

Sanction, netting and subrogation: welcome clarity for liquidators from the Royal Court of Jersey

Briefing Summary: The Royal Court has the power to sanction a liquidator's proposed distribution model, subrogation is part of Jersey law and a liquidator must give effect to a netting agreement. These were some of the key findings of the Royal Court in *Representation of Gardner & Others* [2025] JRC 144.

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Background

The case concerned insolvencies across two related groups of companies, the majority of which were incorporated in Jersey. Other key jurisdictions included England and Wales and the Cayman Islands. Prior to insolvency, the companies provided services to the petroleum sector, predominantly in the Middle East and Asia.

The cross-border nature of this matter is a familiar feature of many offshore insolvencies. A less common – but welcome – feature was the early realisation of assets which resulted in the secured and priority creditors being repaid in full. The difficulty faced by the liquidators was less about recovering assets and more about how to distribute recoveries fairly.

The distribution scenarios were complicated by various intragroup loan and security arrangements which gave rise to a series of intercompany claims across the two groups. The liquidators developed a distribution model to resolve this. They applied to the Royal Court to sanction the model.

Two related legal constructs were at the forefront of the court's analysis; namely (i) the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 ("**Netting Law**") and (ii) the customary law of subrogation. As we explain below, for practical purposes, Jersey's customary law of subrogation operates similarly to the equivalent English law doctrine. However, Jersey's Netting Law has a number of unique features which make it both a powerful and helpful addition to the liquidator's toolbox.

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Sanction of a liquidator's decision

The Royal Court has the power to sanction a liquidator's decision under Article 186A of the Companies (Jersey) Law 1991. However, that power is only automatically engaged when the liquidator is appointed to a creditor's winding up.

In a just and equitable winding up (which was the case here), the liquidator will need to ensure that the sanction mechanism is provided for in the order of appointment. In this case, it was. Therefore the court had the undisputed power to sanction the liquidator's decision. A salutary lesson in the importance of good horizon scanning when preparing a liquidator's order of appointment.

The test for sanction in the relevant scenario is whether the liquidator's decision was taken in bad faith or is a decision which no reasonable liquidator would take. In this case, the court was satisfied that the liquidators had properly applied both the Netting Law and relevant principles of subrogation.

The court did not sanction the payment of particular amounts to particular creditors; nor was such sanction sought. Rather the court's sanction validated the methodology and manner in which distributions were proposed to be made.

Netting Law

The Netting Law contains a number of provisions which are helpful to lenders and liquidators. Our experience is that some of these provisions are not well known or well utilised. For example, under the Netting Law, an agreement not to commence bankruptcy proceedings (ie a non-petition provision) is enforceable.

Another important feature of the Netting Law is it defines a certain class of agreements which must be enforced notwithstanding bankruptcy. That aspect of the Netting Law was central to the court's determination in this case. Importantly, the court confirmed that where an agreement is caught by the Netting Law, the liquidator has no discretion and must give effect to that agreement.

Determining whether an agreement is caught by the Netting Law is not always straightforward and can require complex analysis. Wherever possible, it is helpful if corporate guarantees are drafted so as to make it clear that they engage the Netting Law. This is possible and effective even if the governing law is not Jersey law (as is often the case in our experience). Under Article 2 of the Netting Law, close-out netting, set-off and contractual subordination provisions (which meet the technical definitions of those terms prescribed by the Netting Law) are effective "*despite any enactment or rule of law to the contrary*".

When it comes to group banking arrangements, giving effect to an agreement caught by the Netting Law will often have the effect of creating a series of intercompany claims. That is usually the case where the assets of one group company are used to settle the secured debt of another group company. This raises the sometimes thorny issue of subrogation.

Subrogation

Subrogation is not a novel concept in Jersey law. However, this was the first occasion on which the Royal Court provided a detailed examination of the operational content of the doctrine.

The court was assisted by the English case of *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291. Not all of the *Cheltenham* principles are relevant to Jersey law. However, the court accepted that: (i) discharge of a secured obligation gives the payer the same security rights as the original creditor and (ii) the payer's secured claim is limited to the amount actually paid, not the face value of the discharged obligation.

Subrogation can be complex. It is one thing to state the principles at a high level. Their application to a series of intercompany transactions is quite another. As was the case here, a liquidator will often need to model subrogated outcomes and work with counsel to ensure that the principles have been applied correctly.

A full subrogation analysis is not however always possible. Generally, that is because: (i) realisable assets are limited and a full modelling process is not cost proportionate or (ii) the underlying transactions are of questionable validity or insufficiently evidenced. Pooling of assets and liabilities can be an option in such cases. Pooling can be a pragmatic answer and has been used in other reported Jersey cases but it is not without difficulties or shortcomings. This case suggests that pooling should not necessarily be the liquidator's first or only port of call. A model that takes account of the Netting Law and subrogation might be more complex, but – in appropriate circumstances – it is likely to be a fairer outcome for creditors.

Practical considerations for the industry

Anticipate the possibility of sanction: In a just and equitable winding up, sanction under Article 186A of the Companies (Jersey) Law 1991 is not available as of right. This needs to be included in the proposed order of appointment.

Check if the Netting Law is engaged: Before transacting, a creditor should take advice on whether the proposed agreement is caught by the Netting Law. This could provide game changing protection in an insolvency situation. Checking the applicability of the Netting Law should also feature on the liquidator's checklist.

Consider sanction of the method not the outcome: This application demonstrated the value in having the court consider and approve the liquidator's methodology. In such circumstances, the proper approach is for the liquidator to set out the proposed distribution methodology and the legal basis for it. The liquidator will need to show that decision was not taken in bad faith and is not a decision which no reasonable liquidator would take.

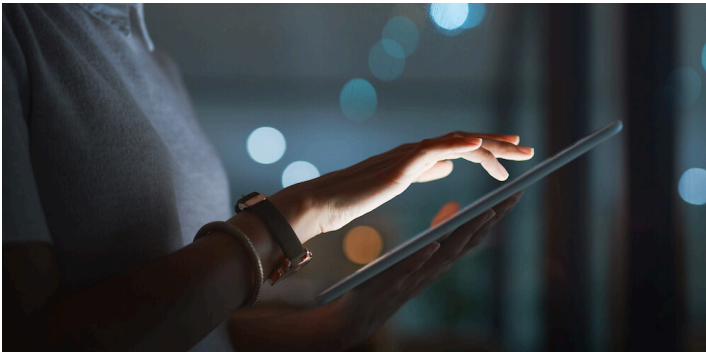
Conclusion

The judgment reinforces Jersey's reputation as a jurisdiction that combines commercial pragmatism with legal clarity. The outcome typifies the Royal Court's regard for the legal principles underpinning insolvency and its willingness to assist professional liquidators with resolving practical challenges.

Carey Olsen acted for the Representors in obtaining a successful judgment in this matter. Carey Olsen's team included Marcus Pallot, Jeremy Lightfoot and Mike Kushner.

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