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UPDATE

Does a creditor with an unliquidated debt have standing to apply for a creditors' winding up under the Companies (Jersey) Law 1991?

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Looking back at 2023, one of the more memorable judicial decisions emanating from Jersey was the decision of the Court of Appeal in HWA 555 Owners, LLC v Redox PLC S.A. and Thieltgen [2023] JCA 085. In this update we explore how this decision might impact upon the creditors' winding-up regime provided for in the Companies (Jersey) Law 1991.

HWA 555 Owners, LLC v Redox PLC S.A. and Thieltgen

Introduction

The Court of Appeal in *HWA 555 Owners, LLC v Redox PLC S.A. and Thieltgen [2023] JCA 085* considered, amongst other things, the question of standing to make a creditor application for a court-ordered creditors' winding up under the procedure introduced into the Companies (Jersey) Law 1991 (the Companies Law) by way of the Companies (Amendment No 8) (Jersey) Regulations 2022 (the Amendment). The Amendment widens the scope of the previous creditors' winding-up regime to enable the Court to make a winding-up order on the application of a creditor.

The novelty of the decision lies in the conclusion of the Court of Appeal that a creditor need not have a liquidated claim (i.e. a certain debt that is undoubtedly due and payable) in order to have standing to make an application for a creditors' winding up under the Companies Law; the Court held that, in certain circumstances, an unliquidated claim will suffice.

Background

To briefly summarise the complex background to the case, Redox PLC S.A. (Redox) is a Jersey-incorporated company which is also registered as a *société anonyme* in the Luxembourg Register of Companies and Commerce and is administered in Luxembourg.

The Appellant in these proceedings was HWA 555 Owners, LLC (the Appellant). Redox had granted a guarantee in favour of the Appellant (the Guarantee) in relation to the liabilities of the tenant (the Tenant) of a property in San Francisco, California under the terms of a lease dated 24 July 2018 (the Lease). Redox and the Tenant are both members of the same group of companies, the IWG Group.

A dispute arose out of the purported termination of the Lease by the Tenant in September 2019. The dispute was litigated in California, as a result of which the Appellant obtained judgment in its favour. That judgment was promptly appealed by the Tenant. In the meantime, the California court made a costs order against the Tenant in the sum of just under US$100,000 (the Costs Order), plus lawyers' fees which were (as yet) unassessed. Expert evidence on Californian law confirmed that the pending appeal resulted in an automatic stay of the enforcement of the California court's orders, both in respect of the original dispute and of the Costs Order.

Meanwhile, on 14 September 2020, Redox applied to the courts in Luxembourg for a bankruptcy order, which was granted on 9 October 2020. On 6 November 2020, the Appellant served a notice on the Tenant claiming termination of the Lease on the basis of the application for a bankruptcy order in respect of

Redox, which was an act of default under the terms of the Lease. The Appellant then issued a demand under the Guarantee given by Redox for a claim in damages.

The Jersey Proceedings

On 15 March 2022, the Appellant made an application to the Royal Court for a creditors' winding up order under Article 157A of the Companies Law, relying on the liquidated part of the Costs Order against the Tenant, which was said to be due by Redox to the Appellant under the Guarantee.

Article 157A(1) of the Companies Law (as introduced by the Amendment) states that:

> '*(1) A creditor may make an application to the court for an order to commence a creditors' winding up if the creditor has a claim against the company for not less than the prescribed minimum liquidated sum and –*
>
> *(a) the company is unable to pay its debts;*
>
> *(b) the creditor has evidence of the company's insolvency; or*
>
> *(c) the creditor has the consent of the company.*'

The Royal Court dismissed the application on the basis that, in the exercise of its discretion it was persuaded that it would be in the interests of the creditors for the bankruptcy proceedings to be conducted in Luxembourg, being where Redox was administered and where separate bankruptcy proceedings were already underway. However, notwithstanding that the application was dismissed, the Royal Court considered that the Costs Order was a liquidated claim sufficient to bestow the Appellant with standing under Article 157A of the Companies Law. In other words, the Royal Court's decision presupposed that a claim for a liquidated sum was necessary and found that there was such a claim.

The Appellant appealed the decision of the Royal Court on three grounds. First, that once the Royal Court had established that the Appellant had standing to make the application under Article 157A of the Companies Law, it was required to make the order sought and did not have further discretion to exercise. Second, that in the event that the Royal Court did have discretion, it was wrong in the circumstances to refuse to make the order winding up Redox. Third, that the Royal Court exercised its discretion on an incorrect basis.

