Carey Olsen secures landmark judgment under new creditors' winding up regime in Jersey

Briefing Summary: In the first judgment of its kind in Jersey, Advocate Marcus Pallot successfully obtained a winding up order in a contested creditors' winding up.

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In this case the debtor argued the underlying debt was disputed. The Royal Court agreed with Carey Olsen that a claim is not disputed for the purposes of a creditors' winding up application unless it is the subject of a "substantial dispute".

New regime

On 1 March 2022 a new creditor instigated insolvent company winding-up regime came into force in Jersey. Carey Olsen discussed it in detail here. From that date a creditor – for the first time in Jersey – may apply to the Royal Court for an order to commence a creditors' winding up of a Jersey company, where they have a liquidated claim of £3,000 or more and: (i) the company is unable to pay its debts; (ii) the creditor has evidence of the company's cash flow insolvency; or (iii) the creditor has the consent of the company.

This concept will be extremely familiar to those who have dealt with insolvent winding up provisions in England and Wales and has brought Jersey in step with many other major jurisdictions. The regime is contained in Article 157A – D of the Companies (Jersey) Law 1991. A part of the new process is that a company is deemed unable to pay its debts for the purposes of (i) above if: (i) the creditor has served on the company a statutory demand in a prescribed form requiring it to pay the sum due; and (ii) the company has for 21 days after service of that demand on the company failed to pay the sum or dispute the debt due to the reasonable satisfaction of the creditor.

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Background

Carey Olsen represented the successful creditor, Vidya A.G., (the "Creditor") in its application for a creditors' winding up of Sumner Group Holdings Limited (the "Debtor") as set out in the Royal Court's judgment of 28 November 2022.
The Creditor had a liquidated claim for $120,000 against the Debtor in respect of a consultancy agreement whereby it would provide consultancy services in return for a monthly fee of $20,000. The monthly payments were not paid, and the agreement had a minimum 6-month term, therefore the Creditor was owed $120,000. The Creditor served a statutory demand but the Debtor disputed the debt on three grounds:

1. $20,000 had in-fact been paid for the first month of the consultancy agreement;
2. The agreement was terminated by agreement with effect from the end of the third month of the agreement: and
3. The Creditor had failed to provide any of the services it was required to provide under the agreement and was therefore in breach of the agreement and not entitled to payment.

These grounds amounted to no more than a futile attempt by the Debtor to put up the façade of a dispute to try and prevent the creditors' winding up and force the Creditor into unnecessary litigation. The Creditor brought a representation before the Royal Court seeking an order that the Debtors be wound up.

Application of the law

The Creditor's case was that a Debtor cannot be allowed to simply allege the debt is disputed as a way of defeating an application for a creditors' winding up. For the new regime in Jersey to carry the necessary clout the Royal Court had to be able to reject allegations of a dispute where they were not a "substantial dispute".

Carey Olsen encouraged the Royal Court to apply English authority on the question of a substantial dispute. It was well established in England that a dispute must be a substantial dispute and the Royal Court applied the summary of Norris J in Angel Group Limited v British Gas Trading Limited [2013] BCC 265 at [22], who had helpfully collated the considerations of the cases which came before it.

The Royal Court also agreed with Carey Olsen that any substantial dispute had to go to the whole of the debt, or at least so much as will bring the indisputable part below the minimum threshold, which is £3,000 in Jersey. The Royal Court agreeing Angel Group applied here together with the supportive English authority put forward by Carey Olsen.

The Royal Court also helpfully set out their view that the case law already available in Jersey assisted in this matter. The Royal Court had already dealt with the question of what constituted a "liquidated claim" and in doing so referred to the previous authority in Jersey regarding applications for a declaration of désastre, such applications also requiring a claim for a liquidated sum. In the Royal Court's judgment, the need for a liquidated claim and the debtor company not disputing the debt were two sides of the same coin addressing essentially the same underlying point.

Drawing on both English and Jersey authority the Royal Court agreed that a claim is not "disputed" unless it is the subject of a "substantial dispute". The reference point is whether the creditor would be entitled to succeed on an application for summary judgment. If it would, then the dispute is not substantial and the Debtor should be wound up.

Decision

The Creditor was granted its application to commence a creditors' winding up. The Royal Court agreed with the arguments on behalf of the Creditor and found that there was no substantial dispute as to the sum due. Specifically in relation to the alleged disputes:

1. the Royal Court could not determine whether the $20,000 had been paid on the evidence before it. However, following English authority, this did not matter because the debt not disputed on this ground ($100,000) still far exceeded the minimum threshold of £3,000;
2. there was no real evidence that the Creditor agreed to early termination. The Royal Court found that the Debtor's evidence lacked credibility on this point; and
3. the agreement did not require any services to be done by the Creditor and in any event the Royal Court rejected as unarguable the allegations that the Creditor did not provide any services in light of undisputed evidence put forward by the Creditor.

While not in issue in these proceedings, it is worth noting that it did not matter that the underlying consultancy agreement was governed exclusively by the law of England and Wales with the exclusive jurisdiction of the courts of England and Wales. As there was not a substantial dispute that the sums were due there was no need for the Creditor to first seek judgment in England and Wales and it was able to enforce its claim against the Debtor directly in Jersey, avoiding significant delay and cost.

Conclusion

This judgment makes clear that the Royal Court will look through any façade of dispute raised by a debtor, thereby reinforcing the effectiveness of Jersey's new creditors' winding up regime and making it an attractive option for creditors wishing to bring insolvency proceedings against Jersey companies, even where the agreement giving rise to the underlying debt is governed by the law of a foreign jurisdiction.

Carey Olsen is now uniquely placed as the leaders in providing advice and representation to parties wishing to pursue or defend insolvency proceedings in the jurisdiction.