

Judicial Guidance for Directors of an Insolvent Jersey Company

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The jurisdiction of the Royal Court pursuant to Article 155 of the **Companies (Jersey) Law 1991** (the “Law”) was examined by the court in the context of a winding up application on behalf of Poundworld (Jersey) Limited (“the Company”) earlier this year. This article looks at the judgment of the court ([2009] JRC 42) in ordering that the Company be wound up on grounds that it was just and equitable to do so pursuant to Article 155.

The Company was incorporated in Jersey in 1982. It recently ran into financial difficulties and was deemed by insolvency specialists advising it to be insolvent. In these circumstances the Company was advised to proceed to a creditors’ winding up pursuant to Article 160 of the Law. However further developments before the creditors’ meeting was due to be held impacted upon this advice.

DIFFICULT SITUATION

The Company found itself in a difficult situation and argued that special circumstances necessitated

the court sanctioned winding up. The Company had two major assets. The first was its stock held by its shipper which was owed money in respect of shipping charges and was threatening to exercise a lien over the stock and sell it in order to satisfy its outstanding invoices. The shipper was intending to sell the goods at wholesale value, resulting in significantly less than the assets’ true value being realised.

The remaining assets of the Company were situated in retail outlets in Jersey, the landlords of which were threatening to exercise a “*droit de gage*” (a type of lien particular to a landlord over movables within the premises) over the stock in the circumstances. The landlords similarly would be looking to sell the goods at wholesale rather than retail value depriving the Company of the full value of the assets.

The Company submitted that if a liquidator could be appointed quickly both the shipper and landlords would be likely to reach an appropriate

agreement with the liquidator as it was an independent party subject to the control of the court. The liquidator could supervise the sale of the assets at retail value thus realising a greater return which would be in the interests of the creditors.

Against this background the Company submitted that it could not wait for the creditors meeting to be held and for the court to make an order that the Company be wound up immediately. To delay matters, it submitted, would prejudice the interests of creditors.

AN UNUSUAL ORDER

The court noted that it was being asked to grant an unusual order and that its statutory jurisdiction under Article 155 of the Law should be exercised cautiously in the ordinary case of an insolvent company as the Law itself provided the mechanism of a creditors' winding up under Article 160 of the Law. However with regard to the particular circumstances of the present case, the court appreciated that the best interests of the creditors would undoubtedly be served by the Company being able to realise the retail value of its assets in order to maximise the cash it could generate to satisfy outstanding debts to creditors. The court was acutely aware that even a short delay of the winding up of the Company could allow both the shipper and the landlords of the retail outlets to sell the assets within their possession at a wholesale price which would not be in the best interest of the creditors.

The court ordered that the Company be wound up on the grounds that it was just and equitable to do so together with the further order that notice of the winding up be provided "forthwith" to all creditors. All creditors were granted liberty to apply to the court so as to allow them the opportunity to be heard if desired.

The Royal Court took this opportunity to review the authorities on Article 155 in Jersey citing the cases of **Re-Leveraged Income Fund Limited**

[Unreported Judgment 31 October 2002] and **Jean v. Murfitt** [Unreported Judgment 11 December 1996]. It is clear that as Article 155 of the Law is based upon a similar provision in the Companies Act of England that English authorities can inform a Jersey court in this area of the law. The court noted in particular that the categories of cases where a court can order a just and equitable winding up are not closed and the jurisdiction is a general one.

ROBUST APPROACH

The case demonstrates the Royal Court's robust approach in circumstances where a company requires its assistance. Directors of companies which become insolvent have to be mindful of the changing nature of their fiduciary duties as a company encounters liquidity problems and is threatened with insolvency. Whilst throughout the company's solvent existence the directors owe a general duty to the company to act honestly and in good faith in the best interests of the company, once the company becomes insolvent or is on the verge of insolvency the directors owe a duty to the company to act in the best interests of the creditors. In this context they should be aware of the ability to request the court's assistance to wind up the company swiftly if necessary to protect the interests of creditors.

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