Putting Jersey companies into English administration - the back door is left shut

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Successful applications to the Royal Court of Jersey for a letter of request seeking assistance from the High Court of England to place a Jersey registered company into administration in England are not uncommon. However, in Harbour Fund II LLP v ORB a.r.l and Litigation Capital Funding the application was declined by the Royal Court because, on the facts of the case, it could perceive no advantage to using the English regime of administration over that of a Jersey law declaration *en désastre*[1] and the company was not being rescued as a going concern. The Jersey company had no obvious connection to England. The decision confirms that applications for letters of request to achieve insolvency "passporting" into the UK will be carefully and fully analysed by the Jersey Court.

Background

Harbour Fund II LLP provided litigation funding to ORB (a Jersey registered company) in respect of English proceedings under the terms of a funding agreement. The litigation landscape in which ORB was involved was complex, with various parties involved, including in ancillary proceedings in the Isle of Man, the settlement of which was linked to the English proceedings, as well as injunctive proceedings brought after the English proceedings were dismissed; in addition production orders were issued seeking information concerning the sale of ORB's assets. Harbour had made formal demand for sums it claimed to be due from ORB pursuant to its funding agreement, totalling close to £33m (£5m of which related to funded legal costs). Harbour informed ORB that failing settlement of Harbour's claim, an application would be made for the appointment of an administrator. Harbour's funding was secured by a debenture over ORB's assets.

Issues

For the English Court to entertain an application to place a foreign company into administration under section 426 of the UK Insolvency Act 1986 on the request of a foreign court (rather than administration being commenced out of Court on COMI grounds), that foreign court must be furthering the interests of an insolvent company and its creditors. In considering whether to exercise its discretion to issue a letter of request on application by a creditor, therefore, the Royal Court has to be satisfied that the subject company is cash-flow insolvent and that the creditor has a liquidated claim (i.e. a certain debt to which there is no reasonably arguable defence).

The Royal Court was satisfied on the evidence before it that Harbour had a liquidated claim (at least in respect of the £5m in respect of funded costs, on the basis that it seemed indisputable that there had been a recovery for the purposes of the funding agreement) and that ORB was cash-flow insolvent on the basis that it had not met the demand for payment by Harbour and there was no reliable evidence that it had retained any assets or if it did, where they were located. It appeared that the majority of the assets which could potentially be classified as ORB's were located outside England. It was not clear therefore that ORB had a substantial connection with England.

It was noted that whoever was appointed to administer the affairs of ORB would have to undertake certain actions to protect the interests of creditors[2] and that an administrator would not be any better placed to undertake those actions than the Viscount in Jersey. The only power not available to the Viscount (which would be available to an administrator) was to rescue ORB as a going concern; however, rescuing ORB was not envisaged.

Further, were the letter to be granted, and an English administrator appointed, there would be an immediate need for the High Court to issue a letter of request to the Royal Court of Jersey to recognise the appointment, and for a number of orders to be made in Jersey. The Court felt a sense of unease at enabling a process by which an English administrator, with whose jurisdiction no substantial connection could be established, could exercise powers in Jersey not available under Jersey law which was termed[3] as "administration by the back door".

The Court concluded that there was no particular advantage in using the English regime since on a declaration *en désastre*, all the property of ORB would vest in the Viscount who had extensive powers and could seek recognition of her status in England and the assistance of the High Court as necessary in that jurisdiction.

Conclusion

This was an interesting decision since letters of request applications that comply with the basic requirements (no issue as to the insolvency of the company, the liquidated claim of the creditor is clear, the assets of the company are in the UK and an opinion of UK counsel that the application for administration would likely succeed is presented to the Jersey Court) are typically granted. The principal stumbling block for Harbour was the lack of evidence connecting ORB with England and the fact that ORB was not being rescued as a going concern. As such, there appeared to be no

cogent reason why the Jersey process of en desastre could not be used for this Jersey registered company.

Although each case is likely to be considered on its facts, where a company is not being rescued as a going concern and a substantial connection to England[4] cannot be shown, and particularly where there is no good reason not to follow available Jersey procedures, the back door to administration is likely to remain well and truly closed.

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[1] Effectively, bankruptcy

[2] i.e. investigate the asset position and seek recovery through various methods

[3] by the Viscount

[4] or whichever country the letter of request is to be made to the courts of

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