

Representation of Maltese Holdings Limited and Zollinger Investments Limited [2012] JRC 172...

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Representation of Maltese Holdings Limited and Zollinger Investments Limited [2012] JRC 172 Preserving parity between creditors

This case considers the ability of the Court to ensure that similarly ranked creditors of a debtor are treated equally prior to the commencement of any insolvency procedure including a just and equitable winding up application.

Background

Mr Breifne O'Brien lives in Ireland. In 2008 and 2009 a number of creditors in that jurisdiction obtained judgments against him in the Irish High Court. The Irish Court enjoined Mr O'Brien from dealing with his assets within or without the jurisdiction below €20,000 million.

Mr O'Brien owns 100% of the shares in Maltese Holdings Limited, a Jersey registered company. Maltese owns 50% of a second Jersey company called Zollinger Investments Limited. The other half of Zollinger is owned by a third Jersey company called Astro Properties Limited. The ultimate owner of Astro is Mr Bernard Lambilliotte, who was related by marriage to Mr O'Brien and is also one of the Irish creditors.

Maltese, Zollinger and Astro are all administered by the same administrator.

Mr Lambilliotte and Mr O'Brien each lent €1.5 million to Maltese/Astro and those sums were lent to Zollinger to assist with the purchase of commercial property. The balance of the purchase was funded by a bank loan.

Some of the Irish creditors claimed that Mr O'Brien dishonestly misappropriated funds from them giving rise to questions about the source of funds transferred by Mr O'Brien to Maltese and

ultimately Zollinger.

The Winding up Application

The bank gave Zollinger notice to repay the loan. The value of the commercial property was such that it was not clear whether there would be any funds to repay the shareholder loans to Maltese and Astro. This together with the conflicts faced by the administrator in administering all three companies and the possibility that some of the Irish creditors may be able to trace their funds through to Zollinger led the directors of Maltese and Zollinger to apply to the Royal Court for the appointment of a liquidator under the just and equitable winding up jurisdiction contained in Article 155 of the Companies (Jersey) Law 1991.

Recognition of Irish Judgment

The proceedings for the winding up petition were commenced in July 2012 and the Irish creditors including Mr Lambilliotte were convened to the hearing. In August 2012 Mr Lambilliotte applied to the Royal Court for recognition of his Irish judgment obtained against Mr O'Brien in 2009.

The Royal Court recognised the judgment and gave permission for Mr Lambilliotte to cause Mr O'Brien's moveables to be seized and sold by the Viscount. The Royal Court was given limited information about the existence of the other Irish creditors and was not told about the application to wind up Maltese.

The Viscount referred the matter back to the Royal Court and the Court ordered that the shares could be seized by the Viscount, but that no sale could be effected pending further consideration by the Court.

Application for a Stay

At a subsequent hearing Maltese argued that there should be a stay on the execution of Mr Lambilliotte's judgment against Mr O'Brien to prevent Mr Lambilliotte from obtaining an advantage over the other Irish creditors. It was argued that the Court had the power to make such an order under its inherent jurisdiction. Mr Lambilliotte opposed any stay and argued that he was entitled to pursue his remedies and obtain whatever advantage he legitimately could.

Decision

The Court resolved to maintain the status quo by restraining Mr Lambilliotte or any of the other Irish creditors from enforcing their judgments in this jurisdiction pending the hearing of the winding up application or further order.

The Court gave the following reasons for its decision:-

1. The Irish High Court had acted to preserve the assets of Mr O'Brien including his interest in

Maltese for the benefit of his creditors.

2. The Court was concerned that the actions taken by Mr Lambilliotte might give him an advantage over the other creditors of Mr O'Brien. The Court had an interest in ensuring that all creditors of a debtor of the same rank are treated equally and the Court would act procedurally to allow that argument to be made by the other creditors at a future date.
3. Although the Court was sitting in the context of the Maltese winding up application, as a large number of the creditors including Mr Lambilliotte were convened before the Court it was convenient to make the stay order in the context of the winding up proceedings.
4. When applying to distrain upon the assets of Mr O'Brien, Counsel for Mr Lambilliotte had not disclosed the full background to the Court and in particular the existence of the winding up application in relation to Maltese.

Comment

Jersey law contains statutory provisions to ensure that creditors with the same rank are treated equally. Article 159(4) of the Companies (Jersey) Law 1991 states that after the commencement of a creditor's winding up, no action shall be taken against a company without leave of the Court. Article 10 of the Bankruptcy (Desastre) (Jersey) Law 1990 states that from the date of declaration a creditor who has a debt proveable in the desastre has no remedy against the person or property of the debtor and cannot bring legal proceedings against the debtor without the permission of the Viscount. Article 10 also states that where a debtor is a company a transfer of shares is void if it is made without the sanction of the Viscount. However there is no equivalent position on a just and equitable winding up.

The other unusual feature of this case is that none of the Irish creditors applied to have a trustee in bankruptcy or the Irish equivalent appointed over the affairs of Mr O'Brien. Such a trustee could have applied to have his or her appointment recognised in Jersey. However, in the absence of any insolvency proceedings the Jersey Court was still willing to entertain the idea that one creditor should not be able to secure an advantage over other similarly ranked creditors.

The Court was also influenced by the lack of information given to the Court when the distraint order was applied for. In particular, it was not informed of the pending winding up application in relation to Maltese and the existence of the Irish injunctions.

This was an interlocutory order made to preserve the status quo and the Court did not hear full argument. However, the indications are that the Court will consider making use of its inherent jurisdiction to ensure parity between creditors even where there is a lack of statutory protection. Creditors trying to enforce judgments should also ensure full disclosure is made of any pending insolvency proceedings.

Advocate Matthew Thompson and Advocate Elena Moran acted for Maltese Holdings Limited.

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