

## Chapter 15

# THE BAILIWICK OF GUERNSEY

### **1. Under the general law**

The Courts of the Bailiwick of Guernsey (being the Royal Court of Guernsey, the Court of Alderney and the Court of the Seneschal of Sark) are generally prepared to recognise a foreign insolvency or bankruptcy. Thus, on the basis of international comity, liquidators, trustees in bankruptcy and similar office holders in a foreign insolvency have all been recognised as having sufficient rights to assert title to property situate within the Bailiwick of Guernsey. In some cases this takes the form of the foreign insolvency office holder issuing proceedings before the Courts of the Bailiwick for the recovery of specific property, which they claim to own under the law of the jurisdiction governing their appointment. Alternatively, the Courts of the Bailiwick will recognise the foreign insolvency office holder as having the right to pursue a particular right of action.

The Courts of the Bailiwick have been prepared to recognise a wide variety of foreign office holders from a number of different jurisdictions. However, recognition is not automatic and the Court retains a discretion in the matter. The Courts of the Bailiwick will generally regard the law of a company's state of incorporation as of prime importance in answering questions about a company's status and legal personality. A foreign insolvency office holder appointed in a jurisdiction other than that of the company's state of incorporation may not be recognised, at least if the appointment would not be recognised by the law of the state of incorporation.

The Courts of the Bailiwick have more limited powers to entertain substantive insolvency proceedings involving a foreign debtor. The power to wind-up companies is limited to companies incorporated under the laws of Guernsey and Alderney distinctly in each of those jurisdictions (companies cannot be incorporated under the Law of Sark). There is no power vested in any of the Courts of the Bailiwick to wind-up a foreign company as is to be found, for example, in the United Kingdom's Insolvency Act 1986 section 221.

Guernsey "*desastre*" proceedings can be initiated against a debtor, including individuals and incorporated entities, whenever there is a Bailiwick judgment outstanding against a debtor whose assets are insufficient to meet his known liabilities (whether based on judgments or otherwise). This procedure can be invoked wherever the debtor may be situated provided that assets are present in the Bailiwick and there is at least one Bailiwick judgment entered against the debtor. However, the *desastre* procedure amounts to no more than a pro rata distribution of the debtor's Bailiwick assets amongst his creditors, subject to certain preferred claims. The procedure has no other consequences for the debtor.

Individual debtors may also be subject to a declaration of insolvency ("*declaration de faillite*"). This procedure can lead to the discharge of the debtor's unpaid liabilities ("*le benefice de la Renonciation*").

The Courts of the Bailiwick have not had to rule on the jurisdiction of the Court to grant a declaration of insolvency in respect of a non-resident debtor. However, it is unlikely that the Courts of the Bailiwick would be prepared to grant such a declaration if the Defendant were not subject to the jurisdiction of the Court.

The E.C. Regulation No.1346/2000 on Insolvency Proceedings does not apply to the Bailiwick of Guernsey

## 2. Assisting legislation

In addition to the common law, The UK Insolvency Act 1986, ('the Act') Section 426, has been extended in part to the Bailiwick of Guernsey pursuant to the Insolvency Act 1986 (Guernsey) Order 1989. This Order extends sub-sections 4, 5 10 and 11 of Section 426 of the 1986 Act to the Bailiwick of Guernsey. The 1989 Order thus provides for statutory assistance within the Bailiwick of Guernsey in favour of insolvencies in the United Kingdom, the Bailiwick of Jersey and the Isle of Man.

Section 426(4) of the Act, as extended to the Bailiwick of Guernsey, establishes a general requirement that the Courts in the Bailiwick of Guernsey give assistance to foreign insolvencies as and when so requested to do so.

Section 426(5) of the Act provides that in rendering such assistance, the Courts of the Bailiwick may apply the insolvency law of the requesting Court or that of the Bailiwick of Guernsey. The Guernsey Courts must have regard to the rules of private international law in exercising their discretion under this section.

In considering any request for assistance under section 426 of the Act, the Courts of the Bailiwick will be guided by decisions of the Courts of the United Kingdom both as to the nature of the assistance that is available and also as to when the Court should exercise its discretion to give the assistance requested by the foreign Court.

### 3. Insolvency practice

Because of its role as an offshore financial centre, most significant failures involving the Guernsey jurisdiction are connected to businesses that are the subject of proceedings in other jurisdictions. Insolvency practice therefore tends to understand the need for and accommodate cooperation with practitioners from other jurisdictions.

### 4. Examples

***Viscount of Jersey v Osmond Clifford Gallienne, (4 November 1982)***

The Royal Court of Guernsey recognised the Viscount of Jersey's title to pursue a claim in Guernsey in circumstances where the Royal Court of Guernsey accepted that, as a matter of Jersey law, the Viscount had become the owner of a right of action as a result of desastre proceedings in Jersey which, in that jurisdiction, had the effect of sequestrating all moveable assets of the debtor, wherever situate.

***Re Seagull Manufacturing Co. Limited (Guernsey Court of Appeal, 5th August 1991)***

The Guernsey Court of Appeal upheld an application for an order in aid issued by the Court in England under section 426 of the Insolvency Act 1986 seeking the power to examine former directors of the company concerned who had always been resident in Alderney and to receive the production of the company's books of account and other records. Under the Law of Alderney there was no power under the local companies legislation to compel such an examination as under section 236 of the Insolvency Act 1986. However, the Court of Appeal was prepared to order that the examination should go ahead.

***Colin Graham Bird v Norman Meader, (Guernsey Court of Appeal 6th February 1989)***

The Guernsey Court of Appeal upheld an application for an order in aid under section 122 of the Bankruptcy Act 1914 seeking an order for the examination of the Defendant a partner in a local firm of accountants about the affairs of the bankrupt. The Guernsey Court of Appeal upheld the order even though the largest, if not the only, creditor in the bankruptcy was likely to be the United Kingdom Revenue and that there existed no local power comparable to section 25(1) of the Bankruptcy Act 1914 to require a person to be examined about the affairs of a bankrupt.

***Re Bre-X Minerals Ltd (22 October 2000)***

A Canadian court had appointed a trustee in bankruptcy in respect of a company, which had monies in a bank account in Guernsey. The Trustee claimed ownership of the monies in a bank account. The Canadian court made an order declaring that the Trustee owned the monies in the bank account. The Royal Court of Guernsey gave effect to the bankruptcy and made an order recognising the Trustee's title to the monies in the bank account.

