'A Comparative Look at Pre-Packs in Selected Jurisdictions' - Jersey

Briefing Summary: Partner Marcus Pallot discusses 'pre-packs' in Jersey in this Special Report with INSOL International.

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1. What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?

Jersey does not have a formal administration regime and neither the Companies (Jersey) Law 1991 nor any other legislation provides for a specific rescue remedy equivalent or similar to administration. The one Jersey statutory route closest to administration is the remsie de biens. That requires the applicant to have Jersey situs real property, to be able to realise it to pay off secured creditors in full and is an old remedy not designed nor suited for the rescue of a going concern. Notwithstanding the lack of a specific rescue tool under Jersey law, practitioners have utilised and developed the process around the statutory just and equitable winding up (just and equitable) so that on a number of occasions it has been used in effect to conduct a quasi-pre-pack.1 The court has shown itself to be quite comfortable in hearing applications made under the just and equitable jurisdiction both for financial services and non-financial services Jersey companies.

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2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

As we note above, there is no formal rescue remedy in Jersey so there is nothing to compare a just and equitable with. The only real option therefore is for the court to consider granting a just and equitable on terms that very closely resemble a pre-pack. The court will have the interests of the creditors at the fore. If it can be shown that a quasi-pre-pack just and equitable is likely to benefit the creditors, then the applicant has a good chance of success. The applicant needs to be the company, a member or a director. In certain cases, the Jersey Financial Services Commission can apply in respect of a regulated financial services business. A creditor cannot be an applicant. If the application is successful, the court will order the appointment of a liquidator and make such further or other orders as it considers just and equitable. Frequently, those orders mirror what the law would prescribe for an insolvent winding up but tailored so as to permit the liquidator to consider the pre-pack option. Notably though, there is no notice period nor notice requirement for the making of such an application so the court can make orders very swiftly. It would be usual for the court to make provision for the liquidator to consider the pre-pack offer, rather than be bound to implement it, but at the same time to provide comfort to the liquidator to proceed with the pre-pack in the liquidator's discretion.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

The position will be very much the same as for directors considering entering into any form of insolvency. The directors will need to carefully consider their duties (with the benefit of appropriate independent legal and financial advice) to act in the best interests of the company's creditors as a whole and to minimise loss.

4. What level of involvement does a court have in a pre-pack?

With just and equitable being the only route, there is (i) no out of court route; and (ii) the just and equitable route involves making a court application. The court can, and may want to, remain actively involved in the process or, more likely, appoint a liquidator, give the liquidator significant powers and then rest on the duly appointed liquidator coming back to court when deemed appropriate by the liquidator. The court will, normally, readily hear a creditor(s) during the course of a just and equitable if they wish to complain and / or otherwise make representations about the conduct of the just and equitable

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

A great deal will depend on the terms of the proposed just and equitable and such orders as the court might make when granting the application. It would be usual for the liquidator to be specifically guided towards acting in the best interests of creditors. It is usual for the court's attention to be drawn also to the relevant UK SIP(s). SIP 16 has been considered previously with a liquidator required to observe its contents.2

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

In short, the liquidator will be required to comply with the orders of the court. The court may rest on the liquidator continuing with the just and equitable, but it will hear complaining parties readily and will require the liquidator to come back to court to close off the liquidation. There is no specific Jersey guidance on valuations, but the court would expect to see sworn affidavit evidence (including in terms of valuations) before ordering a just and equitable and / or otherwise granting powers to the liquidator to carry out the sale.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

In a just and equitable winding up, the conduct of the liquidator remains subject to court oversight at all times. As noted above, the court will frequently be content for the liquidator to continue with the just and equitable process. It will hear creditors and others it thinks might have a legitimate interest in the just and equitable winding up and it will review the liquidator's closing report, at which point it will scrutinise the liquidator and its overall conduct of the just and equitable winding up.

1. See In the Matter of the Representation of Collections Group [2013] JRC 096.
2. Ibid.

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