

Recognition of Foreign Insolvency Office Holders in Guernsey

Introduction

Insolvency office holders appointed in foreign jurisdictions often need to come to Guernsey to recover assets of the insolvent entity which are being held in the jurisdiction. Part of that process will involve recognition of the officer holder's proceedings in question by the Royal Court of Guernsey ("Royal Court") which will then, in many circumstances, enable the office holder to take the recovery action in question as if it were his home jurisdiction. As Guernsey is not part of the European Union, and as it currently has no plans to adopt the UNCITRAL model law of cross-border insolvency, the foreign office holder has two options when seeking recognition from the Royal Court, depending in which foreign jurisdiction the insolvency proceedings have been opened.

Judicial International Cooperation

Under section 426 of the UK Insolvency Act 1986 ("1986 Act"), cooperation and reciprocal assistance in the insolvency arena between the various courts of the United Kingdom and other designated countries and territories is promoted and encouraged. The Insolvency Act 1986 (Guernsey) Order 1989 extended subsections (4), (5), (10) and (11) of section 426 to Guernsey which means that the Royal Court is empowered to provide judicial assistance on insolvency matters to any of the courts of England & Wales, Scotland, Northern Ireland, the Isle of Man and Jersey.

The office holder will apply to the court in his home jurisdiction in order that the home court sends a letter of request for assistance to the Royal Court. The Royal Court will generally not have any discretion to accede to the request unless by doing so it offends public policy or the outcome is oppressive. The leading case within the Bailiwick of Guernsey is *The liquidator of Seagull Manufacturing Company Limited -v- Colin and Susan Slinn* (Guernsey Court of Appeal, August 1991) where an English liquidator sought a private examination of the directors of an English registered company who were resident in Alderney under section 236 of the 1986 Act. It was held that he was able to do so because section 426(5) confers an authority on the court in Guernsey/Alderney to apply the insolvency law of either Guernsey/Alderney or the foreign jurisdiction in relation to comparable matters falling within its jurisdiction.

In Guernsey, the Royal Court has the power to give directions to a liquidator to assist in the performance of

his functions, and this would include ordering the private examination of directors and officers of the company if appropriate. Accordingly, if similar requests were made by courts of jurisdictions to which section 426 has been extended, it is likely that the Royal Court would accede to those requests as long as the relief sought is not contrary to Guernsey insolvency law or where Guernsey insolvency law has a comparable remedy available to insolvency practitioners or creditors of a locally registered company.

The Common Law

Section 426 only applies to the various designated jurisdictions and office holders from those jurisdictions still have to make the initial application to their home court for the letter of request to be sent to the Royal Court, which can potentially be more expensive and time consuming.

The common law, however, offers an alternative route for foreign insolvency practitioners seeking recognition in Guernsey, through the "sufficient connection" test as first seen in the English case of *Schemmer and others -v- Property Resources Limited* [1975] Ch 273. The Guernsey case of *Roy Terry Junior and Durette Bradshaw Plc -v- Bank of Butterfield (Guernsey) Limited* (2006) used and applied the "sufficient connection" test for the first time in Guernsey. As with *Schemmer*, the Royal Court in *Terry* held that there is a sufficient connection where (i) the office holder is appointed in the jurisdiction where the company is incorporated or individual domiciled and (ii) if the defendant submits to the jurisdiction by whose order the appointment was made. It also held that there might be a sufficient connection where (iii) the order of the foreign court is recognised by the law of the place where the company is incorporated, or (iv) the office holder is appointed in a jurisdiction where the management and control of the company is exercised or where it carries on business. In *Terry*, the Royal Court granted recognition under heads (iii) and (iv) above.

Even if there is a sufficient connection, the Royal Court still has discretion whether to grant the relief sought, although unless there is good reason to the contrary (such as a breach of public policy), this discretion will generally be exercised in favour of recognition of office holders in Guernsey. The Royal Court has since exercised its discretion in favour of recognition of US appointed receivers, UK appointed liquidators, UK appointed trustees in bankruptcy in Guernsey and South African trustees of an insolvent estate.



Recognition of Foreign Insolvency Office Holders in Guernsey

Once recognised under the common law, the Royal Court is able to assist the foreign appointed insolvency practitioner in granting a wide variety of remedies such as ordering the delivery up of assets, the examination of directors and officers, injunctive and ancillary relief and costs.

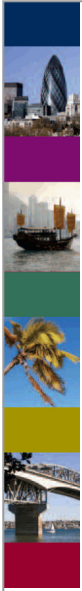
Conclusions

It is relatively easy for a foreign appointed insolvency practitioner to seek recognition in Guernsey and the two alternative routes provide viable and cost effective options for the officer holder in order to enable him to maximise the performance of his functions.

About Ogier

Ogier is an award winning offshore legal and fiduciary services provider. The Group advises on all aspects of BVI, Cayman, Guernsey and Jersey law and associated fiduciary services through a global network of offices covering all time zones and key financial markets.

Ogier continues to be recognised as a leading law firm by the principal legal directories, including Legal 500 and Chambers.



Recognition of Foreign Insolvency Office Holders in Guernsey

Contact details

Guernsey Legal

Caroline Chan
+44 (0) 1481 752262
caroline.chan@ogier.com

Simon Davies
+44 (0) 1481 737181
simon.davies@ogier.com

Nick Gamble
+44 (0) 1481 752257
nick.gamble@ogier.com

Marcus Leese
+44 (0) 1481 737152
marcus.leese@ogier.com

Roger Le Tissier
+44 (0) 1481 737150
roger.letissier@ogier.com

William Simpson
+44 (0) 1481 737163
william.simpson@ogier.com

Fiduciary

Bob Banfield
+44 (0) 1481 721672
bob.banfield@ogier.com

This client briefing has been prepared for clients and professional associates of the firm. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Ogier includes separate partnerships which advise on BVI, Cayman, Guernsey and Jersey law. For a full list of partners please visit our website.