Court and out of court restructuring options in Jersey and Guernsey

Bruce MacNeil, Nigel Sanders, Mathew Newman and Sally Peedom
Ogier

global.practicallaw.com/0-617-5593

JERSEY

This section provides an overview of restructuring options for Jersey companies. The main insolvency procedures for Jersey companies are:

- Creditors' winding-up under the Companies (Jersey) Law 1991, as amended (Companies Law).
- *Désastre* under the Bankruptcy (Désastre) (Jersey) Law 1990, as amended (Désastre Law).

As there is no company rescue procedure, such as administration, in Jersey, there has recently been an increasing use of the "just and equitable winding-up" procedure under the Companies Law (*see below, Just and equitable winding-up*).

Jersey also has the options of:

- Schemes of arrangement under the Companies Law.
- Out of court restructuring transactions.

These restructuring transactions may involve, for example, debt-for-equity swaps (with the agreement of all affected creditors), group reorganisations and/or enforcement of security and set-off provisions.

In addition to the statutory insolvency, there are also Jersey customary law insolvency and liquidation procedures, including:

- *Remise des biens*.
- *Cession générale*.
- *Adjudication of renunciation*.
- *Dégrèvement* (for immovable property).
- *Réalisation* (for movable property).

However, these procedures are only mentioned for completeness, as it is unlikely that any of these procedures would be used for an insolvent company in preference to a *désastre* or winding-up, and these procedures are principally aimed at individuals rather than companies.

Solvent liquidation: summary winding-up

Where a Jersey company is able to discharge its liabilities as they fall due (that is, it is cashflow solvent), it can be wound up using the summary winding-up procedure. A summary winding-up is commenced by:

- Each director signing a statement of solvency using the prescribed wording (with different options) which confirms the company's cashflow solvency.
- A special resolution for the summary winding-up being passed by the shareholders within 28 days of the statement of solvency being signed, with a copy of the special resolution being filed with the Jersey Companies Registry.

In a summary winding-up:

- The liquidation can be conducted by the directors, although a liquidator may be appointed by special resolution to conduct the liquidation instead.
- The directors or liquidator can only take actions that are necessary to realise the company's assets, discharge its liabilities and distribute realisations to the shareholders.

A summary winding-up is completed on the filing with the Jersey Companies Registry of a further statement of solvency signed by the directors or the liquidator (if appointed) stating that the company has no assets and no liabilities, after which the company is dissolved.

Insolvent liquidation: creditors' winding-up

A creditors' winding-up is a winding-up where the statement of solvency required for a summary winding-up cannot be given. It cannot be used where the company has been (or is subsequently) declared *en désastre*.

Despite its name, a creditors' winding-up cannot be started by the creditors and instead requires a special resolution of the shareholders, with a copy of the special resolution being filed with the Jersey Companies Registry. However, there are current proposals for the relevant statutory provisions to be amended to enable other applicants to apply to the Royal Court of Jersey for a creditors' winding-up order. These applicants would be the same as for a *désastre*, namely either:

- The company.
- A creditor (of a given amount).
- The Jersey Financial Services Commission (JFSC) (in the case of a regulated entity).

The making of such an order is at the discretion of the court.

In a creditors' winding-up:

- The company ceases to carry on its business, except in so far as it is advantageous for the winding-up.
- The corporate state and capacity of the company continues until it is dissolved.
- The company's shares cannot be transferred (and the company's shareholders cannot change) without the permission of the liquidator.

- No action can be taken or proceeded with against the company, except with the permission of the court, and subject to such terms as the court may impose. However, this does not prevent the enforcement of pre-existing security interests or set-off provisions (*see below*).

The directors must give at least 14 days' notice in calling a creditors' meeting, which must be held immediately after the shareholders' meeting for the passing of the special resolution for the creditors' winding-up. At the creditors' meeting, the directors must give a statement verified by affidavit as to the affairs of the company. The creditors and/or the shareholders can nominate a person to be the liquidator for the purposes of the creditors' winding-up. The creditors can also appoint a liquidation committee.

Once a liquidator has been appointed, all the powers of the directors cease, except in so far as allowed by the creditors. Subject to this, the liquidator has all the powers that the directors had in relation to the company, although such powers must be exercised for the benefit of the winding-up. There are current proposals for the statutory powers of a liquidator to be added to the wide powers of the Viscount under the *Désastre* Law (*see below, Désastre*).

The liquidator realises the company's assets, discharges its liabilities and distributes realisations to the creditors. The liquidator may seek funds from creditors for the purposes of funding the liquidation. All costs and expenses properly incurred in a creditors' winding-up, including the liquidator's remuneration, are payable out of the company's assets in priority to all other claims.

