GUIDE

Challenging transactions in a Jersey insolvency

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Where a Jersey company becomes insolvent and is subject to *désastre* proceedings under the Bankruptcy (*Désastre*) (Jersey) Law 1990 (the Bankruptcy Law) or a creditors' winding up under the Companies (Jersey) Law 1991 (the Companies Law), the primary objective of the Viscount (in the case of *désastre* proceedings) or the liquidator (in the case of a creditors' winding up) will be to seek to maximise the return to the company's unsecured creditors.

This guide examines the possible grounds upon which the Viscount (the executive officer of the court) or a liquidator may seek to achieve this objective by challenging a transaction to have it set aside or to require a director, member or other person to contribute to the assets of the company.

When is a company insolvent?

For the purposes of each of the Bankruptcy Law and the Companies Law, a company is insolvent if it is unable to pay its debts as they fall due.

Désastre proceedings are the procedure used by a creditor to liquidate an insolvent company. A creditors' winding up is a procedure which may be used by the members of an insolvent company or, since March 2022, a creditor to initiate the liquidation of the company. For more information about liquidating an insolvent company, refer to our guide 'Liquidating an insolvent Jersey company'.

Failure of director to disclose interest

Under the Companies Law, a director is required to disclose to the company the nature and extent of any interest of the director (whether direct or indirect) of which the director is aware in any transaction entered into, or proposed to be entered into, by the company or any of its subsidiaries which conflicts, or may conflict, to a material extent with the interests of the company. A director owes a similar duty to the company under Jersey customary law.

If a director has failed to disclose an interest, the Viscount or the liquidator (acting on behalf of the company) may apply to the court for an order setting aside the transaction and directing the director to account to the company for any profit or gain made. The court will not, however, set aside a transaction unless the court is satisfied that:

- the interests of third parties who have acted in good faith would not be unfairly prejudiced; and
- the transaction was not reasonable and fair and in the interests of the company at the time at which the company entered into it.

Breach of directors' duties

Under the Companies Law, the directors of a company must act honestly and in good faith with a view to the best interests of the company and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The directors owe similar duties to the company under Jersey customary law.

Where the directors cause the company to enter into a transaction which is not in the best interests of the company without shareholder approval granted in accordance with the Companies Law, the directors will be in breach of their statutory and customary law duties to the company and as a result:

- the directors may be held to be personally liable to the company for any loss suffered by the company as a result of the breach; and
- the Viscount or the liquidator (acting on behalf of the company) may be able to have the transaction set aside if any person contracting with the company knew, or ought to have known, that the directors breached their statutory and customary law duties to the company.

If proceedings were instituted against a director alleging that the director breached the director's duties to the company, the director would be entitled to apply to the court to be relieved from liability. The court is empowered by the Companies Law to relieve the director, in whole or part, from liability for negligence, default or breach of duty or trust on such terms as the court thinks fit if it appears to the court that:

- the director acted honestly; and
- having regard to all the circumstances of the case, the director ought fairly to be excused from liability.

In practice, however, the court is only likely to exercise these powers in favour of a director in rare cases.

Wrongful trading

Wrongful trading occurs where, prior to the date on which the property of a company is declared *en désastre* or a creditors' winding up of a company commences (the relevant time), a director knew that there was no reasonable prospect that the company would avoid, or on the facts known to the director was reckless as to whether the company would avoid, the company's property being declared *en désastre* or a creditors' winding up, but nonetheless allowed the company to continue to carry on business.

If, in the course of *désastre* proceedings or a creditors' winding up, it appears that a director allowed wrongful trading to occur, the Viscount or the liquidator may apply to the court for an order that the director be personally liable for all the company's debts and other liabilities arising from the relevant time.

A director may avoid liability for wrongful trading if the director can establish to the satisfaction of the court that, upon becoming aware that the circumstances mentioned above existed, the director took reasonable steps with a view to minimising the potential loss to the company's creditors.

Fraudulent trading

Fraudulent trading occurs where any business of a company is carried on with the intention of defrauding the company's creditors or the creditors of another person or for a fraudulent purpose.

If, in the course of *désastre* proceedings or a creditors' winding up, it appears that fraudulent trading has occurred, the Viscount or the liquidator may apply to the court for an order that any person (including a director) who was knowingly party to the fraudulent trading, make such contributions to the company's assets as the court thinks proper.

Extortionate credit transactions

If a company has entered into an extortionate credit transaction in the three year period prior to the date on which the property of the company is declared *en désastre* or a creditors' winding up of the company commences, the Viscount or the liquidator may apply to the court for an order to (among other things):

- set aside (in whole or part) an obligation created by the transaction;
- vary the terms of the transaction or the terms upon which security for the transaction is held; or
- require a party to the transaction to repay sums paid to the party by the company or to surrender property held by the party as security for the transaction.

A transaction is an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit, the terms of the transaction are such as to require grossly exorbitant payments to be made by the company for the credit or the transaction otherwise grossly contravenes ordinary principles of fair dealing.

