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ARTICLE

Just and Equitable Winding Up in Jersey: A Flexible Friend?

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Synopsis

The insolvency regime in Jersey is an interesting mix of English law and Norman customary law influences. Jersey has four principal methods of winding up a company:

1. Summary winding up;
2. Creditors winding up;
3. Just and equitable winding up; and
4. Désastre

Whilst there are limitations to the insolvency options available in Jersey, for example the absence of an administration process, the Royal Court has shown itself to be willing to take a pragmatic approach when dealing with corporate insolvencies to enable the best possible outcomes for creditors.

The two areas in which the Royal Court has most frequently shown its willingness to assist creditors are (i) in relation to the recognition of foreign officeholders and (ii) the use of the just and equitable winding up regime. This article however focuses on the use of just and equitable winding up in Jersey and the flexible approach the Royal Court has adopted to this regime.

Just and equitable winding up – the legal basis

Just and equitable winding up is provided for by Article 155 of the Companies (Jersey) Law 1991 (the 'Law') which states that:

> (1) A company, not being a company in respect of which a declaration has been made (and not recalled) under the Désastre Law, may be wound up by the court if the court is of the opinion that-
>
> a. It is just and equitable to do so; or
>
> b. It is expedient to do so.
>
> (2) ...
>
> (3) ...
>
> (4) If the court orders a company to be wound up under this Article it may-
>
> a. Appoint a liquidator;
>
> b. Direct the manner in which the winding-up is to be conducted; and
>
> c. Make such orders as it sees fit to ensure the winding up is conducted in an orderly manner.

The Royal Court therefore has a broad jurisdiction under Article 155 of the Law and has noted in the case of *Re Leveraged Income Fund Limited*[1] that whilst Article 155 of the Law is based on a similar provision of the Companies Act 1985 and the English courts have developed certain categories of cases where the court will exercise its power under the just and equitable jurisdiction, the Royal Court is not confined to such categories.

The Royal Court in *Re Leveraged Income Fund Limited* went on to state that the words 'just and equitable' are general words and quoting from Palmers Company Law Vol. 3 said:

> 'It has sometimes been suggested that there is an exhaustive list of situations that may fall within the scope of the "just and equitable" clause, but it now seems that although such classification may be convenient for purposes of presentation, the words "just and equitable" require a more flexible interpretation.'

It is therefore clear that the Royal Court has a wide jurisdiction and is able to adopt a flexible approach in such circumstances. The Royal Court summarised its approach to just and equitable winding ups in the unreported case of *Jean v Murfitt*[2] stating that:

> 'We conclude by observing that the words "just and equitable" in Article 155 of the 1991 Law should be given a flexible interpretation. Justice and equity cannot be confined within the four corners of specific instances.'

Notes

1 [2002] JLR 209.
2 (Jersey Unreported 11 December 1996).

The scope of just and equitable winding up – three key cases

1. Representation of Poundworld (Jersey) Limited[3]

This is an important case which provides guidance on the exercise of the Royal Court's jurisdiction to order a just and equitable winding up. Poundworld was a Jersey company which had been trading for many years before it ran into financial difficulties. The Royal Court was satisfied that the company was insolvent applying the relevant test in Jersey, namely that it was not able to pay its debts as they fell due. It should be noted that this test differs from the balance sheet test applied in England and Wales and a number of other common law jurisdictions.

The directors of Poundworld had initially intended to conduct a creditors' winding up and had given notice of the necessary meetings of creditors and shareholders that were required to take place. In the interim however there were significant developments which caused the directors to change their approach and instead make an application to the Royal Court for a just and equitable winding up, having formed the belief that this approach would be more beneficial for the creditors of the Company.

The crux of the argument put forward by Poundworld's Counsel was that in the special circumstances of the case the Royal Court should make an order for just and equitable winding up, rather than leave the creditors' winding up process to run. This argument was advanced due to the time critical situation facing the company and the delay that would arise from waiting until the scheduled meetings of creditors and shareholders had taken place. Two particular matters were relied upon by counsel to justify the application.

