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Developing cross-bailiwick restructuring laws

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Developing cross-bailiwick restructuring laws: The Guernsey and Jersey Royal Courts sanction cross-border pooling of assets and liabilities of insolvent companies

Overview

In decisions delivered on 24 August 2015 and 7 October the Royal Courts of Guernsey Court and Jersey respectively held that where the affairs of two insolvent companies (incorporated in Jersey and Guernsey respectively) are so intermingled that the expense of unravelling them would adversely affect distributions to creditors, it can be appropriate to treat the companies as a single entity.

Having concluded that there was no bar in the legislative framework of Guernsey which would prevent such an application and with the interests of creditors firmly to the fore, the Deputy Bailiff of Guernsey granted a proposal by the Joint Liquidators (from Grant Thornton) to consolidate the assets and liabilities of a Guernsey company with the assets and liabilities of a related, but separate company incorporated in Jersey subject to the sanction of the Jersey Court. The Jersey Court subsequently reached a similar conclusion in terms of its jurisdiction to grant a pooling order.

This is the first time the Guernsey Court has considered and granted such an order, which has allowed a procedure which, on its face, would appear to contradict basic principles i.e. separate legal personality and that creditors can only share in the assets of the company against which they are entitled to lodge a claim. Acknowledging the inevitable rise of cross-jurisdictional corporate insolvencies, the Guernsey Court confirmed the basic purpose of a liquidation was the realisation of a company's assets for the benefit of its creditors and held that where there was a solution whereby creditors would receive more than they otherwise would, then common sense dictated that such a solution should find favour with the Court. Whilst the Jersey Court has granted a similar application previously in the context of two Jersey companies, it was the first time that an

application had considered the pooling of assets and liabilities of a Jersey company with those of a foreign company. Furthermore, it was the first time that such an order has been made in the context of a just and equitable winding up.

Factual Background

The Huelin-Renouf Group was a leading cross-channel cargo shipper and haulier which carried approximately 21% of all cargo between the United Kingdom and the Channel Islands and served as a lifeline of the Channel Islands for almost 80 years. At the time it encountered financial difficulties in 2013, the Group employed 92 staff across its companies in Jersey, Guernsey and a sister company called Eagleway Freight Limited in the UK (**Eagleway**).

On 20 August 2013, the Royal Court of Jersey ordered the winding up of Huelin-Renouf Shipping Limited (the **Jersey company**) on just and equitable grounds (the Court having held that other regimes for an in solvent winding up were not available or beneficial to creditors). The following day, Huelin-Renouf Shipping (Guernsey) Limited (the **Guernsey company**) was wound up pursuant to Part XXIII of the Companies (Guernsey) Law, 2008 (**Guernsey Companies Law**). Alan Roberts, Jamie Toynton and Ben Rhodes of Grant Thornton were appointed joint liquidators in respect of both companies. Eagleway was placed into administration in England at the same time[1].

Companies' operations intermingled

The intermingling of the affairs of the companies was apparent when the winding up orders were made, but investigations by Grant Thornton into the companies' operations revealed the extent of it. The liquidators concluded that the companies did not operate as distinct entities there being little evidence that suppliers, creditors or customers were aware of which entity they contracted with.

The Guernsey company was entirely dependent on the Jersey company for its ongoing funding and would have insufficient assets to pay a dividend to any of its creditors, including preferential creditors (mostly employees). Grant Thornton concluded that, if the companies were to be liquidated as separate entities, there would be significant professional costs incurred in determining the true assets and liabilities of each company given the complex inter-company position. The likely dividend to Jersey creditors would be materially reduced as a result of those costs. However, a consolidation of the assets and liabilities of the two companies with creditors thereby receiving a dividend from the pooled estates would obviate the need to incur the additional costs. The projected outcome upon pooling was that all preferential creditors of both companies would be paid in full and unsecured creditors as a whole would receive an increased dividend.

The Guernsey Decision

The Guernsey Court was satisfied that the application could be brought pursuant to section 426 of

the Guernsey Companies Law, and that there was no statutory bar to granting such an order. The Deputy Bailiff, following *Flightlease Holdings (Guernsey) Ltd v Flightlease (Ireland) Ltd*[2] considered the approach taken under English insolvency law, as well as under Jersey law in relation to customary law procedures such as *désastre*[3]. The Court considered the Royal Court of Jersey decision in *Re Corebits Services Limited (in liquidation)*[4] and Zoombits Limited (in liquidation) in which the pooling of assets and liabilities of two Jersey companies was approved, and found that a similar approach could be taken in respect of two Guernsey companies. Specific consideration was given to section 419 of the Guernsey Companies Law which provides for a *pari passu* distribution. To ensure compliance with this, the Court accepted the liquidators' undertaking to apply Guernsey law to the claims of Guernsey creditors if pooling were to be ordered[5].