Once the affairs of the company have been fully wound up, the liquidator prepares an account of the creditors' winding-up to be laid before meetings of the shareholders and the creditors. After a return is made by the liquidator to the Jersey Companies Registry confirming the holding of these meetings, the company is normally dissolved within three months.

Just and equitable winding-up

A Jersey company may be wound up by the Royal Court of Jersey under Article 155 of the Companies Law, if the company has not been declared *en désastre* and the court is of the opinion that it is just and equitable, or expedient in the public interest, to do so (as opposed to a test of solvency). The application to the court for such a winding-up may be made by either:

- The company, a director, a shareholder, the Minister for Economic Development or the JFSC, on just and equitable grounds.
- The Minister or the JFSC, on public interest grounds.

If the court orders a company to be wound up, it may appoint a liquidator and direct the conduct of the winding-up.

In the absence of a rescue procedure such as administration in Jersey, there has in recent years been an increasing use of the just and equitable winding-up procedure. There have been various cases in which the Royal Court has ordered the just and equitable winding-up of Jersey companies, which were summarised in the case of *Representation of Maltese Holdings and Zollinger Investments [2012] JRC 239*. In that case it was held that just and equitable winding-up remains a discretionary remedy and the words "just and equitable" should be given a flexible interpretation.

There is a wide jurisdiction for the court to order a just and equitable winding-up, and reasons why this may be appropriate may include:

- Loss of the substratum of the company (*In the matter of Leveraged Income Fund Limited 2002/209; EVIC v Greater Europe Deep Value Fund II Limited [2012] JRC 146*).
- Deadlock in the management of the company (*Bisson v Barker [2008] JRC 193*).
- Desire to keep an otherwise insolvent company trading for the benefit of the company's clients and creditors (*Representation of Poundworld [2009] JRC 042*).
- Where there may be a need for investigation into the company's affairs (*In the matter of Belgravia Financial Services Group Limited [2008] JRC 161*).
- Special circumstances applicable to the winding-up of regulated companies (*Centurion Management Services Limited [2009] JRC 227* and *Horizon Investments Limited [2012] JRC 039*).
- To facilitate a pre-packaged sale of an otherwise insolvent business (*Re Collections Group [2013] JRC 096*).
- Where an insolvent group based in multiple jurisdictions required winding up but had no shareholder support (*Re Huelin-Renouf Shipping Limited [2013] JRC 164*).

It is likely that this procedure will continue to be used in special circumstances such as those set out above (although creditors' winding-up and *désastre* remain the main insolvency procedures for Jersey companies).

Désastre

An application to the Royal Court of Jersey to declare the property of a company *en désastre* under the Désastre Law can be made by:

- The debtor.
- A creditor with a liquidated claim against the debtor of at least GB£3,000 that is not subject to any reasonable defence, set-off or counterclaim.
- The JFSC, in the case of certain regulated entities, on just and equitable grounds.

The application needs to be made in the prescribed form, together with a supporting affidavit. Under the Bankruptcy (*Désastre*) Rules 2006, the application cannot be made unless the applicant has given the Viscount (a court officer who conducts the *désastre*) at least 48 hours' notice of the intention to make the application. In practice, it is advisable to provide draft documents to the Viscount in advance and to ensure his support of the application.

The court has discretion whether or not to start the *désastre* if the company has realisable assets but is unable to discharge its liabilities as they fall due (that is, it is cashflow insolvent). External funding may be required for the *désastre* and the court may require a creditor applying for a declaration to indemnify the Viscount against the costs of the *désastre*.

After the commencement of the *désastre*:

- All the property and powers of the debtor, save those held on trust by the debtor for another person, immediately vest in the Viscount. This is the most important difference between a *désastre* and a creditors' winding-up where title to the debtor's property does not vest in the liquidator.
- The company's shares cannot be transferred (and the company's shareholders cannot change) without the permission of the Viscount.
- A creditor who has a debt provable in the *désastre* does not have any other remedy against the debtor or its property in respect of the debt, and cannot commence or continue any

action or legal proceedings to recover the debt, except with the consent of the Viscount or the court. However, this does not prevent the enforcement of pre-existing security interests or set-off provisions (*see below*).

When the debtor's property vests in the Viscount, it vests subject to security interests and all *hypothecs* (the Jersey equivalent of mortgages) and secured debts to which the property was subject before the vesting. On the sale of immovable property, all *hypothecs* secured against it are extinguished, but the holders of the *hypothecs* have preferential rights in relation to the sale proceeds.

