

# Winding Up on Just and Equitable Grounds

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Gillian Robinson, January 2009

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In recent years, there have been relatively few insolvencies in Jersey whether of corporates or individuals. The current economic climate is however beginning to take its toll and the number of corporate insolvencies is on the rise. In particular, the rarely used court ordered winding up under Article 155 of the **Companies Jersey Law 1991**, as amended (“the Companies Law”), has been used with increasing frequency.

This Article provides that a court may order a winding up if it is just and equitable to do so or if it is expedient in the public interest to do so. An application for this relief may be made by the company, a director, a shareholder, the Minister for Economic Development, Jersey’s Financial Services Commission or certain other specified statutory bodies. It is only the Minister and the Commission which may apply on the public interest ground.

Proceeding under Article 155 may prove to be advantageous compared to a creditors’ winding up or a *désastre* in certain circumstances:

1. Timing – for a creditors’ winding up, 14 days’ notice must be given of the meeting to pass a shareholders’ special resolution which if passed is then followed by a creditors’ meeting. The timing can be crucial if there is a concern on the part of the directors that they may be trading whilst insolvent.
2. Choice of liquidator – whilst in a just and equitable winding up, it is likely that there is a proposed liquidator in mind, it is ultimately a decision for the court. In a creditors’ winding up the liquidator is chosen by the creditors. This is not always desirable if there are doubts as to the bona fides of certain of the creditors’ claims.
3. There is no requirement for insolvency in an Article 155 application. Thus if there is a structure which has some entities which are insolvent and some which are not, the court can wind them all up.

4. The jurisdiction does provide a great deal of flexibility and can be used in a variety of situations as is demonstrated in the following cases:
- In **Jean v. Murfitt** (Jersey Unreported) 11 December 1996, the Bailiff said in respect of this jurisdiction:-  
*“We conclude by observing that the words ‘just and equitable’ in Article 155 of the 1991 Law should be given a flexible interpretation. Justice and equity cannot be confined within the four corners of specific instances”.*
  - In **Re Leveraged Income Fund** (Jersey Unreported Judgment) 31 October 2002, the company was a collective investment fund, which was completely insolvent and had no assets whatsoever. A creditors’ winding up had failed due to a technical problem on the voting for the special resolution. The court wound it up on the basis that the substratum of the company had gone.
  - In **Belgravia Financial Services Group Limited** [2008] JRC 161, it was noted that an investigation into the company’s affairs and that of its subsidiaries, some of which were insolvent, and some of which were not, was required. The court wound up seven companies within the Belgravia Group.
  - In **Bisson v. Barker & Others** [2008] JRC 193 deadlock had been reached in a small private company.

If a court orders a winding up, it is also empowered under Article 155 to direct the manner in which the winding up is conducted and to make any orders as it sees fit to ensure that the winding up is conducted in an orderly manner. Whilst these provisions clearly give the court a great deal of discretion, in practice it may simply incorporate into any order the provisions of the Companies Law which apply to a creditors’ winding up.

Of course, there are disadvantages to a court application. There is the cost of preparing the evidence to place before the court and the perceived advantage of speed over a creditors’ winding up is dependant upon there being court availability to hear the application. Furthermore, parties seeking leave to intervene such as creditors may cause the process to be delayed.

In the event of an insolvent situation, the possibility of an application under the **Bankruptcy Désastre (Jersey) Law 1990** should not be overlooked. An application may be made by a creditor or a debtor and if made, the Viscount (the court’s executive officer) is appointed in a similar role to official receiver. However, in complex cases, the Viscount is likely to appoint a firm of accountants to act and so another layer of cost is incurred. In addition, insolvency must be established, the relevant test being the cash flow test – the inability of a debtor to pay his debts as they fall due.

It is a sign of the times that Jersey is seeing an increasing number of insolvencies, and given the advantages of the court based approach, it will be interesting to see which method is used most frequently.

Appleby appeared for the companies in the Belgravia Group.

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