New ground in insolvency in Guernsey

Insights - 30/03/2020

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.

Ogier's team continues to be at the forefront of Restructuring and Insolvency law, acting in two matters that have broken new ground in Guernsey recently.

Partner Mathew Newman appeared before the Guernsey Royal Court for the applicants in two matters which raised several legal issues, some of which have not been addressed previously by the court.

The matters were *In the matter of Maplecross Properties Limited (in liquidation)* (Royal Court, 29 January 2018) (**Maplecross**) and *In the matter of Canargo Limited* (Royal Court, 21 February 2018) (**Canargo**).

Both cases provide lessons for practitioners, as we outline below:

Background

The Maplecross application concerned whether the liquidators of a company had standing to bring an application for the company to be placed in compulsory liquidation by the court.The precise background of the matter is largely irrelevant and too lengthy for this article. The purpose of the application was, however, that due to the structure of the Maplecross group a compulsory liquidation would provide an additional layer of protection to ensure that funds were not distributed to the Libyan Investment Authority (**LIA**), which is the subject of sanctions. It was thought that it would be prudent to ensure that the process of a compulsory liquidation was followed as the Court would appoint a Commissioner whose purpose and focus would be to examine the accounts of the company in liquidation. It was also thought that in this case there might be the potential for disputes which a Commissioner could refer to Court before any final distribution of the assets was made. The application was brought on two alternative grounds: first, that the company was insolvent on a cash flow basis (this ground was later abandoned); and second that it is just and equitable to do so.

The Canargo application is thought to be the first time that the Royal Court has placed a company into liquidation on the basis of having failed to provide a member of the company with a set of accounts. The applicant was the registered owner of 25% of the issued share capital of the company. The applicant is beneficially owned by Clifford Isaak (**Mr Isaak**). The other 75% of the share capital was held directly or indirectly by or on behalf of David John Ramsay (**Mr Ramsay**). The Canargo application was part of an ongoing dispute between Mr Ramsay and Mr Isaak.

Points to note from each judgment

The standing issue in the Maplecross application was dealt with on the basis that pursuant to section 397(1) of the Companies (Guernsey) Law, 2008 (**Companies Law**), the liquidators had the power to bring the application on behalf of the company. In terms of winding-up on the just and equitable ground, the Court decided that given the highly unusual circumstances of the case including: the dispute between the contributories which is being litigated in the High Court; further disagreement which may yet be the subject of litigation including the validity of the further alocations of shares; the sanctions affecting the LIA and the need to ensure that the liquidation process is conducted and in due course concluded without breaching the sanctions regime, the Court was minded to order that the company should be placed into compulsory liquidation. The Court seemed to be particularly concerned with the fact that the liquidators were requesting extra protection. This desire for protection seemed to bring the Court to the conclusion that it was just and equitable to place the company into compulsory liquidation.

In the Canargo judgment it was acknowledged that winding up a company on the basis of failure to file accounts was quite a draconian step. If there appeared to be good and valid reasons for the failure to supply the accounts, those reasons would have to be taken into account in the exercise of its discretion. From the judgment, it would appear that the Court would be inclined to give a respondent to such an application a considerable degree of leeway to provide the reasons and that careful consideration would be given to them. It appears that the Court might even be prepared to adjourn an application in order to give the respondent opportunity to comply with its statutory obligations. In the circumstances of this case, however, the company had the opportunity to comply with its statutory obligations and although during the course of the application the company confirmed that the accounts had not been supplied, there had been no explanation offered as to why this was the case. Having been afforded the opportunity to supply such explanation and failed to do so, the Court decided that it had no reason to believe that accounts would be produced or that anything would be achieved if they were to allow the company a further period within which to comply. The Jurats recognised that the liquidators would have difficulty in discharging their duties in the absence of any accounts however that could not prevent the Court granting the application to wind up the company.

Conclusion

It is possible that each of these decisions have been made "on their facts". There are, however, some lessons that can be learned from each of them. Firstly, in the case of Maplecross, it has been shown that the Court might give considerable weight to circumstances where a liquidator feels that a decision is necessary for the satisfactory execution of its duties. From Canargo we learn that the Court is prepared to make even the most seemingly draconian decisions in circumstances where there has been a complete lack of cooperation on the part of a respondent.

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