

# Determination of the scope of powers afforded to a trustee in bankruptcy in circumstances where there

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**Please note this briefing does not take into account the new insolvency legislation changes from January 2020 and is in the process of being re-written.**

The recognition of the powers of an English trustee in bankruptcy in Guernsey is generally pursued either by way of a letter of request issued by the foreign court pursuant to section 426 of the Insolvency Act 1986 (**Insolvency Act**) or by way of an application via the common or customary law. The decision of Lee Douglass (in bankruptcy) [1] examines the position (which we understand has previously not been encountered in Guernsey) of an application for recognition under the common law in a situation where there were already *désastre* proceedings in Guernsey. The position was further complicated by the timeline of events, which meant that HM Sheriff had already sold the judgment debtor's assets and the court had to consider the status of those funds and whether they formed part of his estate in bankruptcy. If those funds no longer formed part of his estate in bankruptcy then the implication for the trustee in bankruptcy would be that even if their powers were recognised, there would be no Guernsey situs available.

In Guernsey, Mr Douglass was a party to earlier proceedings and various judgments, in aggregate of nearly £2 million were entered against him. The Acts of Court were passed to HM Sheriff with the arrest of his assets subsequently taking place on 9 January 2015. The indebtedness under these judgments was assigned to a Guernsey Company (**Arresting Creditor**). In England, Mr Douglass was declared bankrupt on 4 January 2017 with the Joint Trustee In Bankruptcy (**JTIB**) being appointed on 22 March 2017. Advocates for the JTIB initially wrote to HM Sheriff to ascertain whether the assets held by HM Sheriff could be paid directly to the JTIB, as there was limited liquidity in the bankrupt's estate to pursue a formal application and on the basis that under English law, assets of the bankrupt automatically vest in the JTIB. The Arresting Creditor summonsed HM Sheriff to pay the proceeds of the assets following the sale. Those proceedings were then adjourned as clearly there were competing interests between

the JTIB and the Arresting Creditor.

The JTIB progressed an application (under the common law) for the recognition of the JTIB which very closely followed section 311 of the Insolvency Act (possession of books and records relating to the Bankrupt's affairs) and consequently sought the recognition of powers that they already had available to them under English law. Under the principle of modified universalism, the Royal Court recognised that it would provide assistance to foreign insolvency office holders under principles of comity, but that the assistance would need to be balanced against certain limitations relating to the form and nature, dependent upon the consequences that flow from the recognition of the JTIB and the existing law in Guernsey.

In considering these factors, the Court referred to an earlier decision (in which Ogier's Advocate Mathew Newman appeared) of *Batty v Bourse Trust Company Limited*<sup>[2]</sup> and explained that under 426 of the Insolvency Act "*there is a duty and not a discretion to act in aid of and be auxiliary to the High Court in England*" and "*the sources of law under section 426 of the 1986 Act as extended are (a) this Court's general jurisdiction and powers, (b) the provisions of Guernsey insolvency law, which would be an updated list of the laws mentioned in section 426(10)(a), as extended and modified, and (c) so much of the law of England and Wales as corresponds to that comprised in (b)*". If the JTIB had brought an application under section 426 of the Insolvency Act, the Court would have been able to confer all of the powers that the JTIB had under English law, to enable the JTIB to conduct those powers in Guernsey. However in applying its discretion on an application under the common law the Court noted that the powers which follow from recognition do not happen automatically and consideration must be given to whether it is appropriate to permit the JTIB to exercise particular powers in the instant case.

The court had regard to the extent of assistance in cross border insolvencies which was recently examined by Lieutenant Bailiff Hazel Marshall in *Brittain v JTC (Guernsey) Limited*<sup>[3]</sup> (also Advocate Newman). The Lieutenant Bailiff gave an indication that she preferred the minority reasoning of Lord Neuberger and Lord Mance in *Singularis*<sup>[4]</sup> and said that as a matter of preference "*I would find against the existence of any common law power in this context, ie an inherent jurisdiction to treat a power conferred only by statute as being available in a case which is not within the statute, relying on some combination of usefulness, a generous assessment of analogy, and resort to a supposed beneficial principle of "modified universalism" of insolvency law, of indefinite and necessarily presupposed extent*<sup>[5]</sup>." The powers that were sought by the JTIB were considered by the Court to be the "ordinary" consequences of recognition rather than a power that has no identifiable equivalent outside of the statutory framework. The issue that the Court was grappling with was that the *désastre* procedure had already been activated and the Court was therefore in a precarious position regarding the powers that were being asserted by the JTIB over the bankrupt's estate and whether the property in the estate was already part of the *désastre* proceedings.

