

UPDATE

Liquidators' new investigative powers

Update prepared by Abel Lyall and Iona Mitchell (Guernsey)

Amendments to Guernsey's corporate insolvency legislation give liquidators more investigative powers and permit liquidators and administrators to set aside transactions at undervalue.

One of the most powerful investigative weapons in any liquidator's armoury is the ability to compel the production from third parties of information and documents regarding the affairs of the company. Until recently, the precise scope of the liquidator's ability to seek production of such information or documents in Guernsey has been uncertain, relying on ill-defined common law powers.

The scope of these important investigative powers has now been clarified in changes to Guernsey's corporate insolvency regime.

The Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020 (the **Ordinance**) was approved by the States of Guernsey on 15 January 2020 and brought into force on 1 January 2023 by regulations made by the Committee for Economic Development.

The reforms are important as they provide a number of new statutory powers of investigation that will assist with the effective winding up of companies.

Investigative powers

Production of documents and information

Liquidators now have an express power to apply to the Court for an order compelling the following persons to produce documents and information relating to the company:

- officers or former officers of the company;
- those who in the last 12 months:
 - are or have been employed by the company;
 - have taken part in the company's formation;
 - are or have been officers of or employed by a company which is or was within the last 12 months an officer of the company (for example, an employee of a corporate director of the company in liquidation); or
- with the leave of the court, any other person.

Under the new provisions, the liquidator is entitled to documents and information '*reasonably required*' for the purposes of the performance of their functions in respect of the winding up of the company. The '*reasonably required*' test is in similar, but not identical, UK provisions under section 235 of the Insolvency Act 1986. It is therefore likely that Guernsey would adopt a similar approach to the question of what is '*reasonably required*'. The legislation does not expand upon what this means, but it is generally accepted that the role of the liquidator is to investigate the affairs of the company, including the cause of company's failure, so it is anticipated that the liquidator could obtain any information pertaining to this. In *R v Brady* (2005), the English Court of Appeal indicated that the purpose includes the identification of potential criminal or other misconduct. It is therefore expected that the test would be construed widely.

The obligation to provide the information and/or documents extends to confidential information except where it is privileged.

A clear ability for liquidators to seek such an order from the Court may lead to greater co-operation and voluntary production by parties having such information and documents.

Examination of Company Officers

A liquidator may also apply to the Court to appoint an Inspector to examine any person who is or has been an officer of the company. While the examination will be similar to that of a witness in a civil trial, it will be conducted in private.

Statements can be used as evidence in other proceedings, save criminal proceedings, where they can only be used in very limited circumstances. UK authority is likely to be followed on the limitations on obtaining such statements, such that they will either not be obtainable or will be subject to use restrictions when they may be used unduly oppressively in other proceedings. The power should not be used merely to provide the liquidator with an advantage in relation to separate litigation. However, when considering the limitations on use, it is expected that the Guernsey Court would also take account of the differences between the UK and Guernsey regimes, such as the availability in the UK of both public and private examinations, and the wider group who may be examined. This may lead to a different result in certain cases.

The Ordinance provides the Committee for Economic Development with a power to make company insolvency rules by regulation, following consultation with the Insolvency Rules Committee. It may be that future insolvency rules provide more detail as to the use of such statements.

Statement of affairs

The administrator's power to demand a Statement of Affairs has been extended to a liquidator. The Statement of Affairs shows the particulars of the company's assets, debts and liabilities; names and addresses of creditors; details and dates of any securities and such further information as the office-holder may reasonably require. The persons obliged to provide the Statement of Affairs are the same as those who can be compelled to provide documents and information above. Failure to provide the Statement of Affairs is a criminal offence and the defaulting party is, in addition, liable to a daily default fine.

Setting aside transactions

The above investigative powers assist liquidators in performing their functions. They also complement additional powers granted to liquidators to set aside certain transactions.

Transactions at undervalue

Liquidators already had the power to bring actions for misfeasance in office or set aside the making of unfair preferences to creditors. However, while certain actions existed under customary law to set aside transactions defrauding creditors, liquidators lacked a statutory cause of action to set aside transactions at an undervalue. The reforms provide some clarity and put the powers on a statutory footing.

Liquidators and administrators may now apply to the Court to set aside a transaction if:

- it occurred within the last six months before the liquidation/administration, or two years where the other party to the transaction is connected to the company;
- the company was insolvent at the date of the transaction or as a result of it; and
- it was not entered into in good faith for the purpose of carrying on the business of the company where there were reasonable grounds for believing that it would be of benefit to the company.

These new provisions align Guernsey broadly with the UK position under Section 238 of the Insolvency Act 1986.

Extortionate credit transactions

In addition, liquidators or administrators now have the ability to apply to the Court to set aside extortionate credit transactions entered into in the last three years before the administration/liquidation.

A transaction would be regarded as extortionate if, having regard to the risk accepted by the person providing the credit, the terms required exorbitant payments or the transaction otherwise grossly contravened ordinary principles of fair dealing. Whether a transaction will meet this test will of course be fact-specific.

Where a liquidator or administration brings an application to set aside this type of transaction, there is a presumption that the transaction was extortionate. This means that the person seeking to maintain the transaction would have the burden of proving that it was not.

Conclusion

The new provisions strengthen liquidators' and administrators' investigative powers and their ability to set aside transactions as a result of information gathered during those investigations. Rather than making any dramatic changes, the amendments provide a statutory basis for a number of powers that existed under customary law, and bring Guernsey in line with the UK and other offshore jurisdictions.

The new provisions only apply to liquidations or administrations commenced on or after 1 January 2023.

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