If an application is made, the onus is on the credit provider to show that the transaction was not an extortionate credit transaction.

Disclaimer of onerous property

The Viscount or the liquidator may, within six months of the date on which the property of the company is declared *en désastre* or a creditors' winding up of the company commences, disclaim any onerous property of the company.

For this purpose, onerous property is any:

- unprofitable contract; and
- moveable property, contract lease or other immovable property located outside of Jersey which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act.

A disclaimer determines, from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed. In addition, it discharges the Viscount or the company from all liability in respect of the property from the date on which the property of the company is declared *en désastre* or a creditors' winding up of the company commences.

A person who sustains loss or damage in consequence of the operation of a disclaimer is deemed to be an unsecured creditor of the company to the extent of the loss or damage and may prove for that amount in the *désastre* proceedings or creditors' winding up.

Invalid security

Where a company has created security over its assets (whether located in Jersey or elsewhere), the Viscount or the liquidator will examine the circumstances surrounding the security, and if there appears to be any irregularity, may challenge the validity of the security. Possible grounds for challenge include:

- a failure to validly create the security;
- a failure to perfect the security, including the failure to register the security in accordance with the Security Interests (Jersey) Law 2012, where such registration is necessary to perfect the security;
- a foreign law governed security document is probably ineffective if it takes security over property located in Jersey;
- a foreign law governed charge which was intended to be a fixed charge only takes effect as a floating charge; and
- the granting of the security is capable of being challenged on other grounds mentioned in this guide (eg breach of duty, a transaction at an undervalue or a preference).

Transactions at an undervalue

If a company enters into a transaction at an undervalue in the five year period preceding the date on which the property of the company is declared *en désastre* or a creditors' winding up of the company commences, the Viscount or the liquidator may apply for an order to (among other things) have the transaction set aside.

A company enters into a transaction at an undervalue with a person if the company makes a gift to the person or it enters into a transaction with the person on terms for which there is no *cause* (ie consideration) or for a *cause*, the value of which in money or money's worth, is significantly less than the value, in money or money's worth, of the cause provided by the company.

For a transaction to constitute a transaction at an undervalue:

- the company must have been insolvent when it entered into the transaction or have become insolvent as a result of the transaction; or
- if the transaction was entered into with a person connected with the company or an associate of the company, the person or associate must fail to prove to the court that the company was solvent when it entered into the transaction and that it did not become insolvent as a result of the transaction.

A court will not set aside a transaction or make any other order on the grounds that it is a transaction at an undervalue if it is satisfied that:

- the company entered into the transaction in good faith for the purpose of carrying on its business; and
- at the time it entered into the transaction, there were reasonable grounds for believing that the transaction would be of benefit to the company.

If a court finds that a transaction is a transaction at an undervalue, it may make such orders as it thinks fit for restoring the position of the company to what it would have been if the company had not entered into the transaction, including to:

- require property transferred as a part of the transaction to be vested in the Viscount or the company;
- require property which represents the application of the proceeds of sale of property transferred as part of the transaction or of money transferred to be vested in the Viscount or the company;
- release or discharge (in whole or part) any security given by the company;
- require any person to pay, in respect of benefits received by the person from the company, such sum to the Viscount or the company as the court may direct;
- provide any surety or guarantor whose obligation to any person was released or discharged (in whole or part) under the transaction to be under such new or revived obligation to the person as the court thinks appropriate;

- require security to be provided for the discharge of any obligation imposed by or arising under the order, for the obligation to be secured on any property and for the security to have the same priority as the security released or discharged (in whole or part) under the transaction; or
- provide that any person whose property is ordered to be vested in the Viscount or the company or on whom an obligation is imposed is to be able to prove in the *désastre* proceedings or creditors' winding up of the company for debts or other liabilities that arose from or were released or discharged (in whole or part) under or by the transaction.

No order will prejudice an interest in property that was acquired from a person other than the company and was acquired in good faith and for value (or prejudice any interest deriving from such an interest) or require a person who, in good faith and for value, received a benefit from the transaction to pay a sum to the Viscount or the company, except where the person was a party to the transaction.

Preferences

If a company gives a preference in the 12 month period preceding the date on which the property of the company is declared *en désastre* or a creditors' winding up of the company commences, the Viscount or the liquidator may apply for an order to (among other things) have the transaction which gave rise to the preference set aside.

A company gives a preference to a person if:

- the person is a creditor of the company or a surety or guarantor for a debt or other liability of the company; and
- the company does anything, or suffers anything to be done, which has the effect of putting the person into a position which, in the event of the property of the company being declared *en désastre* or a creditors' winding up of the company, will be better than the position the person would have been in if that thing had not been done.

For a transaction to constitute a preference:

- the company must have been insolvent at the time the preference was given or have become insolvent as a result of giving the preference; or
- if the transaction was entered into with a person connected with the company or an associate of the company, the person or associate must fail to prove to the court that the company was solvent at the time the preference was given and that it did not become insolvent as a result of giving the preference.

