



UNLIQUIDATED CLAIMS: STANDING OF CREDITORS TO SEEK A COMPULSORY INSOLVENCY PROCESS IN JERSEY

Stephen Alexander and Andrew Bridgeford
Mourant Ozannes (Jersey) LLP • Jersey

The decision by the majority of the Jersey Court of Appeal in *HWA 555 Owners, LLC v Redox PLC S.A. (formerly Regus PLC) and another* [2023] JCA 085 (**HWA**) overturned a longstanding understanding of the rules determining standing for creditors to be able to bring a compulsory insolvency application against companies or individuals. It had previously been understood that an applicant creditor needed to have a liquidated claim (of not less than a prescribed minimum, which is currently £3000). The effect of the decision is that the holder of an unliquidated claim also has standing, provided that the court is satisfied, to the civil standard, that the claim will, once it has become liquidated, exceed the minimum amount. This may, however, not be the last word on the matter.

As far as Jersey companies are concerned, the two main insolvency processes open to creditors are a *désastre* and a creditors' winding up. The creditor of an individual may also apply for the individual's *désastre*.

A *désastre* is a court-ordered insolvency proceeding by virtue of which a court officer (the Viscount) becomes the official liquidator or, in the case of an individual, an officer akin to a trustee in

bankruptcy. It has its origin in Jersey customary law and is substantially governed by the Bankruptcy (*Désastre*) (Jersey) Law 1991 (the **Bankruptcy Law**). A declaration of *désastre* can be both voluntarily applied for by the insolvent debtor or sought for by a creditor against their debtor.

A creditors' winding up, which is carried out by an insolvency practitioner, was until recent years only a voluntary form of winding up of a Jersey company as it had to be commenced by special resolution of the shareholders. An amendment to the Companies (Jersey) Law 1991 (the **Companies Law**) in 2022 introduced, as an alternative to a *désastre* application for creditors of Jersey companies, the ability to apply to the court for an order that the company be wound up in a creditors' winding up. One route for the creditor to obtain such an order is to show that the company is unable to pay its debts as they fall due. Analogously to a winding up order under the UK Insolvency Act 1986, a company is deemed to be unable to pay its debts as they fall due if it fails to pay within 21 days of service of a statutory demand, unless it raises a reasonable dispute over the debt.

In *HWA* a question arose as to the creditor's standing (HWA as Appellant) to bring an application for a creditors' winding up of the First Respondent (Redox). The position with regard to *désastres* is that a creditor must, in order to have standing, have a claim against the debtor 'of not less than such liquidated sum as shall be prescribed by the Minister' (art 3, Bankruptcy Law). Tracking this, the amendment to the Companies Law in 2022 provided that the applicant for a court-ordered creditors' winding up must also have 'a claim against the company for not less than the prescribed minimum liquidated sum' (art 157A, Companies Law). In both cases the minimum sum is currently set at £3000. A line of Jersey cases, including at Court of Appeal level, interpreted the minimum requirement with regard to *désastres* as being a requirement that the creditor has a liquidated claim of not less than this amount. An unliquidated claim, potentially large as it might be, would be insufficient to give the creditor standing. It was therefore natural to assume that the new wording in the Companies Law meant the same thing.

By a two to one majority the Court of Appeal held obiter that the previous interpretation of art 3 of the Bankruptcy Law had been incorrect and that it was also not the correct interpretation of art 157A of the Companies Law. Standing extended in both cases to holders of unliquidated claims. It is enough, the majority held, that the Court is 'satisfied to the civil standard of proof that the value of the claim, whatever it turns out to be, must exceed £3000, or whatever sum may be prescribed in the future'.

In a detailed dissenting opinion James Wolffe KC JA expressed disagreement with the majority on the question of interpretation. He was unable to interpret the requirement as anything other than a requirement that the creditor must have a liquidated claim of an amount

which satisfies the minimum requirement. Wolffe JA noted that both statutes are *in pari materia* and this brings to mind (though it was not expressly mentioned) the presumption in statutory interpretation known as the Barras principle (*Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402). According to this principle, where legislation uses a word or phrase that has been the subject of previous statutory interpretation in the same or a similar context (*in pari materia*) there is a presumption, varying in strength according to the context, that the words or phrase in the second enactment are to be given the same meaning as already been judicially accorded to them in relation to the first. The Court in *HWA* found that the intention behind changes to the statutes in question had consistently been to harmonise the structural approaches to creditors' winding up and *désastre*. It can therefore be argued that this is a case not only in which the Barras presumption applied but also one in which it should have determined the outcome. Viewed as a question of legislative intention at the point in time when the amendment to the Companies Law was enacted (more than a year before the Court of Appeal's decision in *HWA*) it is difficult to see that the States Assembly could have intended anything other than that the 'minimum liquidated sum' requirement was to be given the same meaning as the courts had already given to substantively the same phrase in the Bankruptcy Law.