The Viscount has wide powers under the *Désastre* Law. The Viscount realises the company's assets, discharges its liabilities and distributes realisations to the creditors. All costs and expenses properly incurred or payable by the Viscount in a *désastre*, including commissions levied by the Viscount against the value of assets realised and distributed, are payable out of the liquidated value of the company's assets in priority to all other claims.

Although there is no statutory requirement to do so, the Viscount often calls creditors' meetings and reports to the creditors on progress. The Viscount distributes realisations from the debtor's property to the creditors in accordance with their respective claims and may pay interim dividends for this purpose. When all of the debtor's property has been realised, the Viscount provides the creditors with a report and accounts relating to the *désastre* and pays a final dividend. After the Viscount has filed a notice of the date of payment of the final dividend with the Jersey Companies Registry, the company is normally immediately dissolved.

Pooling

The Jersey Court has made orders pooling the insolvent estates of companies in circumstances where it would be impossible, impracticable and disproportionate to seek to identify individual rights and unravel asset and liability positions between the companies, and when it is in the best interests of the creditors for there to be such a pooling. Orders have been made in the following circumstances:

- Related Jersey companies both in creditors winding-up (*Re Corebits Services Limited (in liquidation) and Zoombits Limited (in liquidation) [2011] JRC 166*).
- Related Jersey and Guernsey companies in just and equitable and insolvent winding-up respectively (*Representation of Huelin-Renouf Shipping Limited (In Liquidation) [2015] JRC 206*).
- A Jersey company in désastre related to entities in insolvency proceedings in England (*Royco Investments Company Limited [1994] JLR 236*).

Setting aside transactions

Under the Companies Law and the *Désastre* Law, the liquidator (in a creditors' winding-up) or the Viscount (in a *désastre*) have the power to apply to court to challenge transactions entered into by the company during the relevant challenge periods, such as transactions at an undervalue and preferences.

If a company enters into a transaction at an undervalue (that is, a gift or sale of assets for significantly less than market value) within five years before the start of insolvency proceedings, on application of the liquidator or the Viscount, the court may order that the transaction be unwound, if the company was cashflow insolvent at the time or became cashflow insolvent as a result of the transaction. However, the court will not make any order in respect of a transaction at an undervalue if it is satisfied that the company entered into the transaction with reasonable grounds and in good faith for the purpose of carrying on its business.

If a company gives a preference to any person within 12 months before the commencement of insolvency proceedings, on application of the liquidator or the Viscount, the court may order that the transaction be unwound, if the company was cashflow insolvent at the time or became cashflow insolvent as a result of the transaction. A preference is any act by a company which has the effect of putting one of the company's creditors into a better position than it otherwise would have occupied in the event of the company's insolvency (such as providing new security or repaying one creditor in advance of other creditors). However, the court will not make any order in respect of a preference unless the company, when giving the preference, was influenced by a desire to put the beneficiary into a better position than it otherwise would have occupied in the event of the company's insolvency. Unless the contrary is shown, this influence is presumed if the beneficiary is an associate or connected with the company.

Certain other transactions may be set aside by the liquidator (in a creditors' winding-up) or the Viscount (in a *désastre*), including:

- Onerous property (including unprofitable contracts), to release the company from all liability in respect of the onerous property from the date of commencement of insolvency proceedings.
- Extortionate credit transactions, which may be set aside or varied if the company was provided with credit on grossly exorbitant terms within three years before the start of insolvency proceedings.

Schemes of arrangement

Under Article 125 of the Companies Law, the court can sanction a compromise or arrangement (scheme) between a company and its creditors or shareholders (or a class of either). The court may, on application of the company (or its creditor, shareholder, or liquidator if it is being wound up), call a meeting after which the scheme becomes binding if sanctioned by the court and agreed to by a majority in number of the creditors or shareholders (or a class of either) representing either:

- 75% in value of the creditors (or class of creditors).
- 75% of the voting rights of the shareholders (or class of shareholders).

Such a scheme is binding on all the creditors (or class of creditors) or on all the shareholders (or class of shareholders), as well as on the company itself and, where the company is in the course of being wound up, on the liquidator and all contributories. A scheme is concluded when the court order sanctioning the scheme is filed with the Jersey Companies Registry.

As these Jersey statutory provisions are similar to the English statutory provisions on schemes of arrangement under the UK Companies Act 1985, English case law on schemes is highly persuasive in Jersey. There is no automatic stay on proceedings in connection with a scheme.

