidator sells assets on behalf of a secured creditor, he is entitled to deduct from the proceeds of sale a sum by way of remuneration equivalent to that which is or would be payable under Section 109”.

The applicant relied on various authorities in England and Australia to support the proposition that costs incurred by the liquidators in realising charged assets are payable ahead of the secured creditor's claims such as:

- *Re Berkeley Applegate*²
- *Re Marine Mansions*³
- *In Re Universal Distributing Co Ltd (in liquidation)*⁴
- *Townsend -v- Biscoe*⁵

The Court paid significant attention to the position of the PSCs and noted the absence of their involvement in the decision making process with respect to the secured Claims. The Court held that it was important that the JOLs have regard to the interests of those PSCs and satisfy themselves that those PSCs are properly protected.

However, particularly given the lack of objection to the funding agreement *per se*, notwithstanding the fact that the PSCs had been given notice of the application, the Court determined that it did have jurisdiction to affect the purported rights of the PSCs and order that any amounts realised on behalf of the PSCs would be subject to the obligations due to LLF under the funding agreement. The Court derived its jurisdiction from common law, determining that Section 142 (2) did not give it jurisdiction to make the order sought.

PSC 争议

有关申请以法院的一般管辖权及公司法（2018 年修订版）第 142(2) 条的以下规定为依据：

“倘清盘人代表有担保债权人出售资产，则清盘人可自销售所得扣除相当于根据第 109 条应付的款额作为酬劳”。

申请人援引英国及澳洲多项判例支持其主张，即清盘人为变现抵押资产所产生的费用，在支付顺序上应优先于有担保债权人的申索，有关案例包括：

- *Berkeley Applegate*² 案
- *Marine Mansions*³ 案
- *Universal Distributing Co Ltd (清盘中)*⁴ 案
- *Townsend-v-Biscoe*⁵ 案

法院相当重视 PSC 的地位，亦了解 PSC 并无参与有担保债权的决策。法院认为，重点在于共同法定清盘人应考虑 PSC 的权益，并确定 PSC 的权益已获妥善保障。

然而，尽管 PSC 已获知有关申请，但特别考虑到融资协议本身并无遭到反对，法院认为其确实拥有可影响 PSC 所声称权利的管辖权，且可命令代表 PSC 获得的任何变现金额，须根据融资协议优先用于清偿欠付 LLF 的款项。法院的管辖权源自普通法，认为第 142(2) 条并无赋予其可作出所寻求之命令的管辖权。

² [1988] 4 BCC 279

³ Co LR 4 Eq 601

⁴ [1933] 48 CLR

⁵ [2010] WL 316608

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⁴ [1933] 48 CLR

⁵ [2010] WL 316608

The Discretion to Sanction Issue

In seeking sanction of the Court in the exercise of powers falling within Part 1 of Schedule 3 to the *Companies Law (2018 Revision)* the applicant relied on the following principles set out in the Judgment of the Chief Justice in *Re DD Growth Premium 2x Fund*.⁶

- (a) *The Court must consider all the relevant evidence.*
- (b) *The Court must consider whether the proposed transaction is in the commercial best interests of the company, reflected prima facie by the commercial judgment of the liquidator.*
- (c) *The Court should give the liquidator's view considerable weight unless the evidence reveals substantial reasons for not doing so.*
- (d) *The liquidator is usually in the best position to take an informed and objective view.*
- (e) *Unless the Court is satisfied that, if the company is not permitted to enter the deal in question, there will be better terms or some other deal on offer, the choice is between the proposed deal and no deal at all.*

White Rock did not challenge the JOLs position on the issue (beyond the challenge based on their own treatment dealt with in the PSC's issue). The Court accepted the submissions of the applicant on the discretion to sanction issue, particularly given the wide-ranging market testing carried out by the JOLs to determine that the LLF deal was commercially the most attractive.

Champerty and Maintenance Issue

Where the Court is asked to sanction a litigation funding agreement, its terms will be carefully scrutinised to ensure that it does not confer upon the funder any right to interfere in the conduct of the litigation or put the funder in a position in which it will be able to exert undue influence or control over the litigation (*Re ICP Strategic Credit Income*⁷).

⁶ Ibid

⁷ FSD 82 of 2010) (AJJ), unreported, 4 April 2014, at paras, 14, 18).

