

# International Corporate Rescue



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## Jersey Companies and UK Administration

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The *Representation of Anglo Irish Asset Finance* [2010] JRC087 was a recent decision of the Royal Court of Jersey relating to an application by a UK creditor for a letter of request to be issued to the English High Court, requesting that an administration order be made in respect of a Jersey company. It was a decision in what has been a developing line of Royal Court decisions over the past 8 years on this subject.

### Background

Since the economic downturn, there has been a growing number of interested parties asking the question whether it is possible to put Jersey companies, particularly those holding UK real estate, but also other assets, into English administration. There is no Jersey statutory equivalent to administration. Where a Jersey company and its creditors are seeking to rescue the company as a going concern, or there is a desire to seek to achieve a better realisation for creditors through an alternative to an insolvent liquidation in Jersey (either by way of a *désastre* or a winding up), in the absence of a local alternative to the terminal effect of a liquidation, it is necessary to consider options available elsewhere. English administration may often offer an appropriate solution.

There are routes by which a Jersey company might fall within an insolvency regime of a foreign jurisdiction, essentially in circumstances where it is insolvent but has its management and/or assets in that foreign jurisdiction. Where a foreign company's centre of main interests is in England, there is English authority (such as *Re BRAC Rent-A-Car International Inc* [2003] 2 All ER 201 and *Re DBP Holdings Limited* [2004] EWHC 1941 (Ch)) to the effect that the English court has jurisdiction to hear a direct application to it for an order placing that non-English company into administration – Jersey companies would be no different. A Jersey company's 'centre of main interests' would be determined, for these purposes, in accordance with the EU Regulation on Insolvency Proceedings. Other English processes might be invoked against a Jersey company: for example, an English Law of Property Act 1925 receiver may potentially be appointed over the UK property of a Jersey company under the terms of an English law security agreement

without involving the court. Having said that, depending upon the circumstances (essentially where there are steps to be taken in Jersey), it would be advisable for a receiver appointed in such circumstances to obtain recognition in Jersey. In any event, at the very least, the applicant for recognition would be well advised to liaise with the Jersey Viscount's Department (the Viscount being the officer of the Jersey Court with responsibility for the conduct of both corporate and personal bankruptcies under the Bankruptcy (*Désastre*) (Jersey) Law 1990) with regard to steps that might be required to be taken in respect of the company.

Notwithstanding the potential for a Jersey company to become subject to an English insolvency proceeding, the Jersey Court does have jurisdiction to seek the involvement of the English Court through the issue of a letter of request. There are a variety of reasons why a party might first seek an order of the Jersey Court for the issue of a letter of request in the context of an intended application for an administration order.

Although a matter of English law, it is understood that where a Jersey company's centre of main interests is not in England, any application for an English administration of the Jersey company would necessarily need to be made pursuant to a letter of request from the Royal Court to the English court, in order to provide a basis for the English Court to exercise its jurisdiction under Section 426 of the Insolvency Act 1986.

Where the centre of main interest of the Jersey company is in England, there are nevertheless a number of factors which militate towards obtaining a letter of request, including the following:

- (a) obtaining a letter of request would ensure that the Royal Court would recognise the appointment of the English administrators of the Jersey company. As noted, it would be advisable for the English administrators to obtain recognition in Jersey where they need to deal with Jersey assets or take other steps in Jersey;
- (b) it may be questionable whether the Jersey company's centre of main interests is in England, or should be stated to be in England for tax or other reasons; and
- (c) based upon principles of comity, where a letter of request has been issued by the Royal Court to the

English Court, thereby seeking the assistance of the English Court to exercise its own jurisdiction over the Jersey company, it would likely preclude the possibility of another creditor (or the company itself) successfully applying to the Jersey Court for a declaration of *désastre* in respect of the company.

### The Jersey Court's approach to applications for letters of request

Typically applications are made by the Jersey company, but they can also be made by creditors. For example in *Representation of The Governor and Company of the Bank of Ireland* [2009] JRC 126, the Royal Court granted an application from a creditor of two insolvent Jersey companies for a letter of request to be made to the English court to put the Jersey companies into English administration. One of the other creditors of the Jersey companies was the Jersey Comptroller of Income Tax and provisions were included in the letter of request that was ultimately granted, seeking comfort that this debt was given priority status under English law. Interestingly, previous Jersey cases before *Representation of The Governor and Company of the Bank of Ireland* had been brought by the debtor company rather than a creditor, and whilst there does not seem to be any doubt that the debtor company had sufficient interest to make the application, it is comforting for creditors to know that all things being equal, there is now authority for their bringing the application before the Court.

From a procedural point of view, advance notice of any application for the issue of a letter of request would need to be given to the Viscount, who would expect to be provided with a copy of the draft application before it is filed. The Viscount would be unlikely to wish to take part in the hearing, but rather would typically seek details of the indebtedness of the Jersey company with a view to ensuring that it had no creditors in Jersey that would be prejudiced by the commencement of English administration (as opposed to Jersey insolvency proceedings).