Wolffe JA nevertheless agreed with the majority that there are good policy reasons for giving some creditors with unliquidated claims standing to apply for a court-ordered winding up. They would otherwise, in the words of Matthews JA, 'have to sit out the debtor becoming increasingly mired in debt until a liquidated creditor decides to pull the trigger and make the application'. In Wolffe JA's view this is a matter for the legislature; but the majority found a way to the same end through statutory interpretation, an interpretation which Bailhache JA also pointed out was convenient on policy grounds.



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It is possible to take the majority decision at face value and as now straightforwardly giving the holder of a sufficiently portentous unliquidated claim the necessary standing to apply either for a *désastre* or a creditors' winding up of a Jersey company, as they see fit. Some uncertainty, however, remains. For one thing, the majority's observations on *désastres* stand in an obiter relationship to what was at issue in the decision itself and, given the dissenting judgment of Wolffe JA on how the Bankruptcy Law should be interpreted, it cannot be regarded as certain that the Royal Court of Jersey will take the same view as the majority if a *désastre* is now applied for by the holder of an unliquidated claim. The dissenting judgment also raises a degree of doubt about whether the material decision on standing for a creditors' winding up under the Companies Law will be followed, although the Royal Court will generally not depart from a decision of the Jersey Court of Appeal unless there has been 'a compelling change of circumstances' (*State of Qatar v Al Thani* [1999 JLR 118]).

Legislative options

If clarity is to be brought by legislation (and consideration of this point is, at the date of this article, underway in Jersey), the policy considerations in favour of unliquidated creditors, emphasised in particular by Matthews JA in the quote above, clearly need to be taken into account. Different considerations of detail may also apply depending on whether the 'unliquidated claim' is one where liability is dependent on a contingent event (a contingent debt) or a claim that is in fact certain to fall due (or has fallen due) but remains uncertain as to the amount to be paid (a prospective debt).

In assessing the legislative options, regard can also be had to the approach in the United Kingdom. The position there moved historically in the same direction as the result in *HWA*. Winding up

petitions could originally be presented only by company creditors whose debts were presently due and payable. The potential inconvenience of this was recognised (see, for example, *Re Melbourne Brewery Ltd* [1901] 1 Ch 453) and in 1908 provision was made for winding up petitions to be presentable by 'contingent or prospective' creditors of a company, a formula of words which was in due course included in s 124(1) of the Insolvency Act 1986. A person owed an obligation to pay damages or like compensation for breach of a legal duty does not, without more, owe a debt; but the creditor may still be a contingent or prospective creditor for the purposes of s 124 if the obligation to pay damages may be converted, on the happening of the contingency, or within a certain prospect, into a money judgment: *In re Wolf Rock (Cornwall) Ltd* [2020] Bus LR 2348, a decision of HH Paul Matthews in his capacity as a High Court judge. There can still be cases of doubt whether the nature of creditor's contention gives them a qualifying claim. MacPherson and Keay, *Law of Company Liquidation* (5th edition) proposes at 3-016 that the difficulties can be resolved by adopting the suggestion of Crossman J in *Re North Bucks Furniture Depositories Ltd* [1939] 2 All ER 549, namely that the term 'creditor' includes every person who has the right to prove in the winding up, although as Wolffe JA pointed out in *HWA* the right to apply for an order and the right to prove in a subsequent insolvency are not currently aligned in Jersey.

Finally, it may be noted that in relation to personal insolvency the law in England and Wales has long taken a different approach. Under the current s 267 of the Insolvency Act 1986 a creditor's petition for bankruptcy of an individual may be presented only by a creditor whose claim is for a liquidated sum of at least £5000. By contrast, if the view of the Jersey Court of Appeal in *HWA* is accepted by the Royal Court, the holder of a sufficient unliquidated claim against a Jersey individual will be allowed to apply for the Jersey equivalent of bankruptcy (*désastre*) of that individual.

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