Out of court restructuring transactions

In recent years, there have been numerous out of court restructuring transactions involving Jersey companies. These transactions have generally involved one or more of the following elements:

- Debt-for-equity swaps (with the agreement of all affected creditors).

- Group reorganisations (including the intra-group transfer of assets and the establishment of new Jersey holding companies and/or Jersey special purpose vehicles to be used for particular purposes in the restructuring).
- Enforcement of security and set-off provisions.

Article 56 of the Security Interests (Jersey) Law 2012 (Security Interests Law) provides that, if the grantor of a security interest becomes bankrupt or the grantor or its property is subjected to Jersey or foreign insolvency proceedings, that does not affect the power of the secured party to appropriate or sell collateral, or otherwise act in relation to collateral in connection with enforcement. This is subject to Article 59 of the Security Interests Law, which provides that in the case of the bankruptcy of the grantor of a security interest, the security interest is void as against the Viscount (or liquidator) and the grantor's creditors, unless the security interest is perfected before the grantor becomes bankrupt. Therefore, perfected security interests created under the Security Interests Law generally remain enforceable following the start of the grantor's insolvency proceedings. The position is similar for security interests created under the Security Interests (Jersey) Law 1983 where a security power of attorney has been granted in favour of the secured party under the security interest agreement.

As regards contractual set-off and netting provisions, Article 2 of the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 (Netting Law) provides that, subject to certain legal rules to the contrary (including Article 34 of the Désastre Law, *see below*), any close-out netting provision or set-off provision in any agreement is enforceable in accordance with its terms. This is the case despite the bankruptcy (such as a creditors' winding-up or *désastre*) of a party to the agreement or of any other person or the lack of any mutuality of obligation between a party to the agreement and any other person.

In the absence of such contractual provisions, mandatory set-off under Article 34 of the *Désastre* Law would apply between the insolvent debtor and its creditors following a declaration of *désastre* or commencement of a creditors' winding-up, although this requires mutuality between the parties (that is, that there must have been "mutual credits, mutual debts or other mutual dealings").

Cross-border insolvency

Article 49 of *the Désastre* Law provides that the Royal Court of Jersey will assist the courts of certain prescribed countries and territories (currently the UK, Guernsey, the Isle of Man, Finland and Australia) in all matters relating to the insolvency of any person to the extent it thinks fit. However, Article 49 does not exclude the pre-existing customary law right of the court to exercise its inherent jurisdiction to assist other countries or to have regard to principles of comity (for example, by making orders recognising the appointment of foreign insolvency officeholders) which has happened in various cases including the following:

- BVI provisional liquidators (*Re Tacon [2007] JRC 065*).
- South African personal representatives of an insolvent estate (*Representation of Van Zyl and Joseph (18 January 2008, unreported)*).

Although the EU Regulation (EC) 1346/2000 on Insolvency Proceedings does not apply in Jersey, the Jersey court may still have regard to where the debtor's centre of main interests (COMI) is in considering applications to commence insolvency proceedings. The court may have regard to the UNCITRAL Model Law on Cross-Border Insolvency 1997 and is required to have regard to the rules of private international law.

As established in a line of Jersey cases, such as *In re O.T. Computers Ltd 2002/29 (31 January 2002)* , it may be possible to put a Jersey company into English law administration by making an application for a letter of request from the Jersey court to the English court. This is a non-statutory discretionary remedy that requires the approval of both courts. It is generally only available where the Jersey company has its management and/or economic activities based in England. It is necessary to show in the application why English law administration would achieve the best possible outcome for the debtor and creditors, and why local alternatives, such as a creditors' winding-up or *désastre*, would not be as beneficial to the debtor and creditors.

GUERNSEY

This section looks at the different court and out-of-court restructuring options available to companies in Guernsey, covering:

- Guernsey's historical and current restructuring and insolvency laws.
- The two principal restructuring regimes available to companies in Guernsey:
  - schemes of arrangement; and
  - administrations.
- The terminal regimes of voluntary and compulsory liquidations (in the event the restructuring regime or rescue fails).
- Pooling.
- Other powers and functions of liquidators including misfeasance, wrongful trading and preference.
- Who can be appointed by the court in Guernsey.
- Guernsey's interaction with other jurisdictions.

Before the introduction of the Companies (Guernsey) Law, 2008, as amended (Companies Law), Guernsey's insolvency law had few statutory provisions and was reliant on the customary law derived from *la coutume de Normandie* (the customs of medieval Normandy) that still survive today. These customary law procedures have been either supplemented and/or superseded by Part VIII and Parts XXI – XXIV of the Companies Law, which deal with arrangements and reconstructions and corporate insolvency. These have brought Guernsey's statutory restructuring regimes broadly into line with English insolvency law principles, while at the same time being intentionally less prescriptive to enable the Royal Court of Guernsey to take a pragmatic and more flexible approach.