The first matter related to stock held by the shipper Poundworld worked with. The arrangements in place between the shipper and Poundworld provided that much of Poundworld's stock was held free of charge in the shipper's warehouse. At the time of the application there was approximately £100,000 of stock at cost price held in the shipper's warehouse. Poundworld however owed the shipper £28,000 and the shipper was threatening to exercise a lien over the stock and to sell it to recover the sums owed to it. Whilst it was not accepted by Poundworld that the lien claimed was valid, Poundworld was unable to gain access to the stock without legal action or paying the sums owed.

The evidence placed before the Royal Court from the proposed liquidator and one of the directors of the company, in support of the application, identified that if the stock was sold by the shipper it was unlikely to realise enough to clear the debt owed to the shipper and was therefore unlikely to provide a surplus for other creditors. In contrast it was asserted that if the stock could be released and was sold from Poundworld's shops at retail value the proceeds could, on a conservative estimate, realise £150,000 and possibly as much as £200,000. Due to the historic relationship between Poundworld and the shipper it was thought unlikely that the shipper would agree with the directors to release the stock but if a liquidator was appointed it was felt the shipper may be willing to do so. The importance of the liquidator being seen to be independent and subject to the supervision of the Royal Court was identified as a key reason for this view.

The second matter involved the stock in the four retail outlets of Poundworld. Rent was overdue on three of the premises. One of the landlords was threatening to exercise his customary law rights over the stock held and there was concern that the other landlords would follow suit. As was the case with the shipper any sale by the landlords of the stock was considered likely to only realise a small percentage of the cost price. If however the stock were to be sold at retail prices from the outlets over a reasonable period it was said that there would be a significant uplift on the sums recovered. The value of the stock was estimated to be, at cost price, approximately £80,000. It was again asserted that the creditors, in this case the landlords, would be unlikely to reach an agreement with the directors of Poundworld but would be likely to do so with a liquidator.

The view of the proposed liquidator was that it would be in the best interests of the creditors for the stock held at the shipper's warehouse and at the retail outlets to be sold at retail prices over a period of six weeks. The key supporting factors identified for this view were:

1. The stock was Poundworld's only material asset.
2. If sold at retail prices the stock may provide a reasonable prospect that preferred creditors would be paid in full and ordinary creditors would receive a 'modest dividend'.
3. If the stock were to be sold at wholesale prices in bulk it would be unlikely that there would be anything more than very limited recovery for anyone other than the landlords and possibly the shipper.

The Royal Court was satisfied that if the appointment of a liquidator was to be delayed until the scheduled creditors' meeting, there was a substantial risk that the interests of the creditors as a whole would suffer a significant negative effect.

The Royal Court challenged counsel by observing that he was asking it to make an unusual order and noting that the Law provided a specific procedure to be used for the winding up of insolvent companies, namely the creditors' winding up regime. The Royal

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3 [2009] JRC 042.

Court observed that the creditors' winding up regime gave creditors a say in the choice of a liquidator and in supervising the conduct of the liquidation through a liquidation committee. As such, the Court questioned whether it was right for it to order the just and equitable winding up of an insolvent company when the creditors' winding up regime existed.

The Royal Court further stated that it should exercise caution before ordering a just and equitable winding up of an insolvent company, whilst at the same time acknowledging that Article 155 of the Law provided it with a wide jurisdiction to order a just and equitable winding up. In the circumstances of the Poundworld case the Royal Court was satisfied that 'the best interests of the creditors would undoubtedly be served by Poundworld being able to sell its remaining stock from its outlets at retail prices by continuing to trade for the limited period necessary to achieve this'.

The Royal Court was also satisfied that if it did not order an immediate just and equitable winding up there would be prejudice to the body of creditors as a whole if they were required to wait until the creditors meeting that had been scheduled. The Royal Court further justified authorising the liquidators to secure the stock and continuing to trade at retail prices by concluding that it was clearly in the best interests of the creditors as a whole.

