Guernsey cross-border insolvency - assisting foreign insolvency office holders

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Guernsey is a jurisdiction that is well used to requests from foreign insolvency office holders for assistance in collecting in assets located in Guernsey. Occasionally these requests involve assistance in interviewing former directors of companies in an insolvency process.

When the need arises for cross-border insolvency proceedings, there are several international treaties which allow for the recognition of foreign insolvency office-holders and the implementation of powers they may wish to exercise in the domestic jurisdiction.

The two most important cross border treaties are the Model Law (produced by the United Nations Commission on International Trade), and the Recast European Insolvency Regulation (**Recast Regulation**) which governs cross-border insolvency within the European Union.

Guernsey is neither a signatory to the Model Law, nor is it a member of the EU. Therefore, Guernsey is not required to comply with the Recast Regulation.

However, the Royal Court of Guernsey (**Royal Court**), under both a specific treaty with the UK and under the common law, is able to provide assistance to foreign insolvency office holders where assets are held in Guernsey.

The process involves the recognition of the office holder by the Royal Court which enables the holder to collect in assets in Guernsey and, if necessary, take further steps to protect the assets of the liquidation estate.

There are two ways in which foreign insolvency office holders can obtain recognition in Guernsey:

1. under section 426 of the England and Wales Insolvency Act 1986 (**IA 1986**); or
2. under the common law

Section 426 of the IA 1986 has been extended to Guernsey via the Insolvency Act 1986 (Guernsey) Order 1989 by an order of the Privy Council. The effect of this extension means that subsections (4), (5), (10) and (11) of section 426 are effectively applied in Guernsey. Through this incorporation, the Royal Court is permitted to provide judicial assistance on insolvency matters to several jurisdictions within the British Isles, those being:

1. England and Wales
2. Scotland
3. Northern Ireland
4. the Isle of Man
5. the Bailiwick of Guernsey; and
6. Jersey

In order to use this route, UK office holders typically apply to the Court in their own jurisdiction for an order, whereby the UK Court must send a letter of request of assistance to the Royal Court in Guernsey. The Royal Court generally must comply with these types of request, with the only exceptions arising from oppressive outcomes and offending public policy. The advantage that comes from this reciprocal arrangement is that the Royal Court is permitted to follow one of two options: (i) to apply the insolvency laws of Guernsey or (ii) to apply the insolvency law of England and Wales when considered appropriate. This provides a great advantage to foreign office holders seeking recognition, as it provides a broad discretion to the Royal Court, and can assist where there is no pre-existing Guernsey statute, such as the lack of statutory remedies in Guernsey for transactions at undervalue. However, amendments to the Companies (Guernsey) Law, 2008, will shortly provide a statutory basis for transactions at undervalue.

Two cases which highlight the benefits of the application of section 426 are *Slinn and Slinn v Official Receiver and Liquidator of Seagull Manufacturing Company Limited*,[1] and *Batty v Bourse Trust Company Limited**[2]*.

Slinn was an Alderney-based case where the Court of Alderney had been asked by an English liquidator for a private examination of the directors (resident in Alderney) of an English registered company pursuant to section 236 of the IA 1986. The Alderney Court held that they were able to permit this examination because section 426(5) confers authority on the court to apply the insolvency laws of either Guernsey or Alderney to comparable matters within its jurisdiction. It was held that this would include the power to order private examinations of directors and officers of a company if appropriate. This was upheld on appeal despite the argument that the Court of Alderney had no power to make the order due to there being no equivalent provision in the Companies (Amendment) (Alderney) Law, 1962.

In the case of *Batty v Bourse*, Batty (the **applicant**) sought for his appointment as liquidator to be

recognised as well as the recognition of certain declarations and orders. The English High Court issued and sent to the Royal Court a letter of request seeking recognition of the applicant's appointment, requesting that the Royal Court hear and determine the applicant's application seeking various heads of relief, and provide such general assistance as would be deemed appropriate. The declarations included:

i. dividends declared were unlawful distributions pursuant to Part 23 of the England and Wales Companies Act 2006 (**CA 2006**)

ii. certain payments were transactions at an undervalue as per the meaning within section 238 of the IA 1986; and

ii. that the payments above amounted to transactions defrauding creditors within the meaning of section 423 of the IA 1986

The Deputy Bailiff held that the Royal Court had a duty to assist the proceedings in the English High Court pursuant to section 426 of the IA 1986 as extended to Guernsey by the Insolvency Act 1986 (Guernsey) Order 1989. He further held that, in the absence of any compelling reason, the court had a duty, not merely a discretion, to act in aid of and be auxiliary to the English High Court. Subsection 5 of section 426 of the IA 1986 provided that the court could apply to any of the matters within the request, either Guernsey insolvency law or so much of the insolvency law of England and Wales as corresponded to Guernsey insolvency law. Section 426 contains wide powers and allowed the Royal Court to make such orders as they thought fit, providing whatever assistance it legitimately could.

The payment of a dividend as in declaration (i) above was not permitted by section 830 of the CA 2006 or section 304(1) of the Companies (Guernsey) Law, 2008 (**CL 2008**). The court was prepared to make a declaration that the payment amounted to an unlawful distribution under Part 23 of the CA 2006.