Personal insolvency is not dealt with in the Companies Law, as Parts VIII and XXI – XXIV relate to corporate structures only. Personal insolvency is largely dealt with under customary law procedures but is presently the subject of reform whereby proposed new insolvency legislation is anticipated to cover both corporate and personal insolvency. The timeframe for implementation of this legislation is presently unknown but anticipated in 2017.

Relevant to all restructuring options is the statutory solvency test set out in section 527 of the Companies Law requiring a company to prove solvency by satisfying that both:

- The company is able to pay its debts as they become due (cash flow test).
- The value of the company's assets is greater than the value of its liabilities (balance sheet test).

The solvency test also imposes other requirements as to solvency for Guernsey companies supervised by the Guernsey

Financial Services Commission (GFSC), under a non-exhaustive list of laws and regulations set out in this provision.

The restructuring options available to companies in Guernsey vary depending on the legal structure of the company, such as whether it is a cellular or non-cellular company. The Companies Law provides for separate insolvency regimes for both cellular and non-cellular companies. Cell companies are Guernsey limited liability companies that are subdivided into separate cells that do not have separate legal identity but that do have separate assets and liabilities, meaning that the assets of one cell are not available to the creditors of another cell in the event of that cell's insolvency. In most respects, the regimes are the same with minor differences to take into account the cellular structure.

However, cells of protected cell companies may enter into a procedure that is known as "receivership" in Guernsey but that is more akin to a liquidation. A receiver has the same powers as a liquidator to realise assets, bring actions and distribute to the cell's creditors, and the receivership is a terminal process with the cell ultimately being dissolved. There are also number of court and out of court driven regimes, summarised below.

Schemes of arrangement and administration

Both the two principal restructuring regimes, schemes of arrangement and schemes of administration are court driven procedures.

Schemes of arrangement. Part VIII of the Companies Law governs schemes of arrangement enabling a Guernsey company to reach a formal compromise or arrangement with creditors or members in order to achieve a stated turnaround/rescue or reconstruction strategy.

Guernsey has recently seen a number of high-profile schemes of arrangement, including in relation to two listed companies, Assura Group Limited and Friends Life Group Limited. These were subject to scheme applications which were approved in late January and early April 2015 respectively. In approving these schemes, the Royal Court confirmed the principle from *Re Montenegro Investments Limited (in administration) [2013-14] GLR 345*, that the four-stage test prescribed by English case law applies in Guernsey. Equally, at the jurisdictional stage, the Royal Court follows English case law authorities on class composition issues. As such, English authorities, practice statements and commentary are persuasive, and Guernsey scheme documentation resembles the documentation expected in England.

A scheme can be either creditor-led or member-led, but a proposal must be put to the relevant stakeholders through a meeting summoned at the direction of the Royal Court for the purpose of approving that proposal. As in other jurisdictions, 75% of the stakeholders (or class) needs to vote in favour of the proposals and the proposals then require approval by the Royal Court for them to be binding on all of the stakeholders, regardless of whether they voted or not. There are specific provisions for company mergers and it is also possible to use a scheme to amalgamate, migrate or convert companies. However, a Guernsey company cannot be migrated into the UK because there is no statutory regime in the UK that allows this to occur. Solvency is not relevant, although specific provisions are made if the company is in liquidation or administration and is proposing a scheme. It may be possible for a company in administration to avoid liquidation altogether and go straight into dissolution if it can be shown that the scheme amounts to a "reconstruction". This is the one exception to the general rule under Guernsey insolvency law that a company in administration should be placed into liquidation if the purpose of the administration order is not achieved.

Administration. This court-based statutory procedure is set out in Part XXI of the Companies Law and provides protection to creditors and a "breathing space" (known as a moratorium) for the company while the company continues to trade and do business under the management and control of the administrator. The administrator's powers are comprehensively set out in Schedule 1 to the Companies Law. The administrator acts as agent of the company in much the same way as an English administrator.

The Guernsey administration procedure is loosely based on the pre-Enterprise Act 2002 English process, whereby an application (with an accompanying supporting affidavit) must be made to the Royal Court of Guernsey seeking an order that the company be placed into administration. Before making an administration order, the court must first be satisfied, among other things, that the company is, or is likely to become, insolvent (either on the cash flow test or balance sheet test (*see above*) and that (at least) one of the following two statutory purposes can be satisfied:

- The survival of the company or cell, and the whole or any part of its undertaking, as a going concern.
- A more advantageous realisation of the company or cell's assets than would be the case on a winding-up.

