

GUIDE TO CORPORATE ADMINISTRATION ORDERS IN GUERNSEY

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PREFACE

This Guide is a summary of the law and procedures relating to Corporate Administration Orders in Guernsey.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they may be addressed to any member of the Dispute Resolution Team, using the [contact information](#) provided at the end of this Guide.

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1. INTRODUCTION

The corporate administration regime in Guernsey is contained in the Companies (Guernsey) Law, 2008, as amended (**Companies Law**) and is an important insolvency process available to companies, Protected Cell Companies (**PCCs**), Incorporated Cell Companies (**ICCs**) and an incorporated cell of an ICC. It is particularly useful where companies are suffering temporary financial difficulties and need a period of respite from creditors in order to implement a rescue plan to survive as a going concern. A number of recent cases, which have come before the Royal Court, demonstrate the flexible and pragmatic nature of the regime.

2. WHEN MAY AN ADMINISTRATOR BE APPOINTED UNDER GUERNSEY LAW?

An application for an administration order may be made by the company, its directors, any member or creditor (including a prospective or contingent creditor) of the company, the Guernsey Financial Services Commission (**GFSC**), a PCC, an ICC, an incorporated cell of an ICC, or a liquidator in the case of a company in respect of which the Royal Court has made an order for winding up or which has passed a resolution for voluntary winding up.

The Royal Court may make an administration order in relation to a company if on balance the Royal Court:

- is satisfied that a company (or a cell of a protected cell company) does not satisfy or is likely to become unable to satisfy the solvency test (i.e. is unable to pay its debts as they fall due and/or has assets less than its liabilities); and
- considers that the making of an administration order may achieve one or more of the purposes of administration.

The purposes for which an administration order may be made are either the survival of the business as a going concern, and/or a more advantageous realisation of assets will be effected than on a winding up.

3. WHEN IS A COMPANY INSOLVENT UNDER GUERNSEY LAW?

A company will be insolvent under Guernsey law when it is unable to pay its debts (**Cash Flow Test**) and/or when its liabilities are greater than its assets (**Balance Sheet Test**).

A company is deemed to be unable to pay its debts, and therefore to be insolvent, if the company does not satisfy a creditor's statutory demand within three weeks; or if it is otherwise proved to the Royal Court's satisfaction that the company is unable to pay its debts.

When considering whether a company meets the Cash Flow Test, it will be determined as a matter of objective assessment of the whole of the evidence as to the company's financial position and its ability to meet its present liabilities from its available assets.

When considering whether a company meets the Balance Sheet Test, consideration will be given to whether the company's assets are less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

4. THE COURT PROCEDURE

An application for an administration order is made to the Royal Court during the sitting of the Ordinary Court on Tuesday as fixed in the Royal Court calendar each year. The application must be supported by affidavit evidence addressing the solvency position of the company, the intended purpose of administration and any other relevant matters.

The application will be heard by a Judge of the Royal Court and three Jurats. The Judge is the sole arbiter of law and procedure, whilst the Jurats will determine any questions of fact. The application and supporting affidavit evidence must be filed with the Court by the Friday preceding the allotted hearing date and served in good time on any other interested parties.

Notice of the application must, unless the Court orders otherwise, be served on the company; the GFSC; in the case of an incorporated cell company, each incorporated cell; and such other person as the Court may direct (including any creditor). Notice of the application must also be delivered to the Registrar of Companies at least two clear days before the day the application is made.

The Court, on hearing an application for an administration order may grant or dismiss the application, adjourn the hearing (conditionally or unconditionally), or make an interim order or any other order it thinks fit. An interim order may also restrict the performance of any functions of the directors or the company pending final determination of the application.

5. **EFFECT OF AN ADMINISTRATION ORDER**

Once an administration order is made, a moratorium takes effect such that no resolution may be passed or an order made for the company's winding up. On the making of an administration order, any application for the company's winding up will be dismissed.

Moreover no legal proceedings may be commenced or continued against the company without leave of the Royal Court. However, the administration order does not prevent the enforcement of secured interests and rights of set-off, including security interests.

When an administration order has been made, all correspondence (including invoices) of a company is subject to such an order, and must contain the Administrator's name and a statement that the affairs, business and property of the company are being managed by the Administrator. That statement must be readily ascertainable from the content of the correspondence, or from a course of dealing between the company and the person to whom the correspondence is addressed.

Any function conferred on the company or its officers, whether by the Companies Law or by the memorandum or articles or otherwise which could be performed in such a way as to interfere with the performance by the Administrator of his functions, may not be performed except with the consent of the Administrator, which may be given either generally or in relation to particular cases.

The Companies Law does not prescribe how long an administration order may remain in force. However, it is open to the Royal Court to fix a time limit for the administration, although usual practice is to leave it open-ended, and for the Administrator to apply to discharge the order in due course once the purpose of administration has been achieved or it is otherwise desirable or expedient to discharge the administration order.

6. **SWEARING IN AND REMUNERATION OF AN ADMINISTRATOR**

If the application for an administration order is made, the Administrator(s) will be sworn in by the Royal Court. Under Guernsey law, an Administrator does not have to be a qualified insolvency practitioner although it is usual practice for the Administrator(s) to be a qualified practitioner.

In the case of complex administrations dealing with UK *situs* assets, the Administrators will typically comprise a Guernsey-based appointee and a UK qualified insolvency practitioner. In such a case, the Court will order that the Administrators be empowered to act jointly and severally.

The Royal Court will ordinarily prospectively fix the Administrator's remuneration at the time of the application by reference to the Administrator's usual schedule of hourly rates. At the time of considering an application for a discharge of the administration order, the Court may approve the final fees and costs of the administration.

