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ARTICLE

Guernsey Insolvency Update

Alasdair Davidson, Head of Litigation & Partner, Bedell Cristin, Guernsey, Channel Islands

Guernsey has a long established statutory corporate insolvency framework which has been updated from time to time. Unlike, for example, England and Wales, Guernsey's corporate insolvency legislation is included under the companies law rather than under a standalone insolvency law. The most recent companies legislation is the Companies (Guernsey) Law 2008. The 2008 Law was the result of a wholesale revision and consolidation of the Guernsey corporate legal framework.

From an insolvency perspective, the 2008 Law consolidated the provisions concerning Administration Orders – a development introduced into Guernsey law in 2005 for ordinary limited companies. Those familiar with Guernsey will know that in recent months there have been a string of significant administration applications pertaining to UK orientated property portfolios (for example the administration of the four general partners constituting the 'Gemini portfolio' under the Propinvest Group). This feature sets Guernsey apart from Jersey where there is no equivalent jurisdiction, which has led to a degree of legal gymnastics in recent time to secure a similar effect through recognition of administration orders secured in England but generated through requests from the Royal Court of Jersey.[1]

Not content to rest on its laurels, though, the States of Guernsey has announced recently the recommendations arising from the consultation carried out on proposed changes to the 2008 Law. Whilst its focus was on the corporate law aspects of the 2008 Law the consultation also encompassed the insolvency regime in Guernsey. The purpose of the consultation exercise was to determine what, if any, changes may be required now that the 2008 Law had been in place for some time.

In terms of insolvency law (and pending specific and standalone revision of the insolvency regime in Guernsey) the consultation has recommended a number of amendments. The most significant proposed changes relating to insolvency are as follows:

(1) The introduction of express provision for the restoration of companies that have been dissolved on completion of a winding up.

The laws of other jurisdictions, particularly England and Wales, influence the development of Guernsey company law and make express provision for this. It is felt that an express provision would remove any uncertainty about the extent of the Court's power to order restoration in circumstances where it is just and appropriate – for example to permit the disposal of an asset of a company that has come to light after completion of the winding up.

(2) To provide that the Guernsey Financial Services Commission must be given not less than seven days notice of any winding up application.

At the moment notice is only required under limited circumstances set out in section 409 of the 2008 Law:

- Where the company concerned is a 'supervised company';[2]
- Where it is engaged in a financial services business; and
- Where it is in the class or description of companies prescribed by the GFSC.

The proposed amendment is considered necessary in order to ensure that an application for winding up does not impact upon any regulatory action being taken or contemplated by the GFSC. Whilst it is most unlikely that in the usual run of an application the GFSC would wish to make representations, this amendment will ensure that the GFSC can intervene where appropriate in order to safeguard the interests of, say, investors and uphold the reputation of Guernsey as a well regulated jurisdiction.

It is perhaps worth noting in passing that the GFSC already has the power to seek the winding up of a Guernsey company – section 410 of the 2008 Law enables it to apply to wind up a company on the ground

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1 For example *In the matter of OT Computers Limited*, 2002 JLR N10

2 In general terms this means a company licensed by the GFSC to act as a bank, insurer, investment fund or fiduciary.

that it is desirable to do so 'for the protection of the public or of the reputation of the Bailiwick'. However, in a recent decision of the Royal Court an attempt by the GFSC to make 'representations' on an application by a liquidator for a release at the conclusion of a liquidation was rejected by the court for lack of statutory basis for such intervention.[3]

(3) The introduction of an express power for the Court to provide a release and discharge to a liquidator on the completion of a winding up.

This removes what had been, until recently, a grey area in relation to the Court's jurisdiction in the process of a winding up. There is no Official Receiver in Guernsey and it is important that experienced insolvency practitioners are prepared to come forward and act as liquidators of Guernsey companies. Indeed, whilst there is no express stipulation under the 2008 Law, in practice the Royal Court requires the appointment of at least one locally based experienced individual on any liquidation or administration. The majority of the major appointments before the Guernsey courts have concerned the joint appointment of office holders – one in Guernsey (which is important to demonstrate a continuation of COMI) with others in the UK or further afield. The absence of an express power for the Court to release and discharge a liquidator on completion of a winding up is perceived as a potential disincentive to attracting suitable qualified practitioners who are prepared to act.