On the making of an administration order, any extant application to wind up the company is dismissed. Regardless of the making of an administration order, secured creditors can continue to enforce their rights, as can creditors who can set off their claims against claims brought by the company who are unaffected by the moratorium in place. An administration order may allow a company to realise assets for distribution to creditors, without facing debt recovery proceedings and other enforcement measures from those creditors. However, an administrator has no power to make distributions to creditors, although the Royal Court has permitted distribution in limited circumstances. This is because an administration is not intended to be a terminal process but rather serves as a "rescue remedy" to stabilise companies in trying financial circumstances.

Administration is a secured creditor friendly process but is the only insolvency process in Guernsey that allows the debtor to continue to trade while in that process and under the control of the court (which has recently developed a practical and flexible approach to the process). The administrator can, at any stage, apply to the court to discharge the administration order and secure his release from liability. It seems from recent case law that the court will allow a distribution from the administration, if coupled with a discharge application, or alternatively, appointment of a liquidator (if the rescue fails). On appointment, the administrator must obtain approval for his proposed remuneration following the enactment of a recent practice direction.

A third insolvency procedure available in Guernsey is *Désastre*, which is a collective court-driven procedure derived from customary law, which allows for a distribution of the debtor's personal property amongst its creditors after a judgment has been obtained against the debtor by the creditor. *Désastre* is not addressed in detail as it is beyond the scope of this article.

Voluntary and compulsory winding-up (liquidation)

Guernsey's liquidation regime, contained Part XXII of the Companies Law (as it relates to voluntary liquidation) and Part XXIII of the Companies Law (as it relates to compulsory liquidation), is also supported by the Royal Court's willingness to exercise its inherent jurisdiction in most circumstances where necessary to assist a liquidator in the performance of his statutory and common law functions.

A voluntary or compulsory liquidation can take a number of forms, depending on the legal structure of the company. However, in both voluntary and compulsory liquidations a liquidator is appointed and the company must cease to trade and conduct business except where beneficial for the winding-up of the company. Liquidation is a terminal process and as such the liquidator's primary function is to realise the assets and distribute to creditors *pari passu* and then to members in accordance with their respective rights. Generally, secured creditors sit outside the liquidation and can deal with their secured assets in accordance with their security rights.

Voluntary liquidation

Guernsey's voluntary liquidation process is given by the company's constitutional documents and the relevant legislation applicable to these documents. Under Part XXII of the Companies Law, the shareholders of the company can decide (by ordinary or special resolution) to wind up the company and appoint a liquidator. The resolution, once passed, commences the voluntary winding-up process. The process is therefore not court driven and creditors have no say in the appointment of the liquidator or in the running of the process generally. There is no requirement for the company or liquidator to call a creditors' meeting. However, creditors can apply to the Royal Court to wind up the company compulsorily and would then be able to remove the current liquidator and seek to appoint their own choice at that stage.

There is no distinction between solvent or insolvent voluntary liquidations and accordingly, by definition, if the company is solvent then there would be a return to the members once the assets have been realised.

Under section 400 of the Companies Law, as soon as the company's affairs are fully wound up, the liquidator:

- Prepares an account of the winding-up, giving details, among other things, of the conduct of the liquidation and the disposal of the company's property.
- Calls a general meeting of the company at which the account is presented and explained.

After the meeting, the liquidator gives notice to the Registrar of Companies of the holding of the meeting and of its date, the details of which are then published by the Registrar of Companies, including notice that the company is to be dissolved in such manner and for such period as he thinks fit. On the expiration of three months after this notice is given, the company is then dissolved.

Compulsory liquidation. Compulsory liquidation is a court driven process. The process can be instigated by a creditor or certain other parties (such as a company director or member, a partner or general partner of a limited partnership, a trustee of a unit trust, or the GFSC) and may be related to the solvency of the company and/or its inability to pay debts as they fall due. A corporate structure can also be wound up on just and equitable grounds. In all cases, a liquidator is appointed to realise the assets of the company and distribute them to creditors after scrutiny from a Commissioner of the Royal Court.

In contrast to administration, the liquidator's powers are fairly limited as the company cannot trade, although those powers are clearly set out in section 413 of the Companies Law and also derive from common law. Wherever necessary, a liquidator can seek directions from the court on matters arising in the course of the liquidation. On appointment, the liquidator must seek approval of his proposed remuneration from the Court, following a recent enactment of a Royal Court practice direction.

