

Modified Universalism: an analysis of the Royal Court of Jersey's ruling

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Introduction

In the context of insolvency, the principle of "modified universalism" (**Universalism**) is defined by Lord Sumption in *Singularis Holdings v Price Waterhouse Coopers* as:

"... a recognised principle of the common law. It is founded on public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of local businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on the basis that will be recognised and effective internationally". [1]

The principle has recently come under scrutiny in the case of *Investin Quay House Limited (in liquidation) v BUJ Architects LLP*. [2] While the Royal Court of Jersey (**Royal Court**) was principally concerned with whether or not to exercise its discretion to impose an interim injunction, the underlying legal issue was the application of Universalism.

Background

Investin Quay House Limited (in liquidation) (**Company**) was incorporated in Jersey in 2013 with the primary purpose to develop a commercial property known as Quay House (**Property**) purchased in 2014. Shortly after the Property was sold in 2018, the Company paid its director, John Downer (**Director**), in excess of £22.6 million (including interest) by way of loan repayments. Following these repayments, the Company was left with approximately £91,000 of assets. However, it also had significant liabilities. Such liabilities included a judgment debt in the sum of £354,000 plus interest (amounting to a total of £433,713 including interest as at 9 July 2021) in favour of BUJ Architects LLP. Other significant liabilities arising from awards or court orders included a claim for

£665,300 plus interest in favour of Local London (Quay House) Limited and £180,000 plus interest pursuant to a further English court order in favour of TC Developments (South East) Limited. In light of these liabilities, the Company was unable to pay its debts as they fell due. This ultimately led to a winding up petition under English law being presented against the Company on 27 July 2020 (**Petition**) by BUJ Architects LLP (**Petitioner**).

Injunction Application and the Royal Court's application of Universalism

On 8 September 2021, the Company issued an ex parte application to the Royal Court seeking injunctive relief to restrain the Petitioner from pursuing the Petition (**Interim Injunction Application**). Prior to this, on 3 June 2021, the Director called and attended a meeting of the Company as a creditor, director and shareholder where he resolved to place the Company into a creditor's winding-up procedure in Jersey. The Interim Injunction Application was therefore an attempt to prevent the Company being wound up in England and to allow for the liquidation of the Company to be carried out in Jersey.

Insolvency proceedings had therefore already commenced in England and the High Court of Justice (**High Court**) had determined that the Company's centre of main interest (**COMI**) was England and Wales.

The Royal Court applied the well-known principles required for obtaining injunctive relief:

[3]

Firstly, the Royal Court held that merely because the Company's COMI is one jurisdiction does not mean it is not managed or controlled in another. The Royal Court confirmed that Universalism is a principle recognised by Jersey law, namely that there is a presumption in favour of the jurisdiction of incorporation being the place where the insolvency process should usually occur (ie in Jersey). The Royal Court therefore considered there was a serious issue to be tried.

Secondly, the Royal Court recognised that damages would not be an adequate remedy for either party given that the Company would be placed into liquidation if the injunction was refused.

However, thirdly (and in relation to the balance of convenience), following an analysis of the particular facts of this case, the Royal Court further recognised the likely detriment to the Company's creditors if this injunction was granted and the insolvency proceedings progressed in Jersey. As briefly detailed above, the Director received significant repayments from the Company which were alleged to prefer the Director to other creditors (**Alleged Preference Payments**). Although the Royal Court made no finding in respect of the Alleged Preference Payments, it acknowledged that there was some evidence indicating that the Director was attempting to prefer

himself and defeat the claims of its other creditors by relying on Jersey legislation. The Alleged Preference Payments had been made more than one year, but less than two years, before the Petition. That meant that an English liquidator could seek to recover those payments under the Insolvency Act 1986. However, it was outside the period in which similar relief could be sought in Jersey under the Companies (Jersey) Law 1991. It was this factor which appeared to tilt the balance of convenience for the Royal Court to dismiss the Interim Injunction Application and effectively allow the Petition to proceed in the High Court.

The Interim Injunction Application was followed by an extemporary judgment of the Royal Court refusing to grant the Company leave to appeal and a stay of execution of costs. [4] Further, on 30 November 2021, James McNeill QC (sitting as a single judge) in the Jersey Court of Appeal considered the Company's appeal against the decision of the lower court and determined that the Company's appeal had no prospect of success. [5] Shortly before this judgment, the High Court heard the Petition and granted the winding up order against the Company on 17 November 2021.

Conclusion

The Royal Court's decision provides significant comfort to creditors that it will use its inherent jurisdiction and discretion to ensure that legitimate creditors (even in a separate jurisdiction) are in the forefront of its decision making process. Where there are jurisdictional conflict issues, there are strong arguments that creditors should "play the ball as it lies" and that a company should be entitled to enjoy the protection afforded by the operation of the statute in its jurisdiction of incorporation. However, the Royal Court has in this case adapted the recognised principle of Universalism and provided the Company's creditors the ability to rely on the more favourable law of England and Wales in relation to preference payments. In this respect, the Royal Court has put the interest of creditors before its own jurisdictional influence. The Royal Court observed that its decision may have swung the other way had the Jersey insolvency procedure been initiated a year earlier.

In reality, the Royal Court's pragmatic approach based on its inherent jurisdiction is not new. The Royal Court has for years showed its willingness to assist with the recognition of foreign insolvency proceedings. In addition, where Jersey law lacks statutory procedures that are implemented in other jurisdictions, it has endeavoured to make use of its relationship with foreign jurisdictions to benefit from the law of that jurisdiction. On a number of occasions, the Royal Court has exercised its inherent jurisdiction to issue a "letter of request" to the High Court seeking the administration (a procedure not available in Jersey) of a company incorporated in Jersey with its assets located in England and Wales. The intention of this request would be to achieve a better realisation for creditors than an *en désastre* or winding-up procedure in Jersey (see *OT Computers Limited* [6]). In the context of Universalism, this approach is likely to increase the commercial attractiveness of Jersey as a jurisdiction to do business, and provides comfort to directors and creditors alike that the Royal Court will strive to find the fairest outcome if insolvency issues arise.

[1] [2014] UKPC 26

[2] [2021] JRC 233

[3] Set out in *American Cyanamid v Ethicon* [1975] AC 396

[4] [2021] JRC 255

[5] [2021] JCA 299

[6] [2002] JLR Note 10

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