The Company Administration Regime in Guernsey – a Flexible and Creative Jurisdiction

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Administration Orders are now a well established feature of the Guernsey insolvency framework and provide practitioners with a flexible means of assisting recoveries. Whilst the concept of such orders is a relatively new addition to Guernsey law their use has increased significantly as their benefits have become more apparent. The Guernsey regime is similar to equivalent jurisdictions with its purpose being to provide a breathing space in order to maximise realisations or provide the opportunity to restore a company's health.

However, there are significant differences to the regime from, say, that in England and Wales both as to its effect and process. This note provides a brief overview of the Guernsey regime and focuses upon recent developments demonstrating the flexible and creative nature of administrations in Guernsey. Indeed, the flexibility of the legislation coupled with the pragmatic approach of the Guernsey Courts has been key to driving their use. This approach has been illustrated by recent cases including the first pre-packaged sale under an Administration Order.

The legal framework

There is no separate insolvency statute or related code under Guernsey Law. The relevant framework is provided under the company legislation. Administration Orders were first introduced in 1997 for Protected Cell Companies and then extended to other types of company in 2006. The latest iteration of the relevant provisions is found in the Companies (Guernsey) Law 2008 (as amended)(the "Law") which was a consolidating statute. S. 374 of the Law provides that an application for an Administration Order can be made to the Royal Court of Guernsey by various parties (including creditors or the company).

The Court will need to be satisfied that:

(1) The company fails or is likely to fail the solvency test (is unable to pay its debts as they fall due and has assets less than its liabilities); and

(2) That one or both of the purposes of the administration may be achieved – either the survival of the business as a going concern and/or a more advantageous realisation of assets will be effected than on a winding up.

The Court will hear the application and, if successful, then swear in and fix the remuneration of the Administrator(s) and provide any further directions sought as to the powers to be exercised following appointment. From a practical point there are wide powers given to any appointee under the Law. The usual additional direction is one allowing any appointees to act jointly or severally. This stems from the fact that the Court will require a locally based Administrator to be appointed so that it is common to have a joint appointment of a UK and a Guernsey based insolvency practitioner.

Once made, an Administration Order provides a moratorium so that no resolution can be passed for a winding up of the subject company nor can any proceedings be brought against it without leave of the Court. There is an important caveat which differentiates its impact to, say, an English order. In Guernsey an administration order does not prevent the enforcement of secured rights or rights of set off.

Case example – *Gemini*

A good example of the manner in which the regime in Guernsey can provide for better returns for creditors is the case of the *Gemini portfolio (In the Matter of Thistle Investments Limited & Ors*, 21.08.12 Royal Court (unreported) Judge Finch). This concerned administration applications in respect of four Guernsey companies which, in turn, provided the general partners to a multitude of limited partnerships ultimately holding a significant portfolio of commercial properties spread throughout the UK. In addition to the majority lenders there was creditor pressure against individual elements of the structure with action from HMRC and others looming. The Court made Administration orders in respect of all four companies (with a restoration order in respect of one company as it had been struck off for failure to pay registry fees) coupled with letters of request to both the High Court of England and Wales and the Court of Session in Scotland seeking ancillary administration orders in those jurisdictions.

There were significant advantages to taking the administration route in contrast to other creditor led action in, for example, England. The planned aim of the process was to enable a prudent and staged programme of disposals of the underlying property assets whilst avoiding a "fire sale" by dumping them all at once onto the market causing a depressed price. It was relatively inexpensive and the tax benefits of the structures were retained, thereby avoiding catastrophic issues which would have significantly impacted upon creditors' returns. In addition, and in contrast to England, there is no time limit to an administration in Guernsey or requirement to report back to the Court at set intervals thereby supporting the viability of the disposal programme and avoiding unnecessary costs of renewal.

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"Pre-packs" – the Guernsey experience

Whilst cases like *Gemini* provide a template for the manner in which Administration Orders can be deployed effectively in maximising creditor returns with "classic" property holding structures the jurisdiction took a leap forward in the matter of *Esquire Realty Holdings Limited* (17.04.2014, Royal Court, Sir Richard Collas B (unreported)). This was the first occasion upon which the Guernsey Courts had to consider an application for a company to be placed into administration in the context of an intended pre-packaged sale by the administrators of the company's assets immediately thereafter (commonly known as a "pre-pack").

The application was brought by the Security Agent for lenders and hedge counterparties and was, as the Court described it, one piece of a jigsaw of arrangements designed to preserve the operations of the European Care Group – one of the largest operators of specialist adult and children's care homes in the UK. The Court was presented with the evidence both of the hopelessly insolvent nature of the company and of the efforts made to find a purchaser and the fact that relevant service providers and the Department of Health had been kept informed of the position.

The Applicant presented the Court with an agreed proposal supported by the intended Administrators that there would be an immediate sale of the business and assets to a Newco upon an order being granted. There is no express statutory framework in Guernsey for "pre-packs" but the terms of the Law are flexible enough to provide for the same effect. The application was presented on the basis that the proposed sale was the route whereby the second limb of the "threshold" test would be met (the means of providing a more advantageous realisation of the assets of the company).

The Court in exercising its discretion to make the Administration Order made plain that it did not expressly approve the detailed arrangements of the proposed sale albeit that such arrangements were a material factor in its considerations. The Bailiff noted the "special risks of a pre-pack administration" and referred to the Jersey case of *Collections Group* [2013] JRC 096 and the English decisions of *Kayley Vending Ltd* [2009] EWHC 904 and *Halliwells LLP* [2010] EWHV 2036. Particular weight was also placed upon the draft SIP16 report produced by the intended administrators. Whilst of no statutory weight in Guernsey it is clear that such a report will need to be given to the Court in any similar future application. Further, in considering how to exercise its discretion, the Court took into account the decision of Andrew Simmons QC (sitting as a judge of the High Court) in *DKLL Solicitors v HMRC* [2007] EWHC 2067 (Ch).

In that case it was held that the court could take into account the interests of the other "stakeholders of the company" including employees when exercising its discretion. In this matter, the Court noted the interests of other stakeholders including about 5000 staff, 3200 service users in 128 facilities together with their close family members.

In addition to the ground-breaking and innovative nature of this decision, the Court demonstrated its ability to take appropriate steps to safeguard both commercial and other sensitive interests. The main application was preceded by an application for an order that the matter be heard in private and the Court files sealed. The grounds for that application included the risk to the operations of the group if other creditors, including service providers, became aware of the situation.

The Court specifically took into account the risk of disruption of care services provided to the vulnerable people being looked after and the "real risk" of distress being caused to such persons and their families. The Court held that this was a "classic case" where justice could be frustrated if the hearing were held in public. Further, it extended a privacy order concerning the granting of the Administration Order itself for a short time in order that the proposed disposal could proceed without disruption. In addition due to the sensitive and confidential evidence in the affidavits privacy orders remain in place for that evidence.

Summary

Decisions such as *Gemini* make plain the advantages of the Guernsey process whereas *Esquire Realty* demonstrates plainly the ability of the Guernsey Courts to deal with complex situations in a pragmatic but sophisticated fashion in the context of extreme commercial and, indeed, human sensitivity.