The novelty of pre-packs in Jersey

Paul Omar writes on how the courts in Jersey have begun to take into account creditors' interests within the just and equitable winding up procedure

PAUL OMAR
Professor of International Insolvency Law at the Nottingham Law School and Secretary of the INSOL Europe Academic Forum

In Jersey, many modern statutes, particularly in the commercial law arena, are modelled on their equivalents in the United Kingdom.

This is certainly the case for corporate law, where Jersey's local statute, the Companies (Jersey) Law 1991,[1] is based on the Companies Act 1985 (United Kingdom). The law contains a Part 21 dealing with the winding up of companies. Access, however, to the procedures of summary (when the company is solvent) or creditors' winding up (when the company is not) is predicated on action by the members resolving that a winding up take place. As such, creditors wishing to pursue a remedy are normally confined to customary law procedures such as the *adjudication de renonciation* (adjudication of renunciation) or *désastre* (disaster), which are the only procedures available for them to initiate.[2] Both processes are somewhat complicated and require the creditor to undertake several steps before obtaining satisfaction.[3] In addition, the costs of the Viscount, an officer of the Royal Court, may be a considerable charge on the estate in a désastre.

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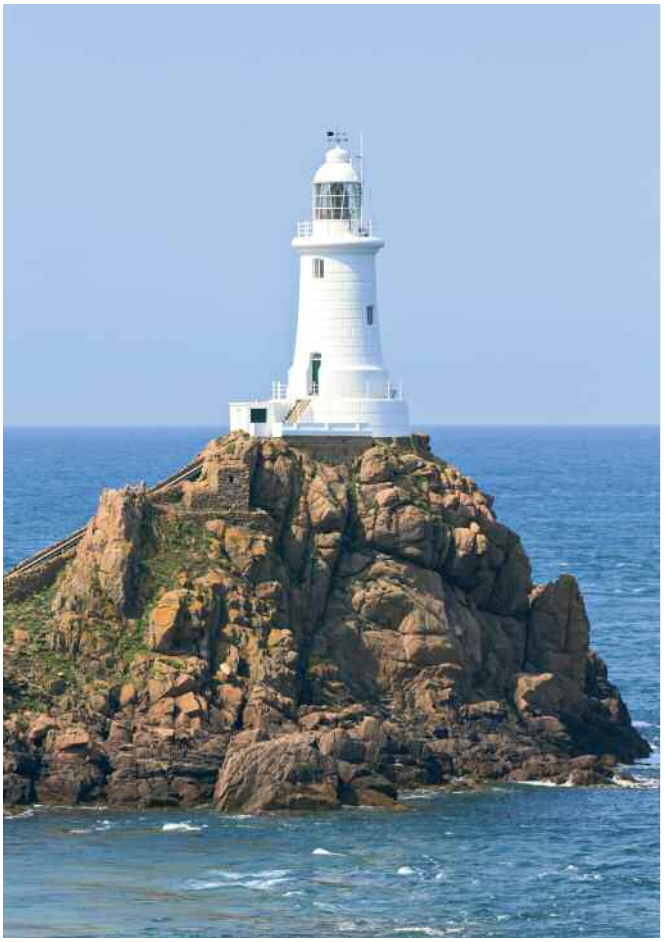
In recent years, however, the courts in Jersey have begun to take into account creditors' interests within the just and equitable winding up procedure. This procedure, which is also in Part 21 of the companies' law, permits winding up on just and equitable grounds or on the grounds of expediency in the public interest.[4] It is available on application to the court made by the company, a director or member of the company,[5] the Minister for Economic Development or the Jersey Financial Services Commission (JFSC).[6] Under this procedure, the court which orders the winding up may also appoint a liquidator and direct the manner in which the winding up is to be conducted.[7] As early as 2002, *Re Leveraged Income Fund Limited* confirmed, as Article 155 was derived from a United Kingdom provision, the permissibility of having regard to case law from that jurisdiction to guide Jersey courts as to the interpretations placed on the meaning of the words "just and equitable", but also stated that modern uses might require a more flexible interpretation.[10] Furthermore, in *Re Poundworld*,[11] the court established that it must consider what was in the best interests of the creditors and extended the scope of "just and equitable" to include what was convenient and would expedite the procedure.



This could result in making this type of winding up a

substitute for the usual creditors' winding up procedure, although originally it was only intended as an exceptional procedure for use in problematic cases, such as where the company was being run as a quasi-partnership,[12] where there was deadlock in management[13] or where the company's substratum (fundamental purpose) had gone.[14] The court was of the view, however, that insolvent companies should normally be wound up by a creditors' winding up and the court should be cautious before ordering a just and equitable winding up in the ordinary case of an insolvent company. In the *Poundworld* case, it was appropriate to do so, as it was clearly in the best interests of all the creditors for liquidators to be authorised to seek to secure the stock as soon as possible and to continue to trade to dispose of it on a retail basis.[15]

