

Cross border insolvency – what assistance can Jersey give? A recent example

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As a leading international finance centre, the Royal Court of Jersey is often required to consider insolvency proceedings which engage multiple jurisdictions. Where foreign insolvency proceedings or winding up arise in relation to a group of companies which include a Jersey company and assets, the foreign insolvency official will need to be recognised by the Royal Court and authorised to protect or recover assets in Jersey. Here we examine the assistance that the Royal Court can give to foreign insolvency officials and examine the dynamic and flexible approach that it adopted in the recent case of *Lydian Investments Limited* [2020] JRC 049.

A foreign insolvency official has no standing to act in Jersey and an application to the Royal Court is required in order for the insolvency official to be recognised and authorised to protect or recover assets in Jersey following a foreign insolvency or winding up.

Requests for assistance by foreign courts to the Royal Court can be made pursuant to the provisions of the Bankruptcy (Désastre) (Jersey) Law 1990 (the **Law**) or on the basis of comity.

Statutory requests for assistance

Article 49 of the Law provides:

"(1) The court may, to the extent it thinks fit, assist the courts of a relevant country or territory in all matters relating to the insolvency of a person, and when doing so may have regard to the extent it considers appropriate to the provisions for the time being of any model law on cross border insolvency prepared by the United Nations Commission on International Trade Law.

(2) For the purposes of paragraph (1), a request from a court of a relevant country or territory for assistance shall be sufficient authority for the court to exercise, in relation to the matters to which the request relates, any jurisdiction which it or the requesting court could exercise in relation to these matters if they otherwise

fell within its jurisdiction.

(3) In exercising its discretion for the purposes of this Article the court shall have regard in particular to the rules of private international law.

(4) In this Article "relevant country or territory" means a country or territory prescribed by the Minister."

The relevant countries or territories presently prescribed are Australia, Finland, Guernsey, the Isle of Man, the United Kingdom and the Republic of Ireland. Those countries have offered reciprocal treatment to Jersey in their insolvency regimes.

A letter of request from the foreign court to the Royal Court is always required.

The content of any letter of request and the accompanying application to the Royal Court for recognition of the foreign insolvency official must be referred to the Viscount before being presented to the Royal Court. The Viscount is the chief executive officer of the Royal Court and the principal insolvency official in Jersey.

The Royal Court retains a discretion as to whether to recognise a foreign insolvency official. It also retains a discretion as to the extent of the assistance that it may give including whether to apply Jersey law or the law of the requesting country when granting assistance. In determining whether to exercise its discretion, the Royal Court will ordinarily take into account all relevant factors including but not limited to:^[1]

- a. that the fact of the request for assistance is a weighty factor;
- b. that the Court may be expected to accept without further investigation the views of the requesting court as to what was required for the proper conduct of the bankruptcy or winding up;
- c. that the request for assistance is not conclusive as to the manner in which the discretion of the court should be exercised;
- d. that it may also be necessary to consider matters occurring since the letter of request was signed;
- e. that it would not be appropriate for the Court to inquire into the basis for the views expressed by the Court of the country making the request; and

- f. whether there is anything inconsistent with public policy or contrary to any fundamental principles of Jersey law in what was being sought.

If the requirements of Article 49 of the Law are met, the Royal Court may recognise the foreign insolvency official and register such appointment in the rolls of the Royal Court.

As to the assistance that the Royal Court can give, its jurisdiction is broad and it may make orders recognising the rights and powers of the foreign insolvency official in respect of Jersey property or make orders for disclosure of documents and/or examination of witnesses and otherwise make orders in aid of the foreign insolvency.

Comity

The Law is ancillary to Jersey customary law. As such, in relation to requests from non-prescribed countries, the Royal Court may exercise its inherent jurisdiction to provide such assistance as it considers appropriate.

An example of this can be seen from the very recent case of *In the matter of Lydian International Limited* [2020] JRC 049 whereby the Royal Court gave assistance to a letter of request issued by the Ontario Superior Court of Justice.

Facts

Lydian International Limited (**Lydian International**) is a Jersey holding company for the wider Lydian Group. Lydian International holds 100% of the shares in Lydian Canada Ventures Corporation, a company registered in British Columbia. Lydian Canada Ventures Corporation in turn owns 100% of the shares in Lydian UK Corporation Limited, a United Kingdom company. Ultimately, through two companies registered in the British Virgin Islands, the three companies wholly own an Armenian company which holds the principal asset of the group, a gold mine in Armenia. Lydian International, Lydian Canada Ventures Corporation and Lydian UK Corporation Limited (together the **Companies**) were the subject of an application made to the Ontario Supreme Court under the Companies' Creditors Arrangement Act (the **CCAA**).

The CCAA is a Canadian statute allowing insolvent debtors to restructure their business and financial affairs. It allows a company to continue its business whilst it seeks to make arrangements with its creditors. This includes "debtor in possession" insolvency proceedings whereby the debtor (the Companies) remains in possession of their property and are able to carry on their business until conclusion of the proceedings. The proceedings are carried out under the supervision of the court with the assistance of an independent insolvency practitioner known as the "Monitor".

Judgment of Supreme Court of Justice in Ontario

It was submitted to the Ontario Court that the Lydian Group business was completely integrated and its business directed primarily out of Canada, with most of its strategic decision making being conducted in Toronto and Vancouver. The Lydian Group's loan agreements were governed primarily by the laws of Ontario. The judgment of the Ontario Court made clear that the restructuring arrangements for the Lydian Group were complex and that it may be appropriate for the insolvency regime of one jurisdiction to oversee the process. The Ontario Court held that the Jersey and UK companies, although foreign incorporated were "companies" pursuant to the CCAA, as they either had assets or did business in Canada. They were also "debtor companies" for the purpose of the CCAA as they were insolvent and had liabilities in excess of C\$5m.

