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Crossing borders in Guernsey: insolvency reforms

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As many readers will know, Guernsey has recently approved a significant set of reforms to our insolvency legislation, to bring it in line with comparable jurisdictions such as England. A rules committee is also working on a set of corresponding rules to deal with the finer procedural points that affect a Guernsey insolvency. You can read Ogier's briefing on the new reforms here.

The purpose of this article is not to look at the reforms themselves, but to review them briefly in the context of the wider cross-border insolvency piece, alongside existing case-law, and examine how Guernsey can, and will, play its part in cross-border insolvencies and restructurings that will be an inevitable consequence of the current COVID-19 pandemic.

Guernsey can be regarded as an "start/end of the line" jurisdiction in insolvency terms. It is the start of the line because insolvency proceedings are often commenced in the Royal Court of Guernsey, but much of the substantive activity during the insolvency process takes place elsewhere (because, whilst Guernsey is the place of incorporation, the entity's principal business was conducted in other jurisdictions). Conversely, it is the end of the line because insolvency office holders appointed in other jurisdictions come to Guernsey to seek assets or information held in Guernsey, for the benefit of creditors. The new reforms have enhanced Guernsey's cross-border capability in respect of both points.

Insolvency Proceedings in Guernsey

One of the major drawbacks of the Guernsey system previously was, arguably and ironically, its simplicity. Creditor oversight was completely lost in a voluntary liquidation. Shareholders could pass a special resolution to put the company into liquidation whatever its financial state, and appoint whomever they chose as liquidator by ordinary resolution. There was no requirement for the liquidator to be a qualified insolvency practitioner or even a member of a professional body.

This had particular ramifications for property holding companies, registered in Guernsey but holding property in the United Kingdom. Banks would appoint Law of Property Act receivers over the UK situs property under the terms of their fixed charge, who would proceed to market and sell

it. However, the receiver's agency would be terminated by the appointment of a liquidator, and so the shareholders could defeat the bank's strategy by appointing their own liquidator, without any input from the bank or other creditors, and upsetting the sale of the property to repay the bank's debt. That liquidator could just as easily be one of the shareholders or a director as anyone else. The only way that this mischief could be rectified would be an application by the bank to the Royal Court for an administration order in tandem with, or instead of, the receivership appointment. This was expensive and in the author's view the only step that could be done to defeat rogue shareholder actions in this context.

The new reforms mandate the appointment of an independent liquidator in the event that the company is insolvent (which it would be if the bank is taking steps to enforce its fixed charge over the UK property). If the shareholders take steps to appoint a liquidator, then it would need to be someone independent of the company and those controlling it, who would, it is assumed, take steps to protect the company's property for the benefit of all creditors, including the bank, and would not stand in the way to frustrate a sale.

The new reforms also provide for an efficient end to an administration and a distribution from an administration, a new and welcome development which would assist wider cross-border group insolvencies by facilitating a cost-effective up-flow of monies to creditors and members as part of a wider group restructuring.

One of the more radical reforms is the new ability of the Royal Court to wind up foreign companies. Whilst these companies must have a sufficient connection, there are, for example, enough BVI registered companies which are administered in Guernsey, and perhaps even with directors provided by the same Guernsey-based corporate service providers, to justify a sufficient connection to Guernsey and thus provide jurisdiction to the Royal Court to wind those companies up. This would, it is suggested, be extremely useful in a group-wide restructuring where the main (administration) proceedings are being run from Guernsey and the costs would be kept lower if the Guernsey court could also, at the same time, wind up subsidiary foreign companies as part of that reorganisation plan.

Insolvency Proceedings Outside Guernsey

The new reforms will, it is suggested, provide a significant improvement to the assistance that Guernsey can provide to foreign insolvency office holders, especially those situated outside the United Kingdom. There are two major reforms to the armoury of a liquidator: (i) the ability to apply to Court to force directors, former directors and employees to provide documents or information to the liquidator as he/she might reasonably require about the formation of the company and its business and affairs; and (ii) the ability to bring claims to clawback assets which have been transferred out of the insolvent estate at an undervalue.