Lately, the courts have also extended the just and equitable procedure to instances involving companies carrying out regulated business in order to permit what is in effect a "trading-out" procedure. In *Re Centurion*,[16] where the company was licensed to carry on trust company business and, inter alia, managed assets on behalf of third parties held in trusts and companies and had also been the subject of close regulatory attention by the JFSC, the court accepted that a just and equitable winding up was the most appropriate remedy as the company's business clients would have more confidence in such a procedure, which would be used essentially for a managed and orderly transfer of the company's business to a third party. Applying *Re Belgravia*,[17] a just and equitable winding up was the appropriate way of proceeding for a number of reasons, including the need for flexibility, the avoidance of conflict with the creditors, the need to protect the interests of the investors and the need for the appointment of an appropriately experienced liquidator. A number of cases involving regulated companies have since confirmed this trend.[18]

More recently, in the course of 2013, the court has appeared willing to extend the scope of Article 155 in order to sanction the carrying out of a pre-packaged sale.[19] In this case, the restructuring of a Jersey clothing retail group in a "dire financial situation" was effected by the court authorising the liquidators to enter into an agreement, under which such assets and/or business of the group as would be required by a NewCo would be sold under a proposed agreement. The agreement would also provide for the consideration to be payable at a later date out of the profits of the new venture formed by one of the existing directors and a wholly new investor. As it was apparently the first occasion on which the court was being invited to consider the possibility of a pre-pack, the court was particularly concerned that it was not being asked to approve a "phoenix" agreement which would simply continue the beneficial ownership in the assets of the business with the existing creditors being left behind. As such, the court also required the petitioner to confirm the statements in his affidavit, not only that he had no interest in the existing group apart from serving as director, but that the existing beneficial owners would not have any interest in NewCo. That done, the court was satisfied that it would be in the best interests of the creditors to wind up the group companies under Article 155 and for the liquidators to enter into the proposed arrangements. The court also required the liquidators to be mindful of the guidance set out in the Statement of Insolvency Practice No. 16, issued by the Joint Insolvency Committee for England and Wales, dealing with pre-packaged sales in administration, although this procedure did not exist in Jersey.[20]

When contrasted with the limitations attached to the other insolvency procedures that might be available, the just and equitable winding up clearly offers the possibility of consideration of the creditors' interest, although, paradoxically, the procedure itself cannot be initiated by them. Set in the wider context of the absence of a rescue regime in Jersey law, the way in which the Jersey courts have used the Article 155 facility innovatively shows their capacity to respond to practice developments aimed at offering a wider range of choices and reflection of relevant interests than are available under the current law. The development of a pre-pack jurisdiction under this provision is a particularly innovative step. Pending any review of Jersey insolvency law that may eventually take place, these developments, including making available the pre-pack, seem to offer the widest choice to enable the restructuring of the debtor's business in appropriate cases. ■

Footnotes:

1 See, by this author, Company Law Study Guide (2013, Institute of Law Jersey, St Helier), Chapter 19; M. Dunlop, Jersey Company Law (2010, Key Haven Publications, Oxford).
2 See, by this author, Law relating to Security on Movable Property and Bankruptcy Study Guide (2013, Institute of Law Jersey, St Helier), Chapters 8-15; A. Dessain and M. Wilkins, Jersey Insolvency Law and Asset-Tracking (4th ed) (2012, Key Haven Publications, Oxford), Chapter 5.
3 In *Re Estates and General Developments Limited (in liquidation)* [2013] JRC 027, however, the court permitted a foreign receiver, appointed in the United Kingdom, to take control of and sell immovable property in Jersey without applying for either an adjudication de renonciation or a désastre on the basis of Article 49, Bankruptcy (*Désastre*) (Jersey) Law 1990, the local equivalent to section 426, Insolvency Act 1986 (United Kingdom).
4 Article 155(1), Companies (Jersey) Law 1991.
5 Ibid., Article 155(2).
6 Ibid., Article 155(3).
7 Ibid., Article 155(4).
8 *Re Leveraged Income Fund Limited* [2002] JRC 209.
9 Section 122(1)(g), Insolvency Act 1986 (United Kingdom).
10 Confirmed later in *Re Belgravia* [2008] JRC 161 and *Bisson v Bish* 2008 JLR Note 46.
11 *Re Poundworld (Jersey) Limited* 2009 JLR Note 12.
12 *Bisson v Bish*, above note 10.
13 *Jean v Murfitt* 1996 JLR Note 8c.
14 *Re Leveraged Income Fund Limited*, above note 8.
15 See also *Re Charles Le Quense* (1956) Limited [2011] JRC 155.
16 *Re Centurion Management Services* [2009] JRC 227.
17 Above note 10.
18 Examples include *Re Horizon Investments (Jersey) Limited* [2012] JRC 039, *Re Horizon Nominees Limited* and *Re Horizon Corporate Directors Limited* [2012] JRC 113 and *Re Maltese Holding Limited* [2012] JRC 239.
19 *Re Collections Group* [2013] JRC 096.
20 Another of the Channel Islands, Guernsey, introduced United Kingdom-style administration in the Companies (Guernsey) Law 2008.
21 See, by this author, Finding Rescue: Creative Alternatives to the Classic Insolvency Procedures in Jersey (2012) 16 JGLR 248.

"THE WAY IN WHICH THE JERSEY COURTS HAVE USED THE ARTICLE 155 FACILITY INNOVATIVELY SHOWS THEIR CAPACITY TO RESPOND TO PRACTICE DEVELOPMENTS"