The Royal Court was also prepared to make a declaration that the payments made at (ii) were transactions at an undervalue within the meaning of section 238 IA 1986. Furthermore, it was held that although there was no direct Guernsey statutory equivalent, there were a number of options under Guernsey law to obtain a similar relief, such as a Pauline action (an ancient common law remedy similar to section 423 of the Insolvency Act 1986). The Royal Court was also prepared to declare that the transactions in (iii) defrauded creditors contrary to section 423 of IA 1986.

The downside to the use of section 426 of IA 1986 is that the office holders in the designated jurisdictions are still required to make the initial application to their own jurisdiction's Courts to obtain the letter of request. This can cause the process to be potentially more expensive and time consuming and means, on occasion, that even English-appointed office holders will use the common law route rather than section 426 of IA 1986.

Although the use of section 426 is beneficial for those in Britain and the Crown Dependencies, any foreign office holder that is further afield cannot use this route due to there being no reciprocity in Guernsey. In order to be recognised in Guernsey and to allow them to seek relief, they would have to rely on the common law route. This secondary process is governed by the "*sufficient connection*" test. The general position is that Guernsey will co-operate in the recognition of foreign insolvency proceedings where there is sufficient connection between an office holder and the jurisdiction in which they have been appointed.

When there is a sufficient connection, the Royal Court still retains discretion, but will, typically, grant the relief sought. However, the availability of relief is tempered, so that the Guernsey Court cannot grant relief unless it has a common law power to do so. This principle of modified universalism was discussed by the Privy Council in the Bermudan decision of *Singularis.****[3]***

Singularis Holdings Limited (**SHL**) was incorporated in the Cayman Islands. When it went into liquidation, the liquidators attempted to obtain material belonging to the company's auditors, PricewaterhouseCoopers (**PwC**). An application was made to the Bermudan Court for the status of the liquidators to be recognised in Bermuda. The Bermudan court then exercised their common law power to order PwC to produce information which PwC could have been ordered to produce under section 195 of the Companies Act 1981 of Bermuda.

The Court of Appeal set aside this order on the basis that it was not an appropriate exercise of discretion because this would be an order made in support of a Cayman liquidation where such an order could not have been made by a Cayman Court under the Cayman Company Law. The Judicial Committee of the Privy Council dismissed the appeal.

In the leading judgment of Lord Sumption, he held that there was a common law power of assistance which existed, but it was subject to limitations. He found that there was a power at common law to assist a foreign court by ordering the production of information necessary for the administration of a foreign winding up. While this principle of modified universalism provides a power to assist foreign winding up proceeding so far as the court properly can, this is subject to local law and public policy.

Furthermore, the power was not available to enable liquidators to do something which they could not do under the law by which they were appointed. The Privy Council found that the common law power of assistance should not be exercised in favour of the Cayman-appointed liquidators. The material which the liquidators sought in Bermuda would not be obtainable under the laws of the Cayman Islands and so the Privy Council did not consider it to be a proper use of the power of assistance to allow Cayman liquidators to obtain documents in Bermuda to which they would not be entitled under Cayman Law.

These principles were approved in the Guernsey Royal Court in *Brittain v JTC*[4] where it was held that for a foreign insolvency office holder to bring an action in the Royal Court Guernsey must

have enacted the equivalent insolvency legislation or have similar common law powers. In that case it meant that a liquidator could not seek information under the common law from directors of a company based in Guernsey because of a lack of legislation in Guernsey available to local liquidators for an equivalent information seeking exercise. It is worth noting that this situation is due to change shortly with the advent of amendments to Guernsey Company Law (mentioned above) which will allow office-holders to seek certain information from former office-holders.

The case of *Lee Douglass**[5]*** provides further insight into issues affecting cross-border personal bankruptcy. An application was made to recognise the appointment of the joint trustees in bankruptcy in Guernsey and for ancillary orders relating to the right of these trustees to collect in funds and records. Mr Douglass was, however, already involved in désastre proceedings in Guernsey (a customary law legal process over the Guernsey personalty of someone whose liabilities exceeds their income). This meant that HM Sheriff had already auctioned off the majority of Mr Douglass' assets and was holding the proceeds. The question remained whether there were enough assets over which a Royal Court recognition order could take effect. Due to the expense of obtaining a letter of request from the court in England, the trustees in bankruptcy applied directly to Guernsey for recognition relying on the principle of modified universalism found in the *Singularis* case. The Deputy Bailiff held that, as the powers to collect in assets and obtain control over records were ordinary consequences of recognition, the Royal Court would grant assistance without a letter of request. However, the Court held that, under Guernsey law, title over the sold assets had already passed to the Guernsey creditors and so the trustees had no right to collect in those assets.

In conclusion, Guernsey is a jurisdiction that is well used to dealing with cross-border issues and has developed practical tools to assist foreign office holders whether under section 426 of IA 1986 or under the common law.

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[1] (1996) 22 GLJ 83.

[2] Batty (as liquidator of Keane Property (Tolworth) Ltd (in liquidation)) v Bourse Trust Company Limited (as trustee of Thorpe Heritage Investment Ltd. FURBS) and Bourse Directors Limited [2017] GLR 54.

[3] Singularis Holdings Limited v PricewaterhouseCoopers [2014] UKPC 36.

[4] In the matter of X (a Bankrupt) Brittain (Trustee in Bankruptcy of X) v JTC (Guernsey) Limited [2015] GLR 248.

[5] In the matter of Douglass (in bankruptcy) and in the matter of an application by Krasner and Wright [2017] GLR 234.

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