Pooling

The Royal Court of Guernsey has recently made orders pooling the insolvent estates of Guernsey and Jersey companies allowing them to be treated as one for the purpose of distributing a dividend to creditors. The decision of the Royal Court of Guernsey delivered on 24 August 2015 (which was followed by a decision of the Jersey Court on 7 October 2015) held that where the affairs of two insolvent companies (incorporated in Guernsey and Jersey respectively) are so inter-mingled that the expense of unravelling them would adversely affect distributions to creditors, the companies can be treated as a single entity.

The pooling order made by the Royal Court enabled the liquidators, once they had concluded adjudication of claims, to provide to the employees 100% of the priority element of the claims, which would have been impossible if the Guernsey company had been treated separately from the Jersey company (in the matter of *Huelin-Renouf Shipping (Guernsey) Limited (in liquidation)* unreported 46/2015).

Powers and functions of liquidators

A liquidator has the power to commence insolvency-specific actions against third parties under the Companies Law for:

- Preferences (where the company has been influenced by the desire to prefer a third party creditor over other creditors).
- Misfeasance (where a director or former director has misapplied or misappropriated company funds).
- Breaches of fiduciary duty (so as to cause loss to the company).
- Fraudulent and wrongful trading. The test for fraudulent and wrongful trading is the same in Guernsey as under English law.

There is no power to bring an action to avoid a transaction at undervalue under Guernsey law. As a check and balance on the liquidator, a creditor or member can also bring misfeasance actions against the directors of a company in liquidation without recourse to the liquidator. While there are no specific investigatory powers under Guernsey law, it is likely that the Guernsey court would, exercising its supervisory jurisdiction, grant an application by a liquidator seeking orders equivalent to those found in sections 234 to 236 of the UK Insolvency Act 1986.

Liquidators also have the power to apply to court to seek disqualification of directors of the company, although this is usually unnecessary for the performance of the liquidators' functions, as it has no financial benefit other than to apply commercial pressure on the director to settle.

Both the liquidator and the administrator can bring actions against third parties in the name of the company, in the event that a third party has acted in a manner (such as having breached a contract or duty owed to the company) resulting in a loss to the company.

Who can be appointed?

While there are no statutory restrictions on who can take court appointments in Guernsey, the Royal Court must be satisfied that the proposed appointment of the insolvency practitioner (whether Guernsey-based or foreign) is reputable and has the appropriate credentials.

In administrations, the person making the application for an administration order can nominate their preferred administrator. Once sworn in by the Royal Court of Guernsey, the administrator is responsible for managing the business and restoring it to health (in which case the administration ends). Failing this, the administrator realises the assets as best they

can and winds up the company. While there is no statutory restriction on who can be nominated, the Royal Court preference is to swear in a Guernsey-based administrator for companies in Guernsey.

In liquidations, joint appointments are now commonplace, with larger complex liquidations proceeding with a joint appointment of a local Guernsey liquidator and an overseas insolvency practitioner, as overseas insolvency practitioners often have access to greater resources enabling the liquidation to be handled more efficiently. In a compulsory liquidation, the nominated liquidator (chosen by the parties themselves) is sworn directly into office by the Royal Court and then conducts the winding-up. At the conclusion of the process, the liquidator's accounts are examined by a court-appointed Commissioner, the assets are distributed according to their priority of respective claims and the company is dissolved.

Most applications relating to court-driven insolvency procedures are heard by the Royal Court of Guernsey in Ordinary Court every second Tuesday morning and the application can be made on very short notice. Special sittings can be also be arranged with the Greffe (Guernsey Registry) in certain circumstances.

Guernsey's interaction with other jurisdictions

Section 426 of the UK Insolvency Act 1986 has been extended to Guernsey on limited terms by an order of the Privy Council and it is therefore possible for the Guernsey and UK courts to seek reciprocal insolvency assistance from one another by a letter of request process. However, because Guernsey insolvency regimes are very similar to UK procedures, this process is rarely used (compared to Jersey, which does not have an administration regime, for example). Instead, cross-border insolvency matters in Guernsey often involve applications for recognition in Guernsey by foreign-appointed insolvency and regulatory office holders seeking assistance from the Guernsey court to recover assets (although potentially not information following a recent decision of the Guernsey court (*X (a bankrupt)* judgment 36/2015 Royal Court of Guernsey, 6 July 2015) held within the jurisdiction.

