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Discharge of an administration order – a pragmatic approach

Service area / Restructuring and Insolvency
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Our restructuring and insolvency team has had further significant success, recently securing the discharge of an administration order over a Guernsey Protected Cell Company to facilitate its voluntary winding up. The team, led by Guernsey based counsel David Jones and including associate Luke Sayer, acted for local insolvency practitioners Tim Le Cornu and Andrea Harris of KRyS Global.

To our knowledge this is the first time that the Royal Court of Guernsey has ordered that an administration order in Guernsey be discharged so as to facilitate a voluntary winding up.

The issue

Pursuant to section 377(2)(a) of the Companies (Guernsey) Law, 2008 as amended (the "Companies Law"), during the period for which an administration order is in force, no resolution may be passed or order made for a company's winding up (a moratorium). Section 393 of the Companies Law confirms that a voluntary winding up commences upon the passing of a resolution for voluntary winding up. Consequently, the Administration Order must be discharged prior to the extraordinary general meeting ("EGM") at which the winding up resolutions are proposed.

The question of the exact procedure to be followed in such a scenario had not previously been considered by the Guernsey court. As such, Advocate Jones submitted that the Royal Court ought to look to English law as persuasive in order to assist it with the application, a submission that the Royal Court accepted.

Background

On 17 November 2015, Lieutenant Bailiff Hazel Marshall QC placed a protected cell company (the "Company") into administration for the purpose of, "achieving a more advantageous realisation of the Fund's assets than would be effected on a winding up" (the "Administration Order").

Due to a number of contributing factors arising during the administration, including the illiquidity of the Company's underlying assets, the Joint Administrators were able to determine that the purpose of the Administration Order would not be achieved by continuing the administration process. The Joint Administrators' analysis of the business enabled them to conclude that the best outcome for creditors and members could be achieved by a long term sales strategy that would enable the monetisation of the underlying illiquid assets. Prior to that monetisation there would be no requirement for any material level of active management of the assets.

In a Guernsey compulsory winding up, a liquidator's ability to make distributions to members and creditors is limited by the requirement to convene a Commissioner's hearing pursuant to section 471 of the Companies Law, and to have final accounts approved before the distribution of any funds.

In this present case, the effect of this requirement would be to prevent interim distributions being made as and when assets were monetised, as each such distribution would need to be referred to an interim Commissioner's hearing. Clearly such a process significantly increases the cost and time involved to the detriment of creditors and members.

Consequently, it was the Joint Administrators' opinion that the voluntary winding up regime set out in the Companies Law provided a more suitable framework for the "run off" exercise. Accordingly, the Joint Administrators applied to the Royal Court for the discharge of the Administration Order prior to the Company being placed into voluntary liquidation.

The judgment

The Royal Court demonstrated its pragmatism by following the leading English authority, Re Norditrack (U.K.) Limited [2000] 1 WLR 343, provided guidance on the issue before it. In summary, Norditrack provides that a discharge order should be made and retained on the Court's file, but not take effect until after the resolutions to wind up have been passed at an EGM of the company.

The presiding judge, Lieutenant Bailiff Hazel Marshall QC, ordered inter alia that the Joint Administrators vacate office and the Administration Order be discharged. The timing of the discharge was the important factor. The approach in Norditrack was adopted and it was ordered that the order would take effect at 2pm on the day of the hearing which was the time proposed for the meeting of the Company in order to vote for the voluntary liquidation. Advocate Jones gave an undertaking to file with the Court a written confirmation confirming the outcome of the EGM as soon as practicable after it had taken place, at which time the Court could release the order, or if the resolutions were not passed, rescind it.

The necessary resolutions were passed, the Court was notified, the Administration Order was successfully discharged and the Company was placed into voluntary liquidation.

Comment

The decision demonstrates the flexibility of Guernsey's insolvency laws and procedures. The Royal Court has repeatedly shown its willingness to be guided by case law from other jurisdictions where doing so does not offend the local legislation and provides solutions to difficult commercial problems. The Guernsey and English statutory provisions in this case were almost analogous and the English case law provided a valuable solution to the difficult timing issue.

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