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UPDATE

# Jersey Court refuses representation for letter of request

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The Jersey Court has refused to issue a letter of request to the English High Court for the appointment of an English law administrator over a Jersey company.

In the case of *Harbour Fund II L.P. v ORB a.r.l & Litigation Capital Funding* [2016] JRC171, the representation failed on the basis that (1) the respondent Jersey company (ORB) did not have substantial connections with England, and (2) there was no advantage to creditors in using the English law administration regime over the Jersey law *desastre* process.

The judgment is an interesting example of how the Jersey Court will exercise its discretion vis-à-vis the issuance of letters or request. In particular, it demonstrates that if there is no substantial connection to England (and properties in England alone may not be sufficient to establish this), the Jersey Court is unlikely to issue a letter of request asking the English Court to invoke an English law process in respect of a Jersey company.

## Letters of Request

While Jersey law has no equivalent to the English law administration process (which, amongst other things, allows an insolvent company to continue trading as a going concern), the Jersey Court can issue a letter of request to the English Court requesting the appointment of an English law administrator over an insolvent Jersey company. This power derives from the Jersey Court's inherent jurisdiction and section 426 of the English Insolvency Act 1986. In certain circumstances, use of the English law administration may be more advantageous for the company and/or its creditors than the available Jersey law processes.

The need for a letter of request can be short circuited if the creditor can establish that the insolvent Jersey company's centre of main interest is in England or Wales (in which case the creditor may be able to effect the administration of the company direct under English law without recourse to the Jersey Courts). If, however, the Jersey company's centre of main interest is not in England or Wales, or if there is any doubt about whether this can be established, the creditor should, if an English law administration is considered more appropriate than any Jersey process, follow the relatively well trodden path of applying to the Jersey Court for a letter of request.

In deciding whether to exercise its discretion in favour of issuing the letter of request, the Jersey Court must consider the interests of the insolvent company and its creditors, and can consider the public interest of the island (albeit this is a subordinate consideration) (Reo (*Powerstation*) Limited [2011] JRC 232A). In terms of how this test is applied in practice, in all previous applications the Court has satisfied itself that: (1) the creditor has a liquidated claim, (2) the Jersey registered company is insolvent, and (3) the company has assets located within the jurisdiction of the courts of England and Wales.

It is the last of these points that caused the issue in the present case, and ultimately led the refusal of the application.

## The Case

While the factual background to the case was complex (being connected with the ongoing Dr Smith/ORB litigation), the Court cut through this to establish that Harbour (the representor) was a creditor of ORB (the respondent) with a liquidated claim, and that ORB was cash-flow insolvent.

### Substantial connection

However, the Court held that it could not establish with any certainty whether ORB had assets in England and Wales. While Harbour adduced evidence from an accountancy firm identifying properties in London, it was not clear whether ORB had an interest in these properties. In addition, the majority of the assets listed by the accountant were situated outside England and Wales (namely in Jersey, Poland, Majorca and Italy). This being so, the Court concluded that there was no substantial connection to England which would justify requesting the assistance of the English Court. In this regard, the Court felt uneasy initiating a process (ie by issuing the letter of request) that would lead to the appointment of an English law administrator (bestowed with the associated powers) over a Jersey company that had no substantial connection to England. The Court noted that this could effectively introduce the process of administration into Jersey 'by the back door'.

## Opinion from English QC

It is worth noting that Harbour furnished the court with an opinion from an English QC stating that the English High Court would likely accede to the request (the production of such an opinion being standard practice in applications for letters of request). However, the Jersey Court was quick to point out that this opinion was premised on the basis that ORB had a substantial connection to England and Wales; the opinion did not in itself establish this (ie the opinion did not justify the assumption on which it was based). As such, the opinion did not remedy the fundamental hole in Harbour's application.

## Best interest of creditors

The Jersey Court also concluded that it was not in the best interest of creditors to appoint an English law administrator. If ORB went into an English law administration process, the administrator's duties would likely include ascertaining the identity and whereabouts of ORB's assets, recovering and selling those assets, intervening in certain connected proceedings, and potentially commencing enforcement proceedings in other jurisdictions. The Court could see no reason why an English administrator would be better placed to undertake these tasks than the Jersey Viscount under the *desastre* process.

The Court alluded to the possibility that it may have reached a different conclusion if the purpose of the administration had been to keep ORB trading as a going concern (as this is a power available to an administrator which is not available to the Viscount), but did not dwell on the point given that it was not relevant on the facts.

## Comment

The case provides useful guidance for both creditors and practitioners on the framework (and its limits) used by the Jersey Court when deciding whether to exercise its discretion to seek to invoke the English law process of administration over a Jersey company. In particular, it is clear that if there is no substantial connection with England or Wales, the Jersey Court is very unlikely to issue the letter. To do otherwise would potentially introduce English law concept of administration into Jersey law via the back door.

A legal opinion from an English barrister confirming the likelihood of the English Court acceding to a request will remain important, but the opinion in and of itself will not be sufficient to establish the necessary substantial connection with England, which will be a matter for the Jersey court to determine based on appropriate affidavit evidence.

Finally, the Jersey Court must be persuaded that the English law administration process will better serve the creditors, the company and/or the Island, over and above the Jersey law *desastre* process. If there is no clear and tangible benefit, then it would be prudent for the representor to opt for the *desastre* (or other suitable Jersey law) process which should continue to be considered the starting point when dealing with an insolvent Jersey company.

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[Document Reference]

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