Landing the Eagle: Guernsey Royal Court confirms distribution of surplus funds to an indirect externa creditor

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The Royal Court has recently handed down the final decision in the matter of *Eagle Holdings Limited (in compulsory liquidation)*. [1] In this decision, the Royal Court of Guernsey provided guidance and assistance to the joint liquidators regarding a distribution of surplus funds. The joint liquidators were seeking to make a distribution to a party which was not a direct creditor as the entity which should have received the benefit of those funds was dissolved. Ultimately, a decision was made to order the distribution to an indirect external creditor which was the only available party to receive those funds. The decision demonstrates the Royal Court's pragmatism and shows the flexibility to allow liquidators to seek directions in particularly difficult situations.

Background

Eagle Holdings Limited was placed into administration in 2013 and compulsory liquidation in 2015. It formed part of a large and complex group of entities within the Propinvest Group and operated as holding company. Within the group structure, three of the subsidiaries (the **Subsidiary Companies**) were placed into voluntary liquidation in 2017. The joint liquidators of Eagle Holdings Limited were also appointed as the joint voluntary liquidators of the Subsidiary Companies.

The joint voluntary liquidators applied for directions to make a payment from the Subsidiary Companies to an indirect creditor, Barclays Bank Plc (**Barclays**). As an alternative, it was proposed that the joint liquidators also be appointed as liquidators over each underlying limited partnership within the structure.

The broader group structure of Eagle Holdings Limited was incredibly complex. Of particular note, it had a subsidiary, Callendar Property Holdings Ltd. Additionally, the wholly owned subsidiary of

Callendar Property Holdings Ltd had been reinstated in Scotland so it could benefit from the receipt of a substantial redress payment from Clydesdale Bank. These funds were transferred upwards to Callendar Property Holdings Ltd, which was itself in the process of being liquidated and so, made a payment to Eagle Holdings Limited. Having received these monies, the joint liquidators had to plough their way through a "complex web" of inter-company positions to determine the appropriate party to receive those funds. In the complex circumstances before them, the joint liquidators made an application for directions under section 426 of the Companies (Guernsey) Law, 2008 (**Companies Law**).

The joint liquidators determined that the sole existing (albeit indirect) external creditor of Eagle Holdings Limited was Barclays. They sought directions to distribute the surplus funds from Eagle Holdings Limited in their capacity as the joint voluntary liquidators of the Subsidiary Companies directly to Barclays. The complication was that Barclays claim to the surplus funds held by the Subsidiary Companies arose through a debt owed to the bank by three Guernsey limited partnerships, of which the Subsidiary companies were each limited partners. However, all of the relevant limited partnerships had been dissolved. Indeed, the relevant general partners had all also been dissolved. There were also certain noteholders whose right to repayment took priority over Barclays, but even that entity had been dissolved.

What the joint liquidators were looking to achieve was a payment to an existing creditor of the Propinvest Group, who had not received what it was owed due to the collapse of the group. The alternative was to treat the monies as being bona vacantia.

Section 426 of the Companies Law

The scope of section 426 of the Companies Law is "extremely broad, but is not unlimited," [2] it is, however, wide enough to seek directions from the Court regarding an intended course of action. The jurisdiction of section 426 has previously been examined by the Royal Court. It enables a liquidator to seek assistance from the Court regarding how to deal with an issue which has arisen during the course of the winding up of a company and which a liquidator is required to resolve as a consequence of the liquidation.[3]

The court will scrutinise the decision-making process and "the applicant must put before the court, making full disclosure, all the materials which have been taking into account (or consciously left out of account by him in reaching the decision in question, and he must explain to the court the process of reasoning which has led him to the decision itself. This enables the court to test and judge the scope and comprehensiveness of the decision-making process, and its rationality and lack of perversity. It does not involve the court endorsing the decision directly, but only the validity of the process by which it has been reached, or, in other words, that the trustee, or liquidator, has done his job properly, in all the circumstances". The Court was satisfied that this was not a case where it was being invited to make the joint liquidators' commercial decisions for them.

The Court considered that a strict application of the provisions in the Companies Law would result in the joint liquidators not being able to take, what they considered to be the fair and pragmatic decision without incurring greater expense, such that any amount available to be distributed to creditors would be significantly reduced.

Dissolution of a company compared to dissolution of a limited partnership

Contrasting the process of dissolution of a company, Bailiff McMahon stated that the effect of a company's dissolution was that it ceased to exist. [4]

While it is the case that the Limited Partnerships (Guernsey) Law, 1995 (the **Limited Partnerships Law**) contains a provision in relation to restoration of a limited partnership, it does not contain restoration provisions equivalent to those in the Companies Law. The dissolution provisions set out in the Limited Partnerships Law, and in particular their timing and effect, operate in a completely different manner to those in the Companies Law, specifically in relation to circumstances of winding up.

