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**Inside Story – January 2018**

**Cross-Border Assistance in Guernsey:
Recent 2017 Cases**

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*Introduction*

In a cross-border insolvency, there are likely to be international elements that present themselves during the course of local proceedings in circumstances where an foreign office-holder wishes to seek recognition and exercise their powers in another jurisdiction. There are several English common-law jurisdictions that are party to the Cross-Border Insolvency Regulations 2006 (UK SI 2006/1030). These regulations give effect to the UNCITRAL Model Law on Cross-Border Insolvency 1997 (“Model Law”) and prescribe how the powers of foreign office-holders are recognised. There is also the Recast European Insolvency Regulation (2015/848) that governs cross border insolvency. However, the Channel Islands, and Guernsey in particular, are not parties to either of these instruments.

*Cross-Border Assistance*

In order to seek assistance from the Guernsey Royal Court, a foreign office-holder will normally have to rely on common-law principles, in relation to which there have been several recent cases, including *Singularis* (a Bermudian case) which was heard by the Privy Council, the apex court common to the Crown Dependencies (of which Guernsey is one), overseas territories and some independent members of the Commonwealth. The common-law power to aid foreign office-holders is important in off-shore jurisdictions, such as Guernsey, as often such jurisdictions are not party to international conventions which automatically provide such powers of assistance in statutory form. Unless these foreign holders can be recognised in places such as Guernsey, creditors will be obliged to seek to appoint local office-holders, which will greatly increase costs. Even if the office-holders are recognised by the Guernsey Court, there is still some debate as to what powers can be afforded to them i.e. whether this extends to the right to interview directors. Much of the uncertainty has arisen out of the application of the *Singularis* case in Guernsey, as to which more below.

However, if the foreign office-holder was appointed in the UK, then there is a reciprocal provision between Guernsey and the UK by virtue of the UK Insolvency Act (Guernsey) Order 1989 (SI 1989/2409), incorporating in Guernsey law the equivalent to the UK’s own assistance provision in section 426 of the parent Act. In practice, an application is made by the UK liquidator to the UK court, which then sends a Letter of Request for assistance to the Guernsey court. The advantage of this reciprocal arrangement is that it allows the Guernsey Court to option to apply its own law or the insolvency law of the UK in place of its own insolvency law, if it is deemed appropriate. The provision affords a broad discretion to the court to apply UK law, which can be especially in important where there is no pre-existing Guernsey statute, for example in relation to transactions at an undervalue. In an important judgment for insolvency practitioners who deal with cross-border insolvency, the decision from the Royal Court in *Batty v Bourse*[[1]](#footnote-1) has reaffirmed the circumstances when co-operation between the Guernsey Royal Court and a foreign court will be considered appropriate under the UK Insolvency Act (Guernsey) Order (SI 1989/2409).

*Facts of the Case*

Mr Batty was appointed as a liquidator of Keane Property (Tolworth) Limited (in liquidation) (“Keane”), a special purpose vehicle that was created for the construction of residential homes in south-west London. The director of Keane was Mr Lewis (a bankrupt). It appeared that, prior to the liquidation of Keane, some £400,000 had been paid to Blythe Investments Group Limited, of which £310,625 was then paid to Bourse Trust company as a Trustee of Thorpe Heritage Investments Limited FURBS (“Thorpe FURBS”). It appeared that no consideration had been given for the transfer of the assets. The liquidators’ investigations revealed that Mr Lewis was a beneficiary of the Thorpe FURBS.

*Reciprocal Relief and Recognition of Foreign Appointment*

The Royal Court followed the legal test which was set out in the decision of *Seagull Manufacturing*[[2]](#footnote-2) regarding the application of section 426 of the Insolvency Act 1986. The test is that, in the absence of any compelling reason, there is a duty and not a discretion to act in aid of and be auxiliary to the High Court in England. To decline the requested assistance was indeed a high hurdle to overcome and the Court would not do so, absent a compelling reason. The Court provided helpful guidance regarding how the principles set out in *Seagull Manufacturing* would be considered.

Perhaps, more importantly, the Court specified that, in applying the principles set down in *Seagull Manufacturing,* it was open to the Guernsey Court to apply UK law in relation to comparable matters sought in the Letter of Request sent by the requesting court in the UK. In this case, the Deputy Bailiff found it was open to him to apply the UK provisions regarding transactions at an undervalue i.e. sections 238 and 423 of the Insolvency Act 1986, albeit he declined to so in this specific instance (in relation to the transfer of the £400,000), as it concerned the payment of a dividend which, in his view, could not be dealt with under the terms of sections 238 or 423. However, the Court also found that sections of the UK Companies Act 2006 that apply to unlawful distributions could be directly applied in Guernsey further to the Insolvency Act (Guernsey) Order 1989 (SI 1989/2409).

The Court equally found that similar provisions present in Guernsey law could also have been used i.e. a Pauline action (*actio Pauliana*), in relation to transactions at an undervalue as well as section 304 of the Companies Law (Guernsey) 2008 in relation to unlawful distributions. The unique nature of the reciprocal framework between Guernsey and the UK means that either Guernsey or UK law can be used by office-holders to recover sums due to the company in liquidation.

*Reliance on the Common-Law*

Nonetheless, as referred to above, where there are no reciprocal arrangements in place, the office-holder seeking recognition is bound to rely on the common-law. This can even occur with UK office-holders, where there are insufficient funds for an application to be made to the UK court seeking a Letter of Request. The principal drawback in relying on the common-law, when seeking recognition in Guernsey, is the absence of the ability to automatically apply the law of the requesting jurisdiction. The difficulties this inability creates was illustrated in *In the matter of X (a bankrupt)*.[[3]](#footnote-3) Here, a UK trustee in bankruptcy sought permission under the common-law from the Guernsey court to examine a third party. Lieutenant Bailiff Marshall found that, having reviewing various authorities including *Singularis*, and the equivalent bankruptcy statute in Guernsey: the *Loi Ayant rapport aux Debiteurs et à la Renonciation 1929,* there was no common power available in Guernsey that would allow a UK trustee to examine third parties. This difficulty could have been avoided if a Letter of Request had been sent under the reciprocal insolvency framework applying between the UK and Guernsey.

*Conclusion*

The above recent Guernsey authorities illustrate that, whilst the Guernsey court will give all possible assistance to a foreign office-holder, including recognition, a UK office-holder, if they wish to seek assistance beyond basic recognition, should apply under the reciprocal framework between Guernsey and the UK. However, this framework applies to a limited number of jurisdictions, necessitating recourse to the common-law, and the problems this step evidences, for all other cases.

1. *William Antony Batty v Bourse Trust Company Limited & Bourse Directors Limited* (Unreported 28 March 2017). [↑](#footnote-ref-1)
2. *Slinn and Slinn v Official Receiver and Liquidator of Seagull Manufacturing Co Ltd* (1996) 22 GLJ 83. [↑](#footnote-ref-2)
3. (Unreported 4, August 2015) [↑](#footnote-ref-3)