The application to the Royal Court would be by way of a Representation (the formal court document) supported by affidavit evidence sworn by an appropriate representative of the applicant. There would be a hearing of the application. Naturally, the evidence will be key in demonstrating to the Royal Court why it should exercise its discretion and issue the letter of request. Based on previous decisions (such as *In re O.T. Computers Ltd* 2002/29 (31 January 2002) and *Representation by Doltable Ltd* [2005] JRC 038A), the Royal Court would expect supporting affidavit evidence to include the following:

- (a) financial statements or a valuation showing the Jersey company's insolvency according to the cashflow and/or balance sheet tests, and valuing

the Jersey company's assets on the basis that an administration order would be made (or if not made, on the basis that the company would be subject to a *désastre* or a creditors' winding up);

- (b) a draft letter of request in a form acceptable to the Royal Court as well as the English court; and
- (c) an opinion from English Counsel that:
  - (i) the English court would receive the letter of request in the form drafted;
  - (ii) receipt of the letter of request would enable the English court to consider whether to make an administration order; and
  - (iii) on the basis of the material available, Counsel is of the view that the English court would be likely to make the administration order.

In deciding whether to grant the application for the letter of request, the Royal Court would consider a number of factors. Some of the factors that have been considered in the cases to be persuasive include:

- (a) the insolvency of the company on a cashflow basis (as this is the test to be applied for the commencement of a *désastre* or a creditors' winding up);
- (b) whether the management and economic activities of the Jersey company are primarily undertaken in England although the EU Regulation on Insolvency Proceedings does not apply directly in Jersey, the Royal Court may still have regard to the concept of centre of main interests;
- (c) if granting the application would be in the best interests of the company and its creditors, such as to achieve a better realisation for the creditors as a whole;
- (d) whether an administration order would facilitate a sale of the company's business or a postponed sale of the assets of the company to achieve greater sale proceeds, thereby resulting in a better realisation for creditors than the sale of the assets for break-up value as would be the case in a *désastre* or a creditors' winding up (e.g. *In re O.T. Computers Ltd*; *Representation of The Governor and Company of the Bank of Ireland*);
- (e) whether there would be any duplication of costs resulting from potentially concurrent insolvency proceedings in England and Jersey (which was a consideration in the case of *In the matter of O.T. Computers Ltd*);
- (f) whether the assets of the company are primarily situated in England (as in the case of *Representation by Doltable Ltd*); and
- (g) that the powers available to English administrators are much wider than those of receivers, allowing

them to do anything necessary or expedient for the management of the affairs, business and property of the company (as in the case of *Representation of Anglo Irish Asset Finance*).

Ultimately, if the Royal Court is satisfied of the following key factors, the application for the letter of request will likely be granted:

- (a) the Jersey company is insolvent on a cashflow basis;
- (b) granting the application would be in the best interests of the company and its creditors as a whole (and not prejudice a particular class of creditors); and
- (c) the English court would be likely to make the administration order.

### Facts of *Anglo Irish Asset Finance*

As far as the facts of *The Representation of Anglo Irish Asset Finance* are concerned, the Jersey company had defaulted on lending in excess of £30m from the applicant bank. The bank had appointed receivers in respect of the property of the company. The receivers had ensured completion of the development of that property (being the project for which the bank had loaned the funds). However, the company nevertheless remained unable to pay its debts as they fell due and was also insolvent on the balance sheet test. Accordingly, the bank wished to apply for the appointment of administrators in England, the company's property being located in London.

The application followed the principles set out in earlier decisions (such as *Re O.T. Computers Limited* and *In The Matter of First Orion Amber Limited*) relating to the obtaining of a letter of request to form the basis for the grant of an order under Section 426 of the Insolvency Act 1986. The Royal Court received affidavit evidence from the bank's UK solicitors and English Counsel setting out the background to the receivership and also explaining the basis on which an administration order would be sought. That evidence confirmed the limited scope of the receivers' appointment, and the fact that they had no duty to deal generally with the claims of unsecured creditors, nor to act beyond the security documentation pursuant to which they were appointed. The court noted, by contrast, the powers that

administrators have and that, based upon Counsel's opinion, the placing of the company in administration might well achieve a better result for the company's creditors as a whole, and in particular with a view to realising the property to enable some distribution to the bank as a secured creditor. Both of those possible results met two of the recognised objectives of seeking an administration order as noted above. In the exercise of its inherent jurisdiction, the Royal Court determined that the case was an appropriate one for a letter of request to be issued and made the order accordingly.

### Comment

This case further illustrates the Royal Court's willingness to consider applications by creditors for letters of request seeking the assistance of the English High Court in placing Jersey companies into administration. It is of further note in that the Royal Court recognised the limited scope of a Law of Property Act receiver's appointment and in so doing reconfirmed that the interests of creditors as a whole, in circumstances where a property holding company is clearly insolvent, will be taken into account by the Royal Court in considering such applications.

Whether there will be any greater increase in the use of the application is a matter of speculation. The continued strain on borrowing and with it the consequential inability to refinance and essentially stagnant property prices, will maintain pressure on companies holding UK real estate. In such circumstances there is potential for the administration route to continue to be followed if the lenders are unable to work out a suitable alternative.

It is clear that the Jersey Court (and also the Viscount) has been and continues to be willing to consider proper applications and to lend assistance. However, applicants must be alive to the fact that such an application will by no means be a rubber stamping exercise and careful preparation of a properly supported case will always be required. The Viscount and the Royal Court will move quickly where possible particularly in the kinds of situations that often prevail when administration orders are being pursued on an urgent or expedited basis. However, if possible, and time and circumstances permit, there is no real alternative to a carefully thought through and properly presented application.

## **International Corporate Rescue**

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