In the Companies Law, dissolution occurs once a company has been wound up. In the case of voluntary liquidations, a liquidator must call for a general meeting of the company as soon as the affairs of the company are fully wound up. After such general meeting, the liquidator gives notice to the registrar, who publishes notice of the final meeting and the company is dissolved three months after such notice. In cases of compulsory liquidation, a liquidator must apply to the Court for an order declaring the company to be dissolved within 15 days of the final distribution of the company's assets. The Companies Law indicates that a company's corporate state and powers continue until dissolution and thereafter it ceases to exist. Once dissolved, a company is not an entity available to receive any funds unless it is restored under the relevant provisions of the Companies Law.

By contrast, the mechanism set out in the Limited Partnerships Law provides the opposite, which is that limited partnerships are firstly dissolved and then wound up. In the context of the Limited Partnerships Law, "dissolution" is comparable to entering into a liquidation in a company context. In other words, the winding down, marshalling and distribution of the limited partnership assets and liabilities under the control of a person appointed to such a role. Examining the provisions of the Limited Partnerships Law further:

1. section 28 sets out the events upon which a limited partnership shall be dissolved. These include, but are not limited to, events set out in the partnership agreement, the expiry of a fixed term and the dissolution of a general partner
2. section 30(1) provides that once a limited partnership has been dissolved its affairs shall, unless a liquidator has been appointed by the Royal Court, be wound up by the general partners. This

makes it clear that winding up occurs **after** dissolution

This methodology for winding up the affairs of a limited partnership after dissolution was noted in *Highbridge Investments LP* where at paragraph 28, the Jurats noted "the premise of what happens after the dissolution of the limited partnership is that there will be a beneficial winding up. They were satisfied that it was a factor for them to take into consideration that the beneficial winding up extended to any creditors of the limited partnership who might otherwise not have been identified during what must have been a very cursory winding up conducted by HGPL as general partner."

Both general partners within the Eagle Holdings Limited structure had been wound up and were dissolved and the three limited partnerships had been dissolved under the terms of the Limited Partnership Law. The Court considered it would be a cumbersome and expensive process if one of the general partners needed to be restored under the terms of the Companies Law to be able to play its part in the ongoing dissolution of those three limited partnerships. It was therefore persuaded to give the directions sought.

Before making the directions sought by the joint liquidators, the Court had considered the alternative option of the surplus funds potentially being bona vacantia. It directed that the relevant authorities be given the opportunity to make submissions to the Court if they so wished. This raised the issue of whether the funds were bona vacantia in right of the Crown in Guernsey or England. On responses from His Majesty's Revenue and Customs, the Treasury Solicitor and the Solicitor for the Affairs of the Duchy of Lancaster that each did not intend to make submissions and would be bound by the Court's order as long as no order for costs were made against them, the Court considered that it was able to determine matters under section 426 of the Companies Law.

The Court reminded itself that what the joint liquidators were seeking to do was a departure from the orthodox terms of the Companies Law. The approach to the three cascades of distributions from the assets held by Eagle Holdings Limited resulted in funds sitting in the joint liquidators' hands as liquidators of the Subsidiary Companies. There were no creditors of those entities who had made claims against them which fell to be settled in the normal way. It would be circular to return the assets to the members of each because those assets would simply end up being returned to those Subsidiary Companies themselves as creditors of Eagle Holdings Limited. In simple terms, there were insufficient funds in the hands of the joint liquidators to satisfy in full Eagle Holdings Limited's indebtedness within its group. This is why the Court was satisfied that the better outcome was to award the primary relief being sought under section 426 by the joint liquidators.

It was noted that Barclays would receive a small windfall. Further, although the noteholders, to whom this money would otherwise have passed, would miss out, it was accepted that it would be impracticable and expensive to try to restore the relevant entities without any guarantee any investors would actually see "a penny piece back".

So, on the basis that a liquidation was principally for the benefit of creditors and Barclays was a

creditor of the limited partnerships, the liquidators were directed to make the practical solution being the distribution to Barclays as identified.

[1] [2023] GRC005

[2] *In the Matter of Canargo Limited (in Liquidation)*

[3] *In the matter of Jubilee General (Longport)*

[4] *In the matter of Whitecliff Investments Limited (in dissolution)*

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Key Contacts

Sandie Lyne

Partner

Guernsey

E: sandie.lyne@ogier.com

T: +44 1481 752224

Michael Rogers

Managing Associate

Guernsey

E: michael.rogers@ogier.com

T: +44 1481 752264

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