A court will not set aside a transaction or make any other order on the grounds that the company has given a preference to a person unless the company, when giving the preference, was influenced by a desire to put the person into a position which, in the event of the property of the company being declared *en désastre* or a creditors' winding up of the company, would be better than the position in which the person would be in if the preference had not been given. Where a preference is given to an associate of the company or a person connected with the company, unless the company shows otherwise, it is presumed to have been influenced by the desire to prefer the associate or connected person.

If a court finds that the company has given a preference, it may grant such orders as it thinks fit for restoring the position of the company to what it would have been if the company had not given the preference, including any of the orders referred to under the heading *Transactions at an undervalue* above.

No order will prejudice an interest in property that was acquired from a person other than the company and was acquired in good faith and for value (or prejudice any interest deriving from such an interest) or require a person who, in good faith and for value, received a benefit from the preference to pay a sum to the Viscount or the company, except where the payment is in respect of a preference given to the person at a time when the person was a creditor of the company.

Unlawful distributions

If:

- a distribution is made by a company to a member; and
- at the time the distribution is made, the member knows, or has reasonable grounds for believing that, the distribution (or part of it) is made in contravention of the Companies Law,

the member is liable to repay the distribution (or the relevant part of it) to the company.

If the distribution was a non-cash distribution, the member is liable to pay to the company a sum equal to the value of the distribution (or the relevant part of it) at the time at which the unlawful distribution was made.

Unlawful purchases and redemptions of shares

Directors

If:

- a company (other than an open ended investment company) has its property declared *en désastre* or commences a creditors' winding up;
- the company has made a payment in respect of a purchase or redemption of shares in the 12 month period before the declaration was made or the winding up commenced;
- the payment was not lawfully made;
- the aggregate realisable value of the company's assets and the amount paid by way of contribution to the company's assets by the members in accordance with the Bankruptcy Law or the Companies Law (as applicable) is insufficient to pay in full the company's liabilities and the expenses of the *désastre* proceedings or creditors' winding up,

the court may, on the application of the Viscount or liquidator, order a director to contribute to the assets of the company to enable the insufficiency to be met.

A director who has made a solvency statement in connection with the purchase or redemption may be ordered, jointly and severally with any other person liable to contribute in connection with the unlawful payment, to contribute to the assets of the company an amount not exceeding the amount of the unlawful payment, unless the court is satisfied that the director had grounds for holding the solvency opinion.

Members

In the circumstances mentioned under the paragraph headed *Unlawful purchases and redemptions of shares - Directors* above, a person from whom shares were purchased or redeemed, may be ordered by the court to contribute to the assets of the company an amount not exceeding the amount of the unlawful payment received by the person.

The court will not order the person to contribute to the assets of the company unless the court is satisfied that, when the person received the unlawful payment, the person knew, or ought to have concluded from facts known to the person, that immediately after the unlawful payment was made:

- the company would be unable to discharge its liabilities as they fall due; and
- the realisable value of the company's assets would be less than its aggregate liabilities.

For more information about share purchases and redemptions, refer to our guide 'Distributions and share purchases and redemptions under the Companies (Jersey) Law 1991'.

Other possible grounds for challenge

The English common law rules known as the anti deprivation rule and rule against unlawful distributions of capital may also give rise to possible grounds for the Viscount or a liquidator to challenge a transaction. Although these rules have not been considered by a Jersey court, it is generally considered that a Jersey court would apply them.

Anti deprivation rule

Under this rule, a contractual provision is void if it requires a company to transfer an asset to another person, or its effect is to deprive the company's creditors of the benefit of the asset, upon the company's insolvency. The principle behind this rule is that a company's assets should be distributed among its unsecured creditors in accordance with the applicable insolvency laws and a person cannot seek to gain an advantage by contracting out of those laws.

Examples of provisions which have been held to breach this rule include a clause which sought to create security over assets upon the owner's insolvency, a clause which sought to forfeit assets upon the owner's insolvency and a clause which provided for the termination of an indemnity upon the indemnified party's insolvency.

The rule will not be offended by a provision which:

- requires a company to transfer an asset at market value to another person upon the company's insolvency because the company's creditors will not be deprived of the benefit of the asset; or
- terminates a licence or a lease upon a company's insolvency because it merely involves the termination of a limited interest.

Rule against unlawful distributions of capital

Under this rule, a company cannot distribute capital to its members except in accordance with specific statutory provisions which permit the company to do so. The principle behind this rule is that the capital of a company should be available to satisfy the claims of its creditors and should only be paid out to its members in accordance with the relevant statutory provisions.

Examples of transactions which have been held to breach this rule include an exorbitant rate of interest payable under a debenture issued to a parent company, the transfer of an asset between commonly owned companies at less than market value and the payment of remuneration to a person who was a director and member of a company where the person had done no work at all for the company.

This issue frequently arises in the context of the transfer of an asset by one group company to another. In this situation, there will only be a distribution under the Companies Law if the net assets of the company are reduced (such reduction being determined in accordance with the generally accepted accounting principles applicable to the company).

Contacts

A full list of contacts specialising in corporate law can be found here.