Counsel on behalf of the Arresting Creditor, JTIB and HM Sheriff analysed the legal effect of

section 7 (3) of the Preferred Debts, Désastre Proceedings and Miscellaneous Provisions (Guernsey and Alderney) Law, 2006 (**Preferred Debts Law**) which states that where HM Sheriff has executed an arrest on any goods and has sold the goods then "... *a bona fide purchaser for value of the goods without notice of any ground on which such an application might have been made shall be deemed to have acquired good title to them*".

All three Counsel advanced different interpretations of this section of the Preferred Debts Law as follows:

- i. Counsel for the Arresting Creditor was of the view that it supports the contention that the Bankrupt had lost the legal interest to both former assets and the proceeds once they had been sold and proposed the analogy that the effect of the sale was similar to a situation where the assets of a person are administered by another;
- ii. Counsel for the JTIB was of the view that following the sale of the assets, the Bankrupt has a continuing and enforceable interest in the proceeds of sale;
- iii. Counsel for HM Sheriff was of the view that the analysis led either to the creation of a constructive trust, or that there is a separation of possession and ownership under the customary law (derived from Roman law) with the result that the assets of the Bankrupt and the proceeds of sale would not fall within his estate.

The Court preferred the analogy of the Arresting Creditor under the Guernsey customary law maxim of "*le mort saisit le vif*" which is applied by executors and means that the heirs are the true owners of the deceased's property and that in a similar way, HM Sheriff takes possession of a judgment debtor's property, on the understanding that he will administer that property upon the directions of the Court.

The Court considered that when the HM Sheriff was provided with the Act of Court to conduct enforcement services, that was considered to be sufficient to engage the office holder on behalf of the judgment creditor in the first instance. When goods are arrested that affords the judgment debtor a further opportunity to satisfy the debt, or face the consequences of failure to do so. Where the judgment creditor has not received satisfaction for the debt and returns to Court to confirm the arrest and seeks the permission for HM Sheriff to sell those assets, that step should be viewed as bringing the matter under the jurisdiction of the Court. The fact the arrested goods cannot be sold, absent a direction/order from the Court confirms that title to them has not passed to a third party. In order to sell the goods the court is required to intervene before the judgment debtor loses the ability to demand return of the goods. Therefore the permission to sell the goods confers a provisional entitlement on HM Sheriff to pass title to a third party. However once the goods are sold, title would vest in the third party and the judgment debtors title to the goods would be lost.

In this case the Court found that the Bankrupt's interest in the assets ended at the time that

they were sold. Upon the sale, the proceeds of sale were not held by HM Sheriff as a direct replacement for the sold goods on the same terms. At that time they were held as part of a Court directed enforcement process and the normal route would follow of having the proceeds of sale paid to the judgment creditor and for them to be dealt with through the désastre process. Therefore at the time that the JTIB sought to be recognised in Guernsey, the proceeds of sale did not form part of the estate of the Bankrupt.

In circumstances where a foreign insolvency office holder is seeking to obtain recognition and conduct their duties of office in Guernsey, we would recommend that a formal letter of request is issued from the foreign jurisdiction and that the application follows the route via section 426 of the Insolvency Act. It is also important to consider the stage of any domestic insolvency proceedings as dependent upon their status the foreign office holder may not have title to the assets over which recognition may be exercised.

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[1] Lee Douglass (in bankruptcy) and Maurice Krasner and Joann Wright (Judgment 32/2017)

[2] (unreported, 23 March 2017)

[3] [2015] GLR 248

[4] Singularis Holdings Limited v. PriceWaterhouseCoopers [2015] 2 WLR 971

[5] Brittain v JTC (Guernsey) Limited (Judgment 36/2015)

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