The Ontario Court found that both Lydian International and Lydian UK Corporation Limited had a strong connection with Ontario and was satisfied that Ontario was the appropriate forum to hear the application and that it was appropriate to issue a letter of request to the Royal Court for assistance.

The Ontario Court also made certain interim orders, the effect of which was that the Companies remain in possession and control of their current and future assets; may continue to carry on business in a manner consistent with the preservation of their business; are entitled to pay various expenses; are directed not to make payments of principal or interest to any of their creditors and are protected from any proceedings or enforcements against them except with consent of the Monitor, or leave of the Court. Those protections extended to the directors and officers of the Companies. The Monitor was ordered to monitor the receipts and disbursements of the Companies; report to the Court at such time and intervals as the Monitor may deem appropriate with respect to matters relating to the property of the Companies; advise the Companies in the preparation of their cash flow statements; have full and complete access to the affairs of the Companies and, be at liberty to engage counsel or such other persons as the Monitor deemed appropriate respecting the exercise of its powers and obligations.

Letter of request

The letter of request from the Ontario Court to the Royal Court sought assistance to act in aid of the Monitor in the conduct of the reorganisation of the Companies and in particular by:

- a. recognising the appointment of the Monitor;
- b. recognising the rights and powers of the Monitor in respect of the property of Lydian International;
- c. declaring that no action shall be taken or proceeded with against Lydian International except by leave of the Ontario Court; and

- d. granting such further or other relief as the Royal Court shall think fit in aid of the applicants and the Monitor in the reorganisation of Lydian International.

The letter of request contained a statement from the Ontario Court *“that, as a matter of international comity, the courts of the provinces and territories of Canada will consider giving effect to orders made by the Royal Court of Jersey relating to the bankruptcy of an individual or company (save for the purpose of enforcing the fiscal laws of Jersey)”*.

Jurisdiction

There was no statutory basis to assist the Ontario Court as Canada is not a prescribed country. The Court was therefore concerned with whether to exercise its inherent jurisdiction to assist.

The relief available under the CCAA including the appointment of the Monitor and certain other orders made by the Canadian Court are not features of Jersey law. The Royal Court was being invited to make orders ancillary to those made by the Ontario Court which could not be obtained in any Jersey bankruptcy or insolvency procedure as there is no equivalent process in Jersey. However, the Royal Court accepted that there was nothing about the relief that was sought that was inconsistent with public policy or contrary to any fundamental principles of Jersey law. Accordingly, the Court found that it did have jurisdiction to make the order.

Discretion

In determining whether to exercise its discretion, the Royal Court took into account the following:

- a. the indication in the letter of request that the Canadian court would consider giving effect to equivalent orders made by the Royal Court in respect of the bankruptcy of an individual or company (a factor which was given considerable weight);
- b. there were no secured or unsecured creditors in Jersey so no Jersey creditors would be prejudiced by any order that the Court may make;
- c. all creditors were notified of the Royal Court hearing and so had the opportunity to be heard;
- d. none of the secured or unsecured creditors expressed any opposition to the orders sought;
- e. Lydian International was Jersey tax resident; had its registered office in Jersey; had an employee in Jersey; board meetings had previously occurred in Jersey and that one of the six directors was resident in the Channel Islands;

- f. the Viscount did not express any views hostile to the application; and
- g. there were no reasons of Jersey public policy impeding the court making the orders sought.

Decision

The Royal Court granted the application and agreed that assistance should be given. In that regard, the Court concluded that:

"Although there is no precedent in Jersey for a Canadian CCAA order or similar order being enforced or recognised in relation to a Jersey company, we had no doubt that we should assist the Canadian Court in this case. There were no reasons of Jersey public policy impeding the court making the orders sought. To the contrary, it is consistent with Jersey's status as a responsible jurisdiction for the Royal Court to lend assistance in order to facilitate an international insolvency process in a friendly country that has a potential to benefit the creditors of the Lydian Group as a whole."

The Court ordered:

- a. that Alvarez & Marsal Canada Inc be appointed as the Monitor of Lydian International with the appointment registered in the rolls of the Royal Court;
- b. Lydian International shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever in Jersey and, subject to further order of the Ontario Court, Lydian International shall continue to carry on business in a manner consistent with the preservation of its business and property; and
- c. No proceeding or enforcement process in or out of any court or tribunal shall be commenced or continued against or in respect of Lydian International, or affecting its business or its property, except with the written consent of Lydian International, or with leave of the Ontario Court.

Comment

This judgment and previous judgments of the Royal Court show its willingness to provide assistance, whether under the statutory provisions of the Law or as a matter of its inherent jurisdiction, to foreign insolvency officials where there are Jersey assets. The Court has a wide and broad discretion and continues to show itself to be flexible as to the assistance that it may grant. Now, more than ever, that may be a welcome approach.

[1] Montrow v Tacon [2007] JCA 144 at [32] and Lydian Investments Limited [2020] JRC 049 at [24]

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Meet the Author



[Damian Evans](#)

Partner

[Jersey](#)

E: damian.evans@ogier.com

T: [+44 1534 514378](tel:+441534514378)

Key Contacts



Bruce MacNeil

Partner

Jersey

E: bruce.macneil@ogier.com

T: [+44 1534 514394](tel:+441534514394)



James Angus

Partner

Jersey

E: james.angus@ogier.com

T: [+44 1534 514316](tel:+441534514316)

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