

Are you a person aggrieved? Critical features to be aware of in contesting decisions of liquidators and trustees in bankruptcy

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A recent judgment of the United Kingdom Supreme Court in *Brake & Anor v The Chedington Court Estate Ltd* [2023] UKSC 29 (10 August 2023) is likely to be a welcome decision for liquidators and trustees in bankruptcy in setting clear boundaries as to who has standing to challenge their decision-making in corporate or personal insolvency contexts. The judgment is expected to be persuasive in offshore jurisdictions such as Bermuda, the British Virgin Islands, and the Cayman Islands given the following statutory provisions from the UK are substantially similar to their island counterparts:

- In the case of a corporate insolvency: *"If any person is aggrieved by an act or decision of the liquidator, that person may apply to the court; and the court may confirm, reverse or modify the act or decision complained of, and make such order in the case as it thinks just."*¹
- In the case of a personal bankruptcy: *"If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit."*²

The Supreme Court held that whilst the language is very broad, the express terms are not, however, to be given a literal reading. Instead, as a matter of principle and having regard to authority, the Supreme Court defined the following classes of persons who have standing pursuant to the above statutory provisions:

1. Creditors have standing where their application concerns their interests as creditors, because the bankrupt's estate or the assets of the company in liquidation are administered under the terms of the statutory trust for their benefit as creditors.
2. Likewise, where there is or there is likely to be a surplus, the bankrupt or shareholders in a company are also persons for whose benefit the estate or assets are being administered and they have standing in respect of their interests in the surplus.
3. Beyond that, there is a limited class of cases³ where creditors, the bankrupt, shareholders, or others will have standing, but only in respect of matters directly affecting their rights or interests and arising from powers conferred on trustees or liquidators which are peculiar to the statutory bankruptcy or liquidation regime.

1 Section 168(5) of the Insolvency Act 1986 (UK) which is similar to s.176(5) of the Companies Act 1981 (Bermuda), and s.273 of the Insolvency Act 2003 (BVI). Section 110 of the Companies Act (2023 Revision) (Cayman Islands) in contrast expressly defines which persons have standing on a sanction application depending on whether the company is solvent, insolvent or where solvency is doubted.

2 Section 303(1) of the Insolvency Act 1986 (UK) which is similar to s. 81 of the Bankruptcy Act 1989 (Bermuda), s.332(1) of the Insolvency Act 2003 (BVI), and s. 98 of the Bankruptcy Law (1997 Revision) (Cayman Islands).

3 These cases have been rare. They have included a bankrupt's application to challenge the trustee's costs and expenses which was directly relevant to an annulment of his bankruptcy; and a landlord's application in respect of a liquidator's disclaimer of a lease as onerous property, which is a procedure uniquely available in a liquidation.

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The UK Court's decision on standing is consistent with the BVI Court of Appeal in *Stanford v the Joint Liquidators of Chesterfield United Inc* (BVIHCMAP2017/0019), a case in which Carey Olsen successfully acted for liquidators who resisted a challenge to their decision to enter into a global settlement agreement which provided for the admission and payment of its substantial claim in a liquidation. Whilst the issue of standing was fatal to the appellant (as a shareholder of a shareholder), the BVI Court of Appeal also rejected the challenge on its merits setting a high bar for overturning a liquidator's decision. In doing so it held that bad faith and fraud apart, a court will only interfere with the act of a liquidator if they have done something so perverse and manifestly absurd that no reasonable person would have done it. It also was not open to the Court to substitute its opinion for that of the liquidator or to question whether a liquidator has chosen the best approach.

Carey Olsen has extensive experience acting in corporate and personal insolvencies in Bermuda, British Virgin Islands, and the Cayman Islands, including for liquidators, trustees in bankruptcy, creditors and shareholders.



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