Appointment of a provisional liquidator for the first occasion in the Royal Court of Guernsey

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The appointment of a provisional liquidator is not often pursued, as the practical implications are draconian. From a commercial viewpoint, it creates a temporary paralysis of the company. When considering an application, the court will examine the degree of urgency, the essential need established by the applicant and the balance of convenience. The court has a wide and unfettered discretion on whether to appoint a provisional liquidator. When the appointment is made, the management of the company is effectively under the control of the appointee, and the directors lose the ability to control and manage the company's affairs. The provisional liquidator will usually be empowered to take possession of the company assets, but does not have the authority to distribute assets, as that is the function of the ultimate liquidator if appointed.

Usually the provisional liquidator is appointed after a winding-up application has been issued but before the court hearing to wind up the company. The powers afforded to a provisional liquidator are usually limited to those set out within the court order for the appointment. The general purpose of the provisional liquidator is to ensure that the company's assets are safeguarded from the risk ofdissipation, which is a necessary precaution when there are allegations of fraud or misfeasance. However, a provisional liquidator can also be appointed in other circumstances, such as where an administration order would be inappropriate and the company needs some breathing space to effecta restructuring proposal.

Recent case law

In an *ex tempore* judgment before the Royal Court in the matter of *IPIS UK (Battersea London I) Limited*, Bailiff Sir Richard Collas granted the appointment of a provisional liquidator. This judgment is important due to the following factors:

- It appears to be the first time that a provisional liquidator has been appointed by the Royal Court over a solvent Guernsey company
- The company was solvent, both at the time of the appointment and for the foreseeable future

The purpose of the company was to develop a high-value English situs property. The property was purchased in February 2015 and a professional team were appointed, with revised planning approval being obtained. However, issues arose and construction on the property did not commence. The development was financed partly by shareholder capital and partly by a bridging loan. The bridging loan expired and no replacement finance was obtained. The bridging lender appointed a fixed charge receiver and a sale of the property was agreed.

The company was due to receive substantial funds following the sale, but was in an unusual situation given the absence of a director or investment manager and therefore unable to operate a bank account. While it was noted that theproject had been an unsuccessful investment for the shareholders, the loss suffered by them was limited to the scope of their initial investment.

Usually, the appointment of a director would have been the obvious solution; however, the mechanism by which a new director could have been appointed would not have been completed before the date on which the company was due to receive the funds described above. As such, therewas an imminent danger that no one would have sufficient authority on behalf of the company to give good receipt for the funds that were due to be paid.

The minority shareholder had applied for the Company to be placed into compulsory liquidation on the basis that there had been a failure of the Company's sub stratum or that there was a constitutional and administrative vacuum as the Company had no directors or investment manager. The minority shareholder contended that it was just and equitable that the Company be wound up pursuant to section 406 (i) of the Companies (Guernsey) Law, 2008.

The majority shareholder subsequently brought an application for the appointment of a provisional liquidator for the principal reason that as the development project had run its course and as a sale was foreshadowed, it was necessary to ensure that the company was able to give good receipt, as substantial funds were anticipated. The fixed charge receiver appointed over the property would take comfort in the knowledge that the provisional liquidator was acting under supervision of the court and would not be distributing the funds without a further order.

It was noted that the Royal Court had jurisdiction to appoint a provisional liquidator pursuant to Sections 89, 359, 411, 412 and 426(a) of the Companies Law 2008. In particular, the bailiff referredto Section 4(1)(2), which provides that *on hearing an application for the compulsory winding up of a company the court may grant the application on such terms and conditions as it thinks fit, dismiss the application or make such other order as it thinks fit.*" Although there is no reference in Section 4(1)(2) to a provisional liquidator, it follows immediately after at sectionSection 4(11), which provides for the "power to restrain proceedings and appoint a provisional liquidator".

The proposal advanced was to appoint a provisional liquidator with powers to:

- investigate the affairs of the company

- make payments
- gather assets.

There was also power for the provisional liquidator to return to the court for directions at any time. Both the majority and minority shareholders consented to the order, and the bailiff, having satisfied himself that the court had jurisdiction, made the order. The provisional liquidator would return to court in due course, when sufficient information had been obtained regarding the company's affairs for a appropriate order.

Comment

This decision adds helpful guidance to the Guernsey insolvency regime, as it demonstrates that the Royal Court adopts a pragmatic and flexible approach when exercising its discretion, particularly where the parties face unusual circumstances.

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