In the *X (a bankrupt)* judgment, the Royal Court held that it preferred the minority views of the Board of the Judicial Committee of the Privy Council in *Singularis v PricewaterhouseCoopers*; such that in order for a foreign liquidator to exercise his powers in Guernsey those powers must be expressly set out in Guernsey statute. It is insufficient for the foreign liquidator to look for equivalent powers in Guernsey common law. This is taking the concept of modified universalism in insolvency proceedings perhaps a stage further than the rest of the common law world.

Practical Law Contributor profiles

Bruce MacNeil, Partner Ogier Jersey, Corporate and Finance Group

Ogier
T +44 1534 514 394
E bruce.macneil@ogier.com
W www.ogier.com

Professional qualifications. Solicitor, 2003, England and Wales; 2009, New York; 2013

Areas of practice. Banking and finance; corporate and commercial; derivatives; Islamic finance; listing services; private equity; regulatory; restructuring and insolvency; structured finance.

Non-professional qualifications. Jersey; Law degree, University College, London

Recent transactions

- Advising Eurohypo on the amendment and restatement of GB£800 million and GB£400 million facilities with Jersey property unit trust and company obligors.
- Advising AIB on security and insolvency issues for the EUR945 million debt restructuring of Independent News & Media.
- Advising Barclays on the sale of Breedon Holdings Limited and the refinancing of GB£134 million facilities.
- Advising Circle Holdings plc, the Jersey holding company for the Circle UK healthcare group, on its AIM listing.

Professional associations/ memberships. Member of The Law Society of England and Wales and The Loan Market Association (LMA).

Publications. Author of various client briefings and the Jersey chapter of *The Acquisition and Leveraged Finance Review*. Co-author of the PLC article on the new Security Interests (Jersey) Law, which provides a comparison of the Security Interests (Jersey) Law 1983 to the new law.

Nigel Sanders, Partner Ogier Jersey, Dispute Resolution Group

Ogier
E nigel.sanders@ogier.com
W www.ogier.com

Professional qualifications. Solicitor, England and Wales 1991, Cayman Attorney (non-practising) 2003; Jersey Advocate 2009; BVI Attorney (non-practising) 2011

Areas of practice. Commercial and financial dispute resolution; contentious insolvency and restructuring matters; Jersey contentious trust matters; fraud and asset tracing; shareholder disputes; commercial disputes involving financial services/investment funds, regulatory issues and property-related matters.

Professional associations/ memberships. Member of the Insolvency Lawyers' Association, INSOL International; ARIES (Channel Islands INSOL branch); overseas member of the Chancery Bar Association, Jersey Law Society (Committee member); Law Society of England and Wales.

Publications. Various client briefings and articles, co-author of the Jersey chapter of *International Trust Disputes (2012)*.

Mathew Newman, Partner Ogier Guernsey, Dispute Resolution Group

Ogier
E mathew.newman@ogier.com
W www.ogier.com

Professional qualifications. Solicitor, 2011, Guernsey; 2002, England and Wales

Areas of practice. Commercial and financial dispute resolution; contentious insolvency and restructuring matters; shareholder disputes; investment schemes; commercial disputes involving financial services, regulatory issues; Guernsey trusts and large scale construction matters.

Professional associations/memberships. Full member of the Insolvency Lawyers' Association, the Association of Business Recovery Professionals (R3); INSOL International; overseas member of the Chancery Bar Association; qualified commercial mediator accredited by the Chartered Institute of Arbitrators.

Publications.

- Various client briefings and publications, member of the editorial board of International Corporate Rescue.
- Co-author of the Guernsey chapter of *International Asset Tracing in Insolvency* (Toube, 2009).
- Co-author of the Guernsey chapter of *The Asset Tracing and Recovery Review*.

Sally Peedom, Managing Associate Ogier Guernsey, Dispute Resolution Group

Ogier
E sally.peedom@ogier.com
W www.ogier.com

Professional qualifications. Sydney, New South Wales, Australia, Solicitor, 2000; Diploma of Legal Practice, College of Law, Sydney, 1999

Areas of practice. Dispute resolution; restructuring and insolvency; contentious insolvency matters; shareholder disputes; trusts disputes; construction disputes.

Non-professional qualifications. Masters of Law and Management, University of New South Wales, 2005; Bachelor of Law, Bond University, Queensland, 1999

Professional associations/ memberships. Member of Guernsey International Legal Association (GILA); Society and Trust Estate Practitioners (STEP) and ARIES (the local Channel Islands Chapter of Insol); overseas member of the Chancery Bar Association.

Publications. Sally is the author of various client briefings and co-author of the Guernsey chapter of *The Asset Tracing and Recovery Review*.