酌情批准权争议

申请人寻求法院批准行使公司法（2018年修订版）附表3第1部分规定的权力，是基于首席法官在 *DD Growth Premium 2x Fund*⁶ 一案的判决书中载述的下列原则。

- (a) 法院须考虑所有相关证据。
- (b) 法院须考虑清盘人的商业判断表面上能否反映，建议交易符合公司的最佳商业利益。
- (c) 法院应相当重视清盘人的意见，除非有充分证据显示毋须如此。
- (d) 清盘人通常最能提出有根据且客观的见解。
- (e) 除非法院认为，倘公司不得进行有关交易，会有条款更佳的交易或其他可行交易，否则仅可在批准相关交易和禁止相关交易两者之间作出选择。

White Rock 并无质疑共同法定清盘人在相关问题上的立场（只是质疑自己在 PSC 争议中将获得的待遇）。法院接纳了申请人有关酌情批准的申请呈述，特别是考虑到共同法定清盘人经过广泛的市场测试后确定与 LLF 交易最具商业吸引力。

包揽诉讼及助讼争议

法院接获批准诉讼融资协议的请求时，须仔细审查相关条款，确保不会赋予出资人任何干涉诉讼过程的权利，亦要避免让出资人能够对诉讼施加不当影响甚至控制诉讼 (*ICP Strategic Credit Income*⁷ 案)。

⁶ Ibid

⁷ 2010年 FSD 第 82 號(AJJ)，未经报道，2014年4月4日，第 14、18 段。

The applicant relied on the Judgment in *In A Company -v- A Funder*.⁸ It was submitted that this case established that the crucial issue was whether the funding agreement has the tendency to corrupt public justice, undermine the integrity of the litigation process and give rise to a risk of abuse. Such a question requires the closest attention to the nature and surrounding circumstances of the agreement. The following seven features of a funding agreement were stated to have particular significance:

- (a) *the extent to which the funder controls the litigation.*
- (b) *the ability of the funder to terminate the agreement at will or without reasonable cause*
- (c) *the level of communication between the funded party and the solicitor.*
- (d) *the prejudice likely to be suffered by a defendant if the claim fail;*
- (e) *the extent to which the funded party is provided with information about, and is able to make informed decisions concerning, the litigation.*
- (f) *the amount of profit that the funder stands to make and*
- (g) *whether or not the funder is a professional funder and/or is regulated.*

White Rock did not challenge the JOLs position on this issue. On balance and after careful consideration of the funding agreement and its terms, the Court granted the JOLs application and made the order to sanction to enter a liquidation funding agreement.

Conclusion

This Judgment should be welcomed by practitioners and is a timely reminder that the Grand Court of the Cayman Islands will be flexible and co-operate wherever possible in facilitating the recovery of monies for an estate by a liquidator. Nevertheless, the decision shows that liquidators, when considering a funding arrangement that will affect secured creditors, have regard to the interest of those secured creditors and satisfy themselves that on balance the interests of those secured creditors are properly protected.

Ben Hobden and Róisín Liddy-Murphy of Conyers Dill & Pearman acted on behalf of LL Finance LLC.

⁸ FSD 68 of 2017 (NSJ), unreported, 23 November 2017.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

申请人基于 *In A Company v A Funder*⁸ 一案的判决，指出该案确立关键问题在于融资协议是否有可能败坏社会正义、破坏诉讼过程的公正及招致滥用风险，因而需密切关注协议的性质及相关情况。融资协议的以下七个特点尤为重要：

- (a) *出资人控制诉讼的程度。*
- (b) *出资人能否任意或毋须合理理由终止协议*
- (c) *受融资方与律师的沟通程度。*
- (d) *倘申索失败，被告可能遭受的损害；*
- (e) *受融资方对诉讼的了解程度及能否作出相关知情决定。*
- (f) *出资人可能获得的利润；及*
- (g) *出资人是否以出资为职业及／或是否受到监管。*

White Rock 并无质疑共同法定清盘人就此事宜的立场。兼顾各项因素且经仔细考虑融资协议及其条款后，法院批准共同法定清盘人的申请，颁令批准订立清盘融资协议。

结论

业界对上述判决应当欢迎，该判决及时提醒我们，为协助清盘人追回财产，开曼群岛大法院会尽可能灵活处理及合作。然而，该判决表明，清盘人在考虑会影响有担保债权人的融资安排时，有留意有担保债权人的利益，确保能在权衡之下妥善保障有担保债权人的权益。

康德明律师事务所 Ben Hobden 及 Róisín Liddy-Murphy 担任 LL Finance LLC 的代表律师。

⁸ 2017年 FSD 第 68 号 (NSJ)，未经报道，2017年11月23日。

本文并非法律意见，其内容亦非详尽无遗，只可作为概览及一般参考资料。感谢您的垂阅！

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