The Guernsey Court had significant regard to the Guernsey company's reliance on the Jersey Company for its ongoing funding with the consequence that once the Jersey company entered liquidation there was no prospect for the Guernsey company to survive. Other key considerations in reaching its decision were that the majority of assets were held by the Jersey company, both companies had been managed by a single management team based in Jersey, there was no resident Guernsey director, invoices were issued in the name of the Jersey company, and when it came to branding, both companies portrayed themselves as if a single Channel Islands entity.

Echoing the conclusions of the Vice-Chancellor in the English Court of Appeal's judgment in *Re Bank of Credit and Commerce International SA (No. 3)*[6] the Deputy Bailiff held as follows:

"When one remembers that the purpose of a liquidation such as the present one is to realise a company's assets for the benefit of creditors, it is plain that the proposed pooling arrangement is the only way in which the creditors of the Guernsey company are likely to receive anything ... Accordingly, if there is a way in which those creditors receive more than they otherwise would, common sense dictates that such a solution should find favour with the Court … Moreover, because of the extremely close connection between the Jersey and Guernsey companies, if there is a solution that enables them to be paid something, the injustice of declining to sanction the Joint Liquidators' proposal becomes self-evident."[7]

The Guernsey Court held that given the potential benefit in the Jersey liquidation it would be appropriate to facilitate the transfer but, from noted that if the Jersey Court disagreed, there would be no prejudice to the Guernsey creditors because the costs of making the application would not affect a distribution that was already estimated to be zero.

The Jersey Decision

The Jersey Court also considered the extent of its jurisdiction in the context of a just and equitable winding up and held that the broad discretion under Article 155 of the Companies (Jersey) Law 1991 (**Jersey Companies Law**) provided the power to grant the order sought. It also referred to its earlier decision in *Re Corebits and Zoombits* and examples in the context of the Jersey law on *désastre* where, in the interests of creditors, compromises involving the

consolidation of assets with other entities had been sanctioned. The Court noted the liquidators' evidence that the affairs of the companies were inextricably intermingled and accepted that the estimated dividend positions (in a pooled or non-pooled scenario) were reasonable. The Court accordingly concluded that the transfer and consolidation of the assets and liabilities of the Guernsey company with those of the Jersey company would be for the benefit of all creditors of both companies. The Court also accepted the liquidators' undertaking that creditors of the respective companies would be treated in accordance with the law of their respective jurisdiction, albeit noting that pursuant to the winding up order in respect of the Jersey company, the statutory provisions concerning the rights of creditors (notably preferred creditors) had been expressly incorporated.

Comment

The decision represents a welcome development in cross Bailiwick co-operation and insolvency / restructuring law. In Guernsey, until the introduction of the Guernsey Companies Law there were few statutory provisions and it was mainly reliant on the customary law derived from *coutume de Normandie* (the customs of medieval Normandy) which still survives today. In extending the guidelines of the *Flightlease* decision (which were held to be of general application to companies operating outside the financial services sector), the Guernsey Court confirmed that gaps in the statutory regime could be filled by looking to English law while for guidance on customary law procedure, it was appropriate to look to Jersey. However, it is clear that Guernsey's statutory regime which is intentionally less prescriptive than those of Jersey or England, has once again enabled the Court to take a more pragmatic and flexible approach to insolvency situations as they arise.

Likewise, the Jersey Court has once again demonstrated that, in appropriate circumstances, it will grant orders in the exercise of the discretion conferred upon it by statute, for the benefit of interested parties, being the creditors in the case of an insolvent company. In recent years there has been a widening of the circumstances in which the Royal Court has been prepared to order the winding up of Jersey companies on just and equitable grounds, including insolvent companies where a creditors winding up or *désastre* are not available. In granting such orders the Royal Court will typically incorporate provisions of the Jersey Companies Law that would apply in a creditors winding up, and which clearly provided the legal framework for the sanction of the cross-border pooling in this case.

Ogier acted for the joint liquidators in Jersey and in Guernsey. For more information please contact Nigel Sanders or Mathew Newman.

[1] The administration of Eagleway was concluded before the applications were made.

[2] [2009-10] GLR 38

[3] *Désastre* is a customary law of Guernsey and Jersey which provides that when a person or body corporate is unable to pay his debts he is said to be *en etat de désastre* in that his current liabilities exceed the value of his assets. *Désastre* allows all the creditors to share the proceeds of sale of a debtor's chattels, as opposed to a single creditor liquidating assets entirely for their benefit.

[4] [2011] JRC 166

[5] While it was significant that the liquidators of the Guernsey company were one and the same as the liquidators of the Jersey company there is no reason that the same logic should not be applied where different liquidators are involved.

[6] [1993] BCLC 1490

[7] Paragraph 22 of *In the matter of Huelin-Renouf Shipping (Guernsey) Limited (In Liquidation)*

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