This question of release and discharge was addressed for the first time by the Deputy Bailiff of the Royal Court earlier this year in the cases of *Amazing Global Technologies Limited (in liquidation)* and *Kingston Management (Guernsey) Limited (in liquidation)*.[4] These cases were heard together and concerned applications for a release and discharge by a liquidator made under section 426 of the 2008 Law. That section enables a liquidator to seek the Court's directions on any matter arising in relation to a winding up and gives the Court power to 'make such order as it thinks fit'.

In the judgment on 11 June 2012, shortly after the outcome of the consultation on company law changes was published, the Court noted that 'The Liquidator's discharge and release application raises a narrow issue for determination, albeit with potentially far-reaching effects.' The court conducted a review of commentary on the subject and considered the specific provision under English law contained in section 174 of the Insolvency Act 1986 which provides express power to grant a release at the conclusion of a liquidation. The Court concluded that, in his view, the natural meaning of section 426 of the 2008 Law merely enabled a liquidator to seek assistance from the Court in relation to how to deal with something that has arisen during the course of a winding up and which needed to be resolved as part and parcel of the liquidation.

Those practitioners who have had involvement with cases in Guernsey may be aware that the Guernsey courts frequently look to developments in English law for assistance and the fields of corporate and insolvency law are no exception to this.

This was acknowledged by the Court who commented as follows:

> 'In support for his contention that this Court could develop Guernsey's insolvency framework by drawing from principles established in English law, Advocate Newman referred me to *Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited* 2009-10 GLR 38 and, in particular, to two passages in para. 91 of the judgment of Southwell LB:[5]
>
> "*(2) since its importation into Guernsey law in the 1880s, it has naturally been appropriate to look to English law to help in the solution of problems concerning companies which are not covered by Guernsey statutes or customary law; …*
>
> *(7) Guernsey, as a significant centre for financial services of many kinds, needs to develop its commercial laws in ways which provide just solutions in the relatively complex situations which arise, for example, in liquidations of commercial companies. English law provides, in my judgment, a more developed system of insolvency law for use by analogy, than the relatively undeveloped solutions in similar situations in Scots law.*"
>
> I have no hesitation in endorsing those conclusions of Southwell LB as being sound guidance of general application.'

However, the Court then went on to highlight an important principle limiting the use of English legal 'analogies':

> 'The *Flightlease* case concerned whether or not the principle of English law often referred to as the rule in *Cherry v Boultbee* (1839) 4 My & Cr 442; 41 ER 171 should be adopted into Guernsey law. The issue, therefore, was not about adopting something set out

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3 *Amazing Global Technologies Limited (in liquidation)*(unreported) 11 June 2012 where the Deputy Bailiff noted 'The 2008 Law does not make any other provision for the GFSC's involvement in liquidations. This supports my conclusion that the legislature did not contemplate the GFSC being entitled to seek to make submissions or, in the language of section 409, "*representations*" in the context of an application under section 426.'

4 (Unreported) 11 June 2012.

5 LB: Lieutenant Bailiff.

in the English legislative framework on insolvency but rather an equitable principle supplementing that legislative framework. Southwell LB concluded (at para. 91(6)) that "*such an equitable principle can sensibly be adopted in Guernsey law because it is in no way incompatible with Guernsey statutes or customary law, and it adds to Guernsey law concerning insolvent companies the element of fairness and* équité".'

The Court held that due to the different approaches to be found in the system of creditor's meetings between the Guernsey and English regimes, there was an incompatibility of the type described by Southwell LB. Whilst noting that the Court was free to adopt equitable principles supplementing the legislative framework of England, he held that it would not adopt something set out in English statute alone.

The Court also noted that a review of the corporate insolvency regime in Guernsey was ongoing and the Court should exercise caution as a result when considering section 426. The Royal Court has, therefore, clarified an area of doubt and ruled that the current law does not provide for a release and discharge of a liquidator upon completion of the winding up. The good news for prospective liquidators, though, is that the States of Guernsey will legislate shortly to provide for such applications and rectify what might otherwise have been considered a shortfall in the insolvency regime in Guernsey.

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