

UPDATE

Company restoration – finding a means to an end

Update prepared by Bruce Lincoln (Partner, Jersey) and Bethan Watts (Associate, Jersey)

The Jersey Royal Court has heard a representation concerning the restoration of a company to the Register of Companies. The case was unusual because the applicant sought to restore the company in order to place it into a court supervised liquidation process, and it first had to overcome the fact that it was not a registered shareholder of the dissolved company and, therefore, appeared to lack standing to bring the application.

The recent case of *In the matter of the Representation of Rendle and Butcher, joint liquidators of Arck LLP* [2017] JRC 004 concerned an application to the Jersey Royal Court to restore a dissolved company to the register in order to recover a debt due from that company. The unusual element of this case, however, was that the applicant wanted to restore the company so that it could be placed into a court supervised liquidation process (under which, the applicant believed, there were better prospects of recovering assets for creditors); but in order to be able to make that application (for a just and equitable winding-up) the applicant first had to overcome the fact that it was not a registered shareholder of the dissolved company and, therefore, appeared to lack standing to bring the application.

The facts

Arck LLP (**Arck**) was established by Mr Clay and Ms Clark as an investment vehicle and between 2006 and 2011 it attracted a total of approximately £50 million from private investors. In 2012 both Mr Clay and Ms Clark were found guilty of fraud and forgery offences. They were sentenced, and were disqualified from serving as directors. Arck was put into liquidation.

In relation to one particular property development, Arck had advanced a loan of approximately £24.4m to Arck Estrela Limited (**Estrela**) which remained outstanding and was therefore a receivable asset to Arck in liquidation. The liquidators sought to recover this loan, but were unable to do so because Estrela had been dissolved.

The ownership structure of Estrela was complex, and therefore the steps which needed to be taken to restore it to the register and then pursue an equitable winding up were equally complex. Arck held an indirect interest in Estrela, via two other dissolved companies, which would both have needed to be restored in order for Arck to apply for the restoration of Estrela.

In addition to this indirect ownership, in 2011 an individual named Mr Hobbs had agreed that he would hold 100 shares in Estrela as a bare trustee for Arck. Unfortunately the declaration of trust was never executed. The Court was asked to decide whether there was a valid bare trust in place, which would provide Arck with standing to (i) make an application for Estrela to be restored to the register; and (ii) apply for Estrela to be equitably wound up, which would permit the recovery of Arck's debt.

Relevant Law

- Article 213 of the Companies (Jersey) Law 1991 governs the process for restoring a company to the register. The effect of a successful application under this article is that the dissolution of the relevant company is voided, and the public record is amended so that it is as if the dissolution never occurred.

Article 213(1) states that an application may be brought under this section by the liquidator of the company concerned, or by any other person appearing to the court to be interested. The case of Independent Marine Services Limited [1996] JLR 294 establishes that there is a low threshold to establish a sufficient interest.

- Article 47 of the Companies (Jersey) Law 1991 permits the Court to rectify a company's register of members.
- Article 155 of the Companies (Jersey) Law 1991 governs the process for the just and equitable winding up of a company. An application for a just and equitable winding up may be made by the company, or by a director or member of the company, but there is no provision for an application by a creditor.
- Article 43(3) of the Trusts (Jersey) 1984 Law allows for the termination of a Jersey trust and the distribution of trust property to the entitled beneficiaries.

The predicament

The Court had no problem finding that Arck had a sufficient interest for the purpose of Article 213 through its position as a creditor and as an indirect beneficial owner.

However, without being a registered member of Estrela, the liquidators of Arck would not have standing to apply for an equitable winding up under Article 155. Further, the original directors of Arck were companies who had themselves been dissolved, which meant that without Court intervention to rectify the register of members, there was no practical means for Arck to become a member of Estrela.

The solution

The Court took a pragmatic view in this case and was willing to find that the 100 shares in Estrela which were held by Mr Hobbs were held on a bare trust for Arck. This trust was terminated and so the 100 shares came to be held directly by Arck.

The Court was then able to exercise its power to rectify the register of members of Estrela so that Arck was registered as a member and thereby gained standing to apply to wind up the company on a just and equitable basis.

Comment

This case is an interesting twist on the relatively common process of restoring a dissolved company to recover a debt. The Court very neatly brought together four separate procedures in order to reach an equitable outcome in circumstances where the creditors of Arck were unfairly out-of-pocket.

The case does not contain any 'new law' per se, but it is noteworthy in its application of what is usually a very standard procedure.

Contacts

Bruce Lincoln
Partner, Jersey
+44 1534 676 461
bruce.lincoln@mourant.com

Bethan Watts
Associate, Jersey
+44 1534 676 917
bethan.watts@mourant.com

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