Both have their obvious merits in a domestic insolvency, where liquidators previously had no real means of obtaining documents from directors and where they could not attack transactions

undertaken at undervalue prior to the commencement of the liquidation. However they also will greatly assist foreign insolvency office holders.

Section 426 of the UK Insolvency Act 1986 is extended in Guernsey in limited means, by an order of the Privy Council in 1989. The extension of section 426 means that the Guernsey court is mandated to provide reciprocal assistance to the courts of England & Wales, Scotland, Northern Ireland, the Isle of Man and Jersey, and vice versa. However, the question of which law to apply to the assistance being sought is a question open for the Guernsey court. In the 2017 decision of Batty v Bourse Trustees, the Royal Court decided, upon an application by a UK liquidator for relief against a Guernsey based trust company, that it could apply the UK Insolvency Act provisions relating to transactions at undervalue in a claim by the liquidator of a company against the trustees of a trust beneficially owned by the rogue director of the company. This was despite, at the time, the lack of legislation in Guernsey relating to transactions at undervalue. However, the court could just have easily applied Guernsey law to the liquidator's claim, the law seemingly giving the courts discretion as to whether they should apply the law of the liquidator's jurisdiction or domestic law. Guernsey did have a customary law device known as an *action paulienne* which may have provided for similar, but not the same, relief as transaction at undervalue claims, but this did not create the level of certainty that liquidators would require when bringing claims (and spending creditors' money) against third parties. Now that Guernsey has its own transaction at undervalue legislative provisions, arguably this creates far more certainty that the relief that the UK liquidator would achieve in the UK could also be achieved in Guernsey too, with the reciprocal assistance afforded by section 426 as extended to Guernsey.

But what about insolvency office holders from other jurisdictions other than the British and Crown Dependency jurisdictions? They cannot use the section 426 route because there is no reciprocity with Guernsey. To seek relief in Guernsey they would need to be recognised, under fairly well established common law "sufficient connection" tests (that is, a sufficient connection to the jurisdiction where they have been appointed, rather than with Guernsey), and then bring the claims that they wish to bring against the Guernsey-based defendant/respondent.

Previously, this was made difficult by a 2015 decision of the Royal Court in Brittain v JTC (Guernsey) Limited in which it was held that in order for a foreign insolvency office to bring an action in Guernsey, Guernsey must have equivalent legislation (and indeed an equivalent insolvency process). This modified the principal of "modified universalism" found in cases such as the Privy Council decision in Singularis v PwC even further. The court in Brittain held that the common law would not assist the foreign office holder to bring the claim as if that type of action existed in Guernsey law without a statutory or customary law footing and by making such a determination, found itself in agreement with the dissenting minority of the judicial committee of the Privy Council in Singularis (Lord Mance's judgment in particular).

This judgment meant that, for example, a Cayman liquidator could not seek information under the common law from directors of the company based in Guernsey because of the lack of legislation in

Guernsey available to local liquidators for an equivalent information-seeking exercise. Whilst the judgment in Brittain is only a first instance decision, it is likely to be followed in the Royal Court given the extremely in-depth analysis that the judge undertook in her judgment.

This of course has now changed with the advent of the new legislation affording Guernsey liquidators those very powers to seek information and documents from third parties. So now it should be possible for a liquidator from any non-UK foreign jurisdiction to apply to the Royal Court under the common law to seek information from Guernsey-based service providers, just as if those liquidators were locally based. This is a welcome development and will be of great assistance to non-UK based foreign insolvency office holders seeking information, or indeed assets, located in Guernsey.

Conclusion

Whilst Guernsey has elected not to widen the scope of its reciprocal insolvency regime to jurisdictions wider than the UK and the other Crown Dependencies, arguably this does not matter now with the new reforms which give greater powers to foreign office holders to seek recognition in Guernsey and seek assets and information in the same way that they would be able to in their home courts. The ability of the Guernsey Court to wind up foreign companies, in addition to the added protections being added to Guernsey's domestic administration and winding up regimes, will make bringing insolvency proceedings with a cross-border element in the Royal Court of Guernsey a much more attractive proposition than before.

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