What the first Jersey insolvency case of its kind in 40 years means for the "back door" to English a

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What the first Jersey insolvency case of its kind in 40 years means for the "back door" to English administration

In a recent trilogy of decisions concerning the high profile insolvency of Jersey company Orb a.r.l (**Orb**) and its sole shareholder Dr Gail Cochrane (**Dr Cochrane**), the Royal Court of Jersey has provided a clear endorsement of the capability of the Jersey insolvency regime to deal with complex cross-border insolvency matters. We consider some of the salient points from the saga so far.

Taking the three decisions of the Royal Court in turn:

i. In the Representation of Harbour Fund II LP [2016] JRC 171, the Royal Court declined an application by Orb's litigation funder, Harbour Fund (**Harbour**), to place Orb into English law administration. On examination of the facts it did not consider there was any advantage of using English administration in favour of Désastre (i.e bankruptcy in Jersey), particularly in circumstances where there was no expressed desire to maintain Orb as a going concern (the **First Proceedings**).

ii. In Harbour Fund II LP v Orb a.r.l and others [2017] JRC 007, Harbour duly returned to the Royal Court to seek declarations en désastre of Orb and Dr Cochrane. Notwithstanding the potential scope and complexity of the two bankruptcies and the burden that would be imposed upon the Viscount and her department in respect of dealing with assets and actions around the world, the Royal Court declared both Orb and Dr Cochrane *en désastre*.The Court stated it was important that Jersey, as a well-respected financial centre, discharged its responsibility for dealing with the affairs of a Jersey company and its own resident (the **Second Proceedings**).

ii. In the Representation of the Viscount [2017] JRC 025, the Viscount sought and was granted two Letters of Request to be issued by the Royal Court to the High Court of England and Wales requesting the assistance of the High Court in accordance with Section 426 of the Insolvency Act 1986in respect of each of the *désastres* of Orb and Dr Cochrane . The Letters of Request broadly sought the recognition of the Viscount in England with authority to exercise various powers to ascertain information about the assets of Orb and Dr Cochrane and to gather in relevant documents and to exercise various powers of investigation (the **Third Proceedings**). The Letters of request are currently on their way to the English Courts.

Factual Background

In the Autumn of 2002 Orb underwent a corporate reorganisation and became the holding company of a group of companies with various interests in hotels, commercial and warehouse properties, transport and logistics businesses and venture and private capital.

In or around late 2002, Dr Gerald Smith (Dr Smith), Dr Cochrane's former husband and the then chief executive of Orb stole approximately £35 million from a company called Izodia in which Orb held approximately 30% of the shares and misapplied the majority of these monies to the benefit of Orb. Following investigations by the Serious Fraud Office Dr Smith faced criminal sanctions and by 2003 Izodia had issued proceedings against Orb and Dr Smith for recovery of the stolen sums transferred from Izodia's bank account. Following the discovery of the theft a substantial proportion of Orb's assets were sold to a Mr Andrew Ruhan and companies owned or controlled by him. In around 2004/5 Mr Ruhan settled the acquired assets into a complex structure ultimately owned by the trustee of an Isle of Man Settlement.

In 2006, Dr Smith pleaded guilty to a number of charges relating to the theft and was sentenced to 8 years in prison. In 2007, a £41 million confiscation order was made against him in England.

Following Dr Smith's release from prison in 2012 Orb and others instituted proceedings against Mr Ruhan in England alleging there had been an oral agreement that Orb would share in the profits made from the sale/development of certain of its assets and that Mr Ruhan had concealed/or sold the assets for his own benefit and failed to account to Orb for its share of the profits as agreed. To ensure Dr Smith continued to assist Orb in the proceedings, Orb together with its joint claimants agreed with Dr Smith that in return for his cooperation they would transfer to him 50% of any sums recovered from Mr Ruhan up to the amount of the confiscation order.

