

UPDATE

Will the reform of Guernsey's insolvency laws to introduce a statutory power of investigation assist Guernsey appointed liquidators in cross-border investigations?

Update prepared by Tina Asgarian (Guernsey)

Under the current provisions of the Companies (Guernsey) Law 2008 (the Companies Law), Guernsey appointed liquidators do not have express statutory powers to require delivery up of a company or a third party's books and records, or to examine and interview third parties. However, this is all set to change.

Under the recommendations approved by the States of Deliberation on 31 March 2017,¹ one of the key reforms to the insolvency provisions of the Companies Law, which has been approved by the States, is the statutory power for liquidators to apply to the court and to request an order for the production of documents and information from directors, officers, employees, shareholders, accountants, book-keepers, bankers and any other person involved in the promotion of the company or with knowledge of the company's affairs.² The proposal further provides that liquidators should have the explicit power to apply to court to require attendance of directors and former directors for the purpose of examination. The proposal to include this statutory power in the amendments to the Companies Law³ will – if exercised properly – be a welcome tool in the Guernsey liquidator's armoury as well as that of foreign office-holders who are seeking information in Guernsey.

These proposed powers, which although extraordinary, are directed at enabling the court to help the office-holder to complete his/her functions as effectively and with as much expedition as possible. They will allow office-holders to obtain general information and discover facts with as a little expense as possible. Whilst it is anticipated that the discretion conferred on the court will be unfettered, in exercising its discretion, the court will no doubt be guided by the need to balance the requirements of the office-holder with the possible oppression to the person from whom the information is sought.⁴

An interesting feature of the proposed amendments will be the extent to which the powers may be used by Guernsey liquidators in insolvencies with a cross-border element. The Huelin-Renouf⁵ insolvency marked a significant step in developing Channel Island wide restructuring laws and demonstrated the benefits of cross-border co-operation for the company's creditors. But the amendments to the Companies Law could potentially increase the geographical extent and reach of a Guernsey liquidator's powers, not just to obtaining information, but to discovering facts relevant to the affairs of the company.

Given the ever increasing and sophisticated nature of cross-border insolvencies, it is anticipated that the need for Guernsey liquidators to require information and documents which are located abroad will increase over time. As matters currently stand, Guernsey liquidators – wearing their hat as foreign office-holders – may request documents from other countries where the local laws or legislation permit foreign office-holders the right to rely on similar powers in their local legislation. The clearest example of this is the

¹ See Mourant Ozannes update: 'Reform of Guernsey's Insolvency Laws', 7 April 2017.

² See paragraph 3.3.4 of the Committee for Economic Development's recommendations, dated 9 February 2017, as approved by the States.

³ The proposals submitted to the States appear to be expressed in the widest of terms, which suggests that the powers will closely resemble the provisions of section 234–236 of the English Insolvency Act 1986: see for example *Re Pantmaenog Timber Co Ltd* [2004] 1 AC 158 (HL) at 163, which refers to the powers conferred under the English Insolvency Act as being 'expressed in the widest terms'.

⁴ See generally *British & Commonwealth Holdings Plc (joint Administrators) v Spicer & Oppenheim* [1993] AC 426.

⁵ *In the matter of Huelin-Renouf Shipping (Guernsey) Limited (In Liquidation)*, 4 September 2015, Judgment 46/2015.

position under section 426 of the English Insolvency Act 1986 (the IA). A Guernsey liquidator wishing to seek the assistance of the English courts under this provision may apply to the Royal Court of Guernsey and ask that it issue a letter of request seeking the assistance of the UK court. The request is authority for the UK court to apply either its own insolvency law, or the corresponding insolvency law of Guernsey. Because Guernsey's Companies Law does not contain any express statutory powers of investigation, a Guernsey appointed liquidator may find that reliance on this provision (in England) is more easily founded on the English statutory provisions under section 236 of the IA.

If, however, the States' proposals are adopted and the Companies Law is amended to give Guernsey liquidators the statutory powers to investigate, then the amendments of themselves may give the Guernsey courts scope to increase the extraterritorial powers of Guernsey liquidators to require a person resident outside the jurisdiction to submit to the court an account of his/her dealing with the company or produce any books, papers or other records in his/her possession or under his control relating to the company.⁶ Of course, much will depend on how the statutory powers are drafted, but assuming that the provisions will be similar in nature to section 236 of the IA, then such a provision, coupled with the power to wind up an overseas company,⁷ could pave the way for the Guernsey courts to extend the scope of the liquidator's power to respondents outside of the jurisdiction.⁸

The issue of the extraterritorial effect of the English provisions of section 236 of the IA is currently the subject of active judicial debate in England.⁹ But whatever the outcome of the debate in England, from a Guernsey perspective, when it comes to seeking assistance from foreign courts, having a statutory power within the Companies Law will of itself be of great assistance to Guernsey appointed liquidators (who are seeking assistance outside of the confines of section 426 of the IA - ie, under the common law¹⁰ or other local legislation). Whether those rights will be further extended will in part depend on the wording of the amending provisions, but also the facts and circumstances prevailing at the time.

Cross-border issues play an increasingly important part in Guernsey's insolvency law and practice and international elements may present themselves at any time, even during the course of a local insolvency. These proposed reforms to the corporate provisions of the Guernsey Companies Law will greatly assist Guernsey liquidators and ensure that they are well placed to respond to the continued and ever increasing international dimension of modern insolvency proceedings.

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⁶ In addition, if the Guernsey provisions are wider in scope than the provisions of section 236 of the IA, the Guernsey office-holder may apply for relief under the laws of Guernsey, even if the practice diverged from the English practice. See for example: *England v Smith* [2001] Ch 419 and *Re Duke Group Ltd* [2001] BCC 144.

⁷ See paragraph 3.2.9 of the Committee for Economic Development's recommendations, dated 9 February 2017, as approved by the States.

⁸ See for example *Re Mid East Trading Ltd* [1998] BCC 726 at paragraph 753.

⁹ See the conflicting decisions of David Richards J in *Re MDF Global UK Limited* (In special administration (No 7) [2015] EWHC 2319 (Ch) and that of HHJ Hodge QC in *Omni Trustees Limited ; Official Receiver v Norriss* [2016] Ch 325.

¹⁰ See for example the judgment in the Privy Council decision in *Singularis Holdings Ltd v PwC* [2014] UKPC 36, in which it was stressed that the common law power of assistance was subject to (among other things) the limitation that it did not enable office-holders to do something which they could not obtain by order of the courts under which they were appointed. This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at mourant.com. © 2017 MOURANT OZANNES ALL RIGHTS RESERVED