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UPDATE

Harbour v Orb: a 'last-gasp' attempt to avoid désastre

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The Jersey Royal Court has reviewed relevant bankruptcy law and has declared a company and its sole shareholder directed en désastre in spite of the fact that proceedings were commenced in Jersey. The Court found that the English proceedings had been commenced to subvert the Jersey bankruptcy procedure.

As we reported in our legal update 'Jersey Court refuses representation for letter of request' (October 2016), in *Harbour v ORB* [2016] JRC 171 the Jersey Court, for the first time, refused to issue a letter of request to the English High Court for the appointment of an English law administrator over a Jersey company. At present Jersey does not have an equivalent to a UK administration order. Such orders may, however, be obtained in respect of a Jersey company either by virtue of the English High Court's original jurisdiction where the company's centre of main interests is in England and Wales or, where it is not, by the Jersey Court issuing a letter of request to the High Court and the High Court granting assistance in insolvency matters pursuant to section 426 of the Insolvency Act 1986.

The latter route has been successfully used in relation to a number of Jersey companies, and remains an important option (which is also available where an administration order is sought from the Scottish or Northern Irish courts). But the decision in *Harbour v Orb* showed that this option has its limits. It is necessary to establish that the company has a substantial connection with the UK and that, ultimately, a UK administration is likely to be the most effective method of collecting and administering the company's assets in the interests of its creditors. The applicant in *Harbour v ORB* was unable to demonstrate either of these points. The application for a letter of request was accordingly refused.

Since that decision, a series of events culminated in a decision by which the Jersey Court declared the assets of both the Jersey company (Orb) and the Jersey resident director and shareholder (Dr Cochrane) to be *en désastr*e (bankrupt): *Harbour Fund II LP v Orb a.r.l and Dr Gail Cochrane* [2017] JRC 007. The new judgment shows the Jersey Court's robust approach where there is a 'last gasp' and inadequately evidenced attempt to stave off an order of *désastre* by alleging that the debtor has a right of set off against the applicant creditor.

The Facts

Following the refusal to issue a letter of request, Harbour made a formal demand as a creditor of Orb for a liquidated sum of £5.2m. This demand was not met, so pursuant to a personal guarantee Harbour issued a formal demand to Dr Cochrane. When she too failed to pay, Harbour brought an application in the Jersey Court for a declaration *en désastre* in respect of both Orb and Dr Cochrane (the Respondents). A hearing was listed for 24 November 2016. On 22 November 2016, two days before the hearing, the Respondents filed a claim in the English High Court against Harbour for a sum of £73m (the English Claim). Off the back of this claim, the Respondents resisted the application for a declaration *en désastre*, on the grounds that Harbour's liquidated claim of £5.2m may be subject to set-off and counterclaim, pending the outcome of any decision of the English Court.

Relevant Legal Principles

The principles applied by the Court are set out in Article 3 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 and Rule 2 of the Bankruptcy (*Désastre*) Rules 2006. Under these rules, a creditor applying for a declaration *en désastre* must show that the debtor is cash flow insolvent (ie unable to pay its debts as they fall due) but has realisable assets. Any creditor will have standing to bring an application if it has a claim of at least £3,000 which is a certain debt and is undoubtedly due and payable. However, in order to be a 'certain debt' that claim cannot be the subject of a genuine dispute and arguable defence (*SO Holdings* [2011] JLR 782).

The English Claim

The English Claim was drafted and filed without any legal advice. The grounds of the claim are, in short, that Harbour had breached the terms of a funding arrangement in relation to earlier proceedings, and as a result Dr Cochrane had been forced to take on a contingent liability of around £73m from another third party funder. After having filed the claim, the Respondents instructed English solicitors to advise on the English Claim, and Jersey lawyers to resist the application for a declaration *en désastre*. Both sets of lawyers were instructed merely a day before the hearing.

The English solicitors filed a last-minute affidavit in the Jersey proceedings, alerting the Jersey Court to the newly issued English proceedings, and stating the view that the English Claim was a genuine claim, and was 'no last-gasp gimmick'. The Respondents argued that to allow the bankruptcy proceedings to go ahead would be manifestly inappropriate and unfair in the light of a real and genuine dispute for which the proper means of resolution was before the English Courts. It was submitted that the Jersey Court should not pre-judge the outcome of any English proceedings or summarily determine whether there was allowable set-off or counterclaim as a matter of English law.

The Court's reasoning

The Court had a number of criticisms of the approach taken by the Respondents:

- The English solicitors could not realistically, in only one day, come to a reasoned conclusion as to the legitimacy of a claim which they did not draft. Indeed, the affidavit itself states that the English solicitors had not had a chance to read all of the relevant material.
- Prior to filing the claim, Dr Cochrane had never made any mention of a prospective claim, including in her earlier affidavit. The Court stated that it was inconceivable that if the claim was genuine, no reference would ever have been made to it before.
- The application for a declaration *en désastre* was not 'without notice'. The Respondents had known of the application from as early as September 2016. Harbour had taken every reasonable step to notify the Respondents of its intentions, including seeking an *inter-partes* hearing.
- There was no evidence filed in support of the Respondents' arguments. The Court expressed the view that at the very least it would have expected to see an affidavit filed by Dr Cochrane to assist with the exercise of the Court's discretion.

In summary, the Court found that the English Claim was indeed a 'last gasp' attempt to avoid bankruptcy.

It is clear from the judgment in this case that it is of paramount importance to the Jersey Court that it should be seen to be discharging its responsibilities for dealing with the affairs of a Jersey registered company and a Jersey resident who appeared to be insolvent. The decision of the Court was guided by pragmatism, and was not swayed by a weak attempt to subvert the established legal principles.

In order to oppose a declaration *en désastre* the Court needs to be presented with sufficient evidence to justify its opposition. The Court made clear in this case that it might have been minded at the very least to agree to a short adjournment to allow the Respondents to obtain additional funding, had it been presented with evidence to justify the Court exercising discretion in that way.

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