A final complexity worthy of note is that ancillary proceedings were commenced in Isle of Man in 2013 in respect of the assets under the Isle of Man Settlement, these proceedings were settled and the term of the settlement involved the transfer of the assets in the Isle of Man Settlement to Dr Cochrane in her personal capacity. Mr Ruhan counterclaimed in the English proceedings, asserting that the Isle of Man settlement assets were beneficially owned by him and that the transfer of the

assets to Dr Cochrane was a misappropriation. Harbour is the litigation funder to Orb in respect of the English proceedings under the terms of a funding agreement which provided it with security over all of Orb's assets and a guarantee of Orb's liabilities by Dr Cochrane.

Lessons from the saga so far

- ***Must carefully consider connections to England and ask whether there is "any advantage to English administration"***

In the First Proceedings, the Royal Court found that there was no advantage to using English administration in favour of désastre. Further, it did not accept that Orb had substantial connections with England.

Although evidence from an English accountancy firm identified some properties in London it was deemed unclear as to whether Orb had an interest in these properties, further the majority of assets listed by the accountant were situated outside England and Wales. Accordingly, the Royal Court held that initiating the English administration process over a Jersey company that had no substantial connection to England was unjustified.

The court made its finding despite the fact that Orb satisfied all of the established criteria for placing a Jersey company into English law administration, namely: undisputed insolvency, a liquidated claim against it by Harbour, UK assets and an opinion of English Counsel confirming that the application for administration would be likely to succeed.

The Royal Court has put a clear marker down that going forward it will be closely examining whether, in substance, a company has a close connection with England when considering whether English law administration is appropriate for a Jersey company. It was also concerned about allowing an English administrator to exercise powers in Jersey that are not available under Jersey law to the Viscount, such as the power available to an administrator to keep the company trading as a going concern, labelling it as being "administration by the back door."

- ***The Royal Court will not easily permit any frustration of désastre proceedings***

Prior to the Second Proceedings, Harbour made formal demand on Orb for a liquidated sum of £5.2 million and a further disputed claim of £28 million. As Orb was unable to pay, Harbour issued a formal demand to Dr Cochrane, as guarantor of Orb's debt. The debt remained unpaid that therefore Harbour issued the Second Proceedings and sought declarations en désastre of both Dr Cochrane and Orb.

Two days prior to the hearing, a claim was filed in the English courts by Dr Cochrane and Orb against Harbour for a sum of £73 million. Thereafter, Dr Cochrane and Orb instructed Jersey Advocates to assist with resisting Harbour's application for a declaration *en désastre*.

The Royal Court refused to allow Dr Cochrane and Orb to frustrate the Jersey désastre process by

engaging in English proceedings that it considered to be a 'last gasp' attempt to avoid bankruptcy and accordingly, refused to adjourn Harbour's application to declare Dr Cochrane and Orb *en désastre*. Not impressed by the conduct of Dr Cochrane and Orb The court concluded that the English proceedings did not represent a genuine claim.

- ***the Royal Court will request, on behalf of the Viscount, assistance from the English High Court***

In the recent Third Proceedings, the Royal Court has given further support to the view that Jersey, as a well-respected financial centre, should discharge its responsibility for dealing with the affairs of Jersey resident company, and resident by granting an application by the Viscount (the official Insolvency officeholder of Jersey) for the issue by the Royal Court of letters of request, pursuant to which the Viscount sought recognition in England to administer the désastres of Dr Cochrane and Orb. It is estimated that Dr Cochrane and Orb owe creditors the combined sum of £1.3 billion.

The court was prepared to make a wide request for assistance including asking the English court to authorise the Viscount to exercise such of her powers and functions as may be necessary, (including the power to intervene in and prosecute or defend or apply for a stay in various sets of proceedings currently before the English courts and to ascertain information and gather in relevant documents relating to assets of Dr Cochrane and/or Orb). If the request is accepted, it will be the first time that Jersey's Viscount has been recognised by the English High Court for nearly 40 years.

Comment

The trilogy of cases has provided a salutary reminder to the international insolvency community and to creditors of Jersey companies, that Jersey has a sophisticated insolvency regime which will be utilised in cross border insolvencies. It is not clear whether these decisions will buck the trend of placing Jersey companies into English law administration, but it certainly demonstrates that it cannot be assumed that the door to UK administration is always going to be open and the court will closely examine the facts in order to determine whether English law administration is in fact suitable for a Jersey company in all the circumstances.

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