Redox cross-appealed on the basis that although the Royal Court correctly identified the legal test for standing, it then misapplied that test by holding that the Costs Order was a *liquidated* sum sufficient for standing under Article 157A of the Companies Law. Redox's position was that as a result of (i) the stay of the California proceedings; and (ii) the fact that the full amount of the Costs Order was as yet unquantified, the Costs Order was at present an unliquidated sum.

The Decision

In relation to the Appellant's three grounds of appeal, in short, the Court of Appeal held that the Royal Court does in fact have a discretion to exercise on an application under Article 157A of the Companies Law, but that the correct approach is to proceed on the basis that an application by a qualifying creditor should be granted, unless there is a sufficiently good reason not to do so. On that basis, it considered that the Royal Court had in fact erred in the exercise of its discretion.

As foreshadowed above, however, the surprising aspect of this decision lies in the Court's conclusion on Redox's cross-appeal. As to that, the Court of Appeal held that the Appellant did have standing to apply for a creditors' winding up order, irrespective of whether or not the Costs Order could be classified as liquidated. The majority concluded that the ordinary and natural construction of Article 157A of the Companies Law permits an application to be made for a creditors' winding up both by a creditor with a liquidated claim and by a creditor with a contingent or unliquidated claim against the debtor, as long as the claim can be demonstrated to be of a value exceeding the prescribed amount. Matthews JA stated:

'*the phrase "claim against the debtor of not less than such liquidated sum as shall be prescribed by the Minister" does not mean that the value of the claim must be a liquidated sum. It is enough that the Court is satisfied to the civil standard of proof that the value of the claim, whatever it ultimately turns out to be, must exceed £3,000, or whatever sum may be prescribed in the future*'.

It is important to note however that there was a robust dissenting judgment on the liquidated claim point, with Wolffe JA taking the view that the natural interpretation of Article 157A(1) of the Companies Law is that the presence of the word 'liquidated' means that the creditor must in fact have a claim for a liquidated sum, which is not less than the prescribed minimum. Therefore, an unliquidated claim (such as a claim for damages not quantified by judgment or agreement) does not give standing to a creditor to commence a creditors' winding up. To conclude otherwise would be to effectively ignore the word 'liquidated' in both Article 157A of the Companies Law and, in addition, in the materially similar wording within Article 3 of the Bankruptcy (Désastre) (Jersey) Law 1990 (the **Désastre Law**), which the Court of Appeal in HWA 555 used as an aid to the constriction of Article 157A(1) of the Companies Law.

However, on the facts, the judges agreed on the overall result, i.e. that Redox had standing to apply, because Wolffe JA considered that the Costs Order was a liquidated claim which satisfied the statutory test for standing. The Court of Appeal thus set aside the order of the Royal Court, albeit that the Court of Appeal made no order for winding up because the parties had settled the matters in dispute following the hearing but prior to the Court of Appeal handing down judgment.

Conclusion

Prior to the judgment in HWA 555, it was broadly (perhaps even universally) considered amongst practitioners (such views being supported by previous judgments of the Jersey courts in relation to the Désastre Law) that in order to engage Article 157A, a creditor must have a liquidated claim against the debtor company. Whilst an unliquidated claim could be filed in the creditors' winding up once the procedure had been commenced, an unliquidated claim was not sufficient to initiate the creditors' winding up by itself.

This view was reinforced by the requirement in Royal Court Practice Direction 22/01 for the creditor's application under Article 157A to be supported by an affidavit which states that '*the creditor has a claim against the company for a liquidated sum*' (emphasis added), as well as by the case-law relating to the similar wording in the Désastre Law.

The judgment in HWA 555 however departed from this analysis, holding that a creditor of an unliquidated claim does indeed have standing to apply for a creditors' winding up under Article 157A of the Companies Law, so long as the value of the claim when liquidated will exceed the prescribed sum, which is a surprising outcome. It is particularly surprising when the Amendment was made against the backdrop of prior judicial decisions and established commentary on the materially similar wording in Article 3 of the Désastre Law, confirming that an applicant creditor requires a liquidated claim exceeding the prescribed minimum.

In view of the persuasive dissenting judgment, and of the fact that the judgment in HWA 555 departs from the previously widely-held interpretation of the requirements under Article 157A, it is likely that this issue will resurface again in future for consideration (albeit not on a direct appeal in the HWA 555 proceedings, which appear to have been settled out of court). Therefore, whilst the decision is binding on the Royal Court for the time being, it would be wise for a creditor to exercise caution in seeking to initiate a creditors' winding up under Article 157A of the Companies Law, on the basis of an unliquidated sum, or at least to do so with their eyes wide open to the reality that this is an issue which may rear its head again.

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