

# Insolvency procedures in respect of Jersey companies

The credit crunch has put pressure on a wide range of structures and, as a result, lenders, borrowers and other counterparties are looking more closely at the impact of possible insolvency proceedings. As Jersey companies have often been used in cross-border finance transactions, it is important to be aware of the differences between Jersey and English insolvency procedures for companies.

## What are the main Jersey insolvency procedures for a Jersey company?

These are:-

- (a) a creditors' winding up under the Companies (Jersey) Law 1991 (the "**1991 Law**"). This is commenced by a special resolution of the shareholders. The procedure is broadly similar to a creditors' voluntary winding up under the UK Insolvency Act 1986; and
- (b) a *désastre* under the Bankruptcy (*Désastre*) (Jersey) Law 1990 (the "**1990 Law**"). This may be commenced on application to the Royal Court by a creditor owed a liquidated sum of not less than £3,000, the company itself or, in some circumstances, the Jersey Financial Services Commission. If a creditors' winding up has already commenced when a declaration of *désastre* is made, the winding up terminates.

The 1991 Law also contains provisions relating to just and equitable winding up, summary winding up (similar to a members' voluntary winding up) and schemes of arrangement, which are broadly similar to the equivalent procedures under the UK Insolvency Act 1986 and the UK Companies Act 1985.

There are no Jersey law insolvency procedures equivalent to the UK administration or administrative receivership or to the US Chapter 11 bankruptcy procedures. Insolvency proceedings in Jersey do not combine parent and subsidiary companies' assets into a single pool; the insolvency is on a company by company basis.

## What is the effect of commencement of Jersey insolvency procedures?

On a creditors' winding up, liquidators are appointed, usually by the creditors. The liquidators will stand in the shoes of the directors and administer the winding up, gather in assets, settle claims and distribute assets as appropriate. After the commencement of the winding up,

no action can be taken or continued against the company except with the leave of court. This does not prevent secured creditors enforcing their pre-existing security against the property of the company. The corporate state and capacity of the company continues until the end of the winding up procedure, when the company is dissolved.

On a declaration of *désastre*, title and possession of the property of the debtor vest automatically in the Viscount, an official of the Royal Court. With effect from the date of declaration, a creditor has no other remedy against the property or person of the debtor, and may not commence or continue any legal proceedings to recover the debt. This does not prevent secured creditors enforcing their pre-existing rights against the property now vested in the Viscount, as the Viscount takes the property of the debtor subject to security.

Shares of a company which is subject to a creditors' winding up or a *désastre* may not be transferred without the consent of the liquidators or the Viscount, as the case may be.

## What are the powers of the liquidators or the Viscount?

The liquidators, on a creditors' winding up, may exercise all powers of the company as may be required for its beneficial winding up; they have express power to pay the company's debts.

The Viscount, on a *désastre*, has wide powers to sell all or part of the debtor's property, carry on the business of the debtor as far as is necessary for its beneficial disposal, pay debts, enter into compromises and arrangements with creditors, and exercise any authority and power in respect of the debtor's property which the debtor could otherwise have exercised.

The liquidators and the Viscount may apply to the Royal Court for an order that:

- (a) the directors are personally responsible for the debts and liabilities of the company on the grounds of wrongful trading. (There may also be claims personally against the directors for breach of their fiduciary duties to the company);
- (b) persons who were knowingly party to the company carrying on business with the intention to defraud creditors of the company, or for some other fraudulent purpose, are liable to contribute to the company's assets; and

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- (c) where shares of the company have been redeemed or bought back in the 12 months before the commencement of the creditors' winding up or the declaration of *désastre*, the persons from whom such shares were redeemed or bought back and/or the directors may be required to contribute to any shortfall in the assets of the company.

## What transactions can be set aside?

The liquidators, on a creditors' winding up, and the Viscount, on a *désastre*, may:

- (a) disclaim any onerous property (including unprofitable contracts, but excluding Jersey real property) by giving notice to interested persons;
- (b) apply to the Royal Court for an order setting aside any transactions at an undervalue or preferences entered into or given within a relevant period before the commencement of the creditors' winding up or the declaration of *désastre*; and
- (c) apply to the Royal Court for an order setting aside extortionate credit transactions entered into in the prior three years.

On a *désastre*, the Viscount may apply to the Royal Court for an order setting aside excessive approved pension arrangement contributions.

These statutory provisions are broadly similar to the equivalent UK statutory provisions.

## How are assets distributed on a creditors' winding up or *désastre*?

The liquidators or, as the case may be, the Viscount will apply the realised assets of the company as follows:-

- (a) payment of the fees and expenses of the liquidators or the Viscount. The fees of the Viscount can be material, consisting of 10% of the value of all assets realised and 2.5% of the value of all assets distributed;
- (b) payment of up to six months' salary and holiday pay and bonuses of any employee (subject to statutory limits);
- (c) certain amounts due in respect of health insurance, social security, income tax, rent and parish rates; and
- (d) payment of all proved debts.

Where property is subject to a security interest under the Security Interests (Jersey) Law 1983, the proceeds of sale are paid and in accordance with the waterfall in that law as follows:

- (a) in payment of the costs and expenses of the sale;
- (b) in discharge of security interests according to their chronological order of creation; and
- (c) in payment of the balance to the liquidators or the Viscount.

Article 34 of the 1990 Law provides for mandatory set off of mutual credits, mutual debts and other mutual dealing between a debtor and a creditor. (This is similar to rule 4.90 of the UK Insolvency Rules 1986). Article 34 is also applicable, by extension, to a creditors' winding up. By virtue of the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005, contractual set-off provisions may survive the bankruptcy of any party or other person and will be enforceable in accordance with their terms, regardless of any lack of mutuality.

## Insolvency and Jersey trusts

A Jersey company may act as trustee of a Jersey law trust, such as a Jersey property unit trust (or JPUT). As a matter of Jersey law, a trust is not a separate legal person but acts through its trustee. The insolvency procedures in the 1991 Law and the 1990 Law relate to the insolvency of a legal person, and do not apply to a trust. If the assets of the trust are less than its liabilities, it is likely that the trustee would apply to the Royal Court for directions.

If the company acting as a trustee becomes insolvent, its personal creditors have no right or claim against the trust assets. If a company which is a trustee is subject of a declaration of *désastre*, it must resign as trustee forthwith.

## Cross-border insolvency

Article 49 of the 1990 Law provides that the Royal Court shall assist the courts of prescribed countries and territories (currently the UK, Guernsey, the Isle of Man, Finland and Australia) in all matters relating to the insolvency of any person to the extent it thinks fit. However, this does not exclude the pre-existing customary law right of the Royal Court to exercise its inherent jurisdiction to assist non-prescribed countries or to have regard to the rules of private international law.

Although the EU Regulation on Insolvency Proceedings does not apply in Jersey, the Royal Court may still have regard to where the debtor's centre of main interests is in considering applications to commence insolvency proceedings. It may be possible to put a Jersey company into administration under English law, by making an application for a letter of request from the Royal Court to the English court. It would be necessary to show in the application that English administration would be likely to achieve the best possible outcome for the debtor and



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creditors (as opposed to local alternatives, such as a creditors' winding up or a désastre).

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