7. THE ADMINISTRATOR'S DUTIES AND FUNCTIONS

The Administrator may do all such things as may be necessary or expedient to manage the company's affairs, business and property. The specific powers of the Administrator are set out in Schedule 1 to the Companies Law and include extensive powers to manage the affairs of the company in addition to the general power. During the currency of the administration, the Administrator is an officer of the company and the Court.

The Administrator is deemed to act as the company's agent and will not incur personal liability, save to the extent he is fraudulent, reckless, grossly negligent or acts in bad faith. A person who ceases to be an Administrator may seek a release from all liability in relation to his conduct of the administration, save where he has incurred personal liability. A person dealing with the Administrator in good faith is not required to enquire whether the Administrator is acting within his powers.

The Administrator may apply to the Court for directions in relation to the extent or performance of any function, and any matter arising in the course of the administration. On such an application the Court may make such order as it thinks fit. The general direction power is typically utilised in situations involving complex questions of law or fact.

8. CREDITOR'S AND MEMBER'S RIGHTS

At any time when an administration order is in force, under section 388 of the Companies Law, a member or creditor of the company may apply to the Royal Court for an order on the basis that the company's affairs are being or have been managed in a manner which is unfair and prejudicial to their interests, or it would be otherwise desirable or expedient for an order to be made.

In the event such an application is successful, the Court may make an order (i) regulating the future management by the Administrator of the company's affairs; (ii) require the Administrator to refrain from doing or continuing to do an act; (iii) to do an act which the creditor / member has complained the Administrator has omitted to do; (iv) require the summoning of a meeting of members; or (v) discharge the administration order.

Also, under section 422 of the Companies Law, any member or creditor of the company may apply to the Royal Court for an order in the course of the winding up of the company where the Administrator has been guilty of any misfeasance or breach of fiduciary duty in relation to the company. On such an application the Royal Court may order the examination of the conduct of the Administrator and may order him to contribute such sum to the company's assets as the Court thinks fit. The Administrator may have a defence to such a claim under section 522 where he has acted honestly and reasonably, and having regard to all of the circumstances of the case (including those connected with his appointment) he ought fairly to be excused.

9. CROSS-BORDER INSOLVENCY – RECOGNITION OF FOREIGN INSOLVENCY OFFICE HOLDERS

As Guernsey is not a part of the United Kingdom or a European Union member, neither the English Cross-Border Insolvency Regulations 2006 nor the Council Regulation on Insolvency Proceedings 2000 applies in Guernsey. Moreover, the UNCITRAL Model Law on cross-border insolvency has not been adopted in Guernsey.

It is possible for an order made in any part of the United Kingdom under the provisions of the Insolvency Act 1986 (**Insolvency Act**) to be enforced in Guernsey. Section 426 of the Insolvency Act provides for cooperation and reciprocal assistance in insolvency proceedings between courts of the United Kingdom and various other designated countries and territories, including Guernsey. Therefore UK office holders (including Administrators) may use section 426 of the Insolvency Act to seek recognition and assistance in Guernsey.

Foreign insolvency office holders appointed outside of the UK must rely on the common law in order to obtain recognition in Guernsey of their appointment and ancillary assistance of the Royal Court. Foreign office holders relying on the common law route in Guernsey must obtain a local recognition of their appointment and establish that the entities over which they are appointed have a “sufficient connection” with the appointing jurisdiction. What amounts to a “sufficient connection” will be heavily fact dependent and it is recommended that advice be sought on a case-by-case basis.

10. RECENT CASES

In the case of *In the Matter of Esquire Realty Holdings Limited* (Royal Court, 19/2014), the Royal Court was asked to place a company into administration in the context of an intended pre-packaged sale by the Administrators of the company’s assets immediately following their appointment. This was the first application of its type in Guernsey. The decision is also significant as the Royal Court recommended that pre-pack administration applications should, “unless there are overwhelming reasons not to”, be supported by a report prepared in accordance SIP 16, issued by the Joint Insolvency Committee in England and Wales, which is a statement of insolvency practice, the purpose of which is to ensure that creditors are informed as to the reasons why an insolvency practitioner decided on a pre-packaged sale.

In *Mitco Retail One Limited et al and In the Matter of Part XXI of the Companies (Guernsey) Law, 2008*, as amended (Royal Court, 31/2014), the Royal Court ordered that a group of companies, comprising a wider German property holding structure owing its creditors in excess of €50m, be placed into administration on the application of its secured creditor. The application was opposed on the basis that it would be in a position to refinance the loan facility and an administration order would not achieve the purpose of administration. Following a contested hearing, in a 2:1 decision of the Jurats of the Royal Court, the companies were placed into administration. The judgment is notable as it held that, following English common law, under Guernsey law even if an administration order is granted or the court is minded to accede to the application, the effective date of the order may be delayed to allow the company to take certain steps to avoid the order taking effect.

In *EFG Private Bank (Channel Islands) Limited v BC Capital Group Limited & Ors* (Royal Court, 34/2013) the Royal Court set out the principles applicable to the Guernsey court’s consideration of assistance in foreign insolvencies. The Royal Court noted that it has an “active obligation pursuant to inter-jurisdictional comity or co-operation” to provide active assistance to foreign insolvency processes and that proper regard must be given to the principle of universalism in cross-border insolvency proceedings. The Royal Court has an underlying discretion as to what form that assistance may take. The guiding principle is that “the discretion available to the Court must be exercised judicially, with a view to achieving fairness and justice between all parties.”

For more specific advice on corporate administration orders in Guernsey, we invite you to contact:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).

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