Just and equitable winding up: the status quo in Jersey

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Introduction

The Royal Court of Jersey may grant a winding up order on the grounds that it is just and equitable to do so pursuant to article 155 Companies (Jersey) Law 1991 (**Companies Law**). This can apply to a solvent or insolvent company. It is similar to the statutory powers of the English courts under section 122(1)(g) Insolvency Act 1986 (**English Insolvency Act**). Although the Royal Court will have regard to English case law in assisting their interpretation of "*just and equitable*"[1], recent Jersey case law appears to have developed a much wider discretionary application. This has inevitably led to the widening of circumstances in which such an order will be granted in Jersey.

Background

The main procedures for winding up a company in Jersey are:

a) En désastre

Pursuant to the Bankruptcy (Désastre) (Jersey) Law 1990, a debtor or a creditor with a liquidated claim of more than £3,000 may issue an application to the Royal Court seeking a declaration that a debtor's property is declared en désastre. Once the Royal Court has established that the company is unable to pay its debts as they fall due and exercised its discretion to declare its property en désastre, the company's assets vest in the Viscount of Jersey for the purpose of adjudication and distribution.

b) Creditors' winding up

This process is similar in nature to a creditor's voluntary winding up under the English Insolvency Act. However, despite its name, this process is initiated by a company's shareholders. It is not a

process which can be initiated by creditors whose only available avenue to place a company into an insolvency procedure, at present, is via a declaration *en désastre* (although in some circumstances creditors may apply some degree of pressure on the directors/shareholders to initiate this process as an alternative to a declaration *en désastre*). As discussed below, amendments to the Companies Law (which come into force on 1 March 2022) will provide a further avenue for creditors to initiate a winding up process. Pursuant to articles 156-186 of the Companies Law, this process is initiated by a company's shareholders passing a special resolution requiring a two thirds majority at a general meeting. The appointment of a liquidator is usually effective from a subsequent creditors' meeting or where there is no creditor nomination, by the shareholders at the general meeting.

c) Summary winding up

This procedure (under articles 145 to 154A of the Companies Law) is also initiated by a shareholder's special resolution. However, this procedure applies to solvent liquidations where a company has neither assets nor liabilities or if it has assets and all its directors declare solvency and affirming that the company's debts can be discharged in full (within six months from the start of the winding up).

Applicability

Having regard to the above Jersey insolvency procedures, one can see how there may be circumstances in which they will neither be appropriate nor provide the best outcome for creditors in cases of insolvency. In those circumstances, the following individuals will have standing to issue an application seeking the winding up of a company on just and equitable grounds in accordance with article 155(2) of the Companies Law: the company, director(s), shareholder(s); the Chief Minister; the Minister for Treasury and Resources; or the Jersey Financial Services Commission.

In the recent case of *Financial Technology Ventures and Others v ETFS Capital Limited and Graham Tuckwell* ***[2]***, the Royal Court recognised that there is not an exhaustive list of all the circumstances in which it may be just and equitable to wind up a company in light of its wide discretion but recognised the following examples:

- where the substratum of a company (ie its purpose/main objects on which the company was formed) has been lost or abandoned[3]
- where there is a deadlock between the members and/or directors preventing decisions being made[4]
- where there is a breakdown of relations between participants in a quasi-partnership preventing co-operation in the conduct of the company's affairs[5]; and
- where an insolvent company's affairs need to be investigated[6]

In addition to the above, other notable examples include:

- to keep an insolvent company trading for a limited period in order to sell its remaining stock at retail value for the benefit of the company's creditors[7];
- where there is a pre-pack sale[8]
- where there is no shareholder support and so a creditors' winding up procedure cannot be initiated[9]; and
- where there are special circumstances involving regulated companies[10]

Taking a recent case by way of an example, *Re Betindex Limited**[11]*** (**Betindex**) involved a Jersey incorporated company operating an online gambling platform designed to resemble stock market investments but in respect of professional football players. Initially, the Royal Court sought the assistance of the English courts to place Betindex into administration (a procedure not available in Jersey) but once the English courts determined that administration would not achieve its purpose, it was ordered that the administration be discharged conditional on Betindex being placed into liquidation in Jersey through either a declaration *en désastre* or a just and equitable winding up. The Royal Court concluded it was appropriate to grant a winding up order on just and equitable grounds for the following reasons:

a. The substratum had arguably been lost as Betindex was unable to provide gambling services
b. It was a high-profile collapse involving thousands of traders and gambling regulators both in Jersey and the UK. It was therefore in Jersey's reputational interests and the public interest more broadly for the Royal Court to supervise the winding up
c. This matter would likely involve complex court applications relating to creditor claims valued between £65.2 million and £90 million and adjudication of those claims including an application under article 51 of the Trusts (Jersey) Law 1984 concerning the administration of the funds held in trust account totalling approximately £4.5 million
d. It was more flexible than a creditor's winding up given that the Royal Court is able to make "*whatever orders were required to suit the needs of each case*"
e. It was more preferable to a declaration *en désastre* given the complexities which would require the Viscount to engage external advisers. Instead, it was preferable for the winding up to be conducted by professional insolvency experts

Conclusion

An important feature of a just and equitable winding up pursuant to article 155(4) of the Companies Law is the Royal Court's ability not only to appoint a liquidator but also its ability to direct the manner in which the winding up is to be conducted and "*make such orders as it sees fit to ensure that the winding-up is conducted in an orderly manner*"[12]. Unlike English courts,

the Royal Court is not bound by statute to consider whether another remedy is available or whether a shareholder making such an application is acting unreasonably rather than pursuing another remedy[13], however, case law has made clear that the Royal Court will want to be satisfied that there are compelling reasons for a just and equitable winding up and that other available procedures are not appropriate. What is also clear from the abundance of case law is the Royal Court willingness to exercise a very wide discretion and grant an order on just and equitable grounds where the outcome will be more beneficial for creditors.

In accordance with the upcoming amendments to the Companies Law[14] coming into force on 1 March 2022, a creditor will now have the option to issue a winding up application (initiated by a statutory demand) and to appoint a liquidator (or provisional liquidator) from a register of private sector insolvency practitioners maintained by the Viscount. This is a momentous development in the Jersey insolvency jurisdiction. It therefore remains to be seen how these amendments may affect the use of just and equitable winding up applications as they may alleviate creditor pressure previously applied on directors and shareholders (particularly in circumstances where creditors wish to be the driving force behind the winding up process with a steer on their preferred liquidator). In our view they will remain a flexible and useful tool to maintain value.

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[1] In *Re Leveraged Income Fund Limited* [2002] JRC 209, the Royal Court (at paragraph 10) noted that article 155 of the Companies Law is based on the English Insolvency Act which is why English authorities are of particular assistance.

[2] [2021] JRC 025

[3] For example, see *Re Draganfly Investments Limited [*2020] JRC103 / Re Betindex Limited [2021] JRC 309

[4] For example, see *Bisson v Barker* [2008] JRC 193

[5] For example, see *Re Green Equity Limited* [2013] JRC 169A

[6] For example, see *Re Belgravia Financial Services Group Limited* [2008] JRC 161

[7] For example, see *Re Poundworld* [2009] JRC 042

[8] For example, see *Re Collections Group [2013] JRC 096*

[9] For example, see *Re Huelin-Renouf Shipping Limited* [2013] JRC 164

[10] For example, see *Horizon Investments Limited* [2012] JRC 039

[11] [2021] JRC 309

[12] Article 5(4) Companies Law

[13]Section 125 English Insolvency Act

[14] Companies (Amendment No. 8) (Jersey) Regulations 2022

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