The Court showed that it was alive to the fact that it was making an order for a just and equitable winding up without hearing from the creditors of Poundworld, some of whom may have potentially been prejudiced by its decision, and therefore required that notice be given to creditors without delay and additionally gave permission for any creditor to apply to it to seek to have the order set aside.

2. Re Representation of Collections Group[4]

The second key case is that of *Re Representation of Collections Group*. The Royal Court was asked for the first time to order a just and equitable winding up in circumstances where the proposed course of action for the liquidators was to enter into an agreement to sell as much of the business and assets of the Collections Group to a new company, in what would be known in England as a 'pre-packaged sale'. The Court observed that this was something sometimes done by administrators but that in Jersey the concept of administration does not exist. The Royal Court noted that it was clearly established that it had a wide discretion under Article 155 of the Law when considering applications brought for a just and equitable winding up. The Royal Court was satisfied that it had the jurisdiction to make the orders sought in this case and turned to consider the question of whether it should exercise its discretion to do so.

It was acknowledged by the Royal Court that such a sale could sometimes be in the interests of creditors but that due to the potential for abuse the Joint insolvency Committee of England and Wales had issued a Statement of Insolvency Practice (SIP 16) which provided guidance for insolvency practitioners in relation to pre-packaged administrations. The Royal Court made extensive reference to SIP 16 and required that the liquidators pay careful attention to the guidance it provides.

The Collections Group employed some 47 full time staff along with approximately ten seasonal staff and was in a dire financial position. The companies had relatively limited assets in the way of stock and other fixed assets. The proposed liquidator summarised the companies' position as being that they could not pay their staff, their obligations in respect of their premises or their stock. Consequently it was submitted to the Royal Court that if the order was not made the companies would need to be closed immediately, all of the staff would become unemployed and there would be almost no payment to any creditor.

The proposal put to the Royal Court was that if the companies were free of their historic debt, could be restructured and receive new investment then it would be possible for a significant part of the business to trade successfully and profitably. An investor unconnected with the companies had been identified who was prepared to provide an injection of funds of at least £400,000 if the businesses were acquired by a new company.

The proposed sale agreement that was to be entered into by the liquidator involved the sale of such of the business and assets of the companies as the new company was willing to acquire, with the sum ultimately to be paid equal to 20% of net profits of the business generated within one calendar year of the acquisition. The new company would also pay 25% of any net proceeds of sale if it should dispose of any part of the business within a year of the acquisition. Although the potential sums would not realistically clear all of the debts of the companies there was a reasonable prospect the preferential creditors could be paid in full or in part with little chance that the proceeds would be sufficient to pay ordinary unsecured creditors.

The Royal Court heard a number of reasons from counsel as to why it should order a just and equitable winding up. In summary it was argued that the companies were hopelessly insolvent and would have to cease trading immediately if the Court did not approve the pre-packaged agreement. This would have caused the loss of 47 jobs, have a negative impact on the local retail market and cause there to be no dividend for

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4 [2013] JRC 096.

any creditor. In contrast counsel highlighted that if the Court ordered the just and equitable winding up, around 40 jobs would be saved and there would be a realistic prospect of preferred creditors receiving a dividend within 12 months.

Of significant concern to the Royal Court was ensuring it did not approve a 'Phoenix' agreement which resulted in companies with the same or similar beneficial ownership emerging with the assets of the business but without the creditors. The Royal Court was satisfied in the circumstances that this was not the case. Even though a director of the companies was to be involved with the proposed purchaser, he did not own any part of the companies, and it was in the best interests of the creditors for a just and equitable winding up to be ordered, the Royal Court accepting the reasons put forward by counsel.

3. Representation of Julian Charles Tyacke[5]

The third case illustrating the scope of the just and equitable winding up regime in Jersey is *Re the Representation of Julian Charles Tyacke*. This case related to an application to the Royal Court for an order for a just and equitable winding up in relation to five companies which formed part of a wider corporate structure, including companies incorporated in a number of different jurisdictions across the globe. There were considerable intercompany links within the group and the assets of the Jersey companies were in a number of locations across the globe with the majority in the Middle East. The group of companies of which the Jersey companies were part was operating at a substantial loss and the Jersey companies were cash flow insolvent.

The application made to the Royal Court was part of a wider process involving the other companies in the group structure which was intended to bring the companies to an end in accordance with the relevant processes in each jurisdiction. The Royal Court observed that the corporate structure involved was 'on any analysis complex' and that it was apparent that in respect of the winding up there would need to be significant levels of co-operation between the Jersey companies and the other group companies. The assets of the corporate group were spread across some 38 sites located across the world and inevitably co-ordination would be required to secure those assets so that the winding up could be progressed in an orderly manner and avoid the risk of improper preference of certain creditors over other creditors.

As in the two other cases we have looked at, the Royal Court observed that its jurisdiction to order a just and equitable winding up was a broad one. In considering the application the Royal Court stated that it was being asked to exercise its discretion to enable the Jersey companies to be subject to a just and equitable winding up as a result of their insolvency. The Court cited with approval the decision in *Poundworld*, in which the Royal Court confirmed that it could order a just and equitable winding up where the company to be wound up was insolvent.

The Royal Court determined that a désastre, a form of insolvency procedure open to creditors and debtors where the Viscount (Jersey's official receiver) is appointed to manage the bankrupt's affairs, was not appropriate in the circumstances, noting that the Viscount would be unlikely to be in a better position than professional liquidators. The key reasons identified by the Royal Court in reaching this conclusion were:

1. The Jersey companies were part of a very complicated group of companies. The whole insolvency process needed to be effectively co-ordinated and considerable interaction would be required between the insolvency processes in the various jurisdictions, with many of the systems utilised by the Jersey companies in common with companies in the group located elsewhere;
2. Many of the assets of the Jersey Companies were in 'high risk' jurisdictions and it was important to act quickly in respect of the assets to ensure that they were secured. The Viscount would not have authority to act in those jurisdictions and would need to take extremely urgent action if she were to be able to take any steps;
3. It was important in the circumstances of this case not to enter into a process by which notice would be given to creditors before they are secured as there was a risk of dissipation.

The Royal Court was also satisfied that a creditors' winding up was not appropriate in the circumstances due to the concerns that were expressed about notice being given to some creditors who it was thought may pose a risk to the recovery of some of the group's assets. It is worth noting that a number of the Jersey companies' major creditors had been given notice of the application and were represented at the hearing and that the majority of the major creditors had approved the approach proposed by the representor. The Viscount also agreed that in the circumstances a just and equitable winding up was more appropriate.

The Court concluded that it was satisfied that the companies were insolvent and a just and equitable winding up was the best means of winding up the Jersey companies given the 'highly complex Intercompany and Intergroup relationships and the worldwide location of the assets'.

Notes

5 [2018] JRC 237.

Conclusion

As the cases considered in this article illustrate the Royal Court has shown it is willing to make full use of its wide jurisdiction to order a just and equitable winding up of a Jersey company. The circumstances in which the Royal Court will order a just and equitable winding are diverse and the Royal Court's powers have facilitated attempts to realise the best outcome for creditors in difficult circumstances.

The pragmatic approach taken by the Royal Court in relation to applications for a just and equitable winding up is helpful to creditors and practitioners alike. It has been used to help ameliorate the lack of an administration regime in Jersey and deal with complex insolvency situations that can arise in relation to global corporate structures. It is also indicative of the Royal Court's approach to insolvency situations more generally, to put it simply the Royal Court is focused on facilitating the best outcome for creditors and will use its powers creatively to achieve this aim.

International Corporate Rescue

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