

UPDATE

The Royal Court recognises Canadian 'debtor in possession' bankruptcy orders over a Jersey company

Update prepared by Stephen Alexander (Partner, Jersey) and Max Galt (Associate, Jersey)

A development to the customary law principles of comity and reciprocity in Jersey: The Royal Court recognises 'debtor in possession' bankruptcy orders of the Canadian Court over a Jersey company for the first time.

Introduction

In a recent decision of the Royal Court, Mourant Ozannes successfully obtained orders of the Royal Court recognising 'debtor in possession' bankruptcy orders of the Ontario Superior Court of Justice (**Canadian Court**), relating to Lydian International Limited (**Lydian International**), a Jersey company. It is the first time that such Canadian proceedings have been recognised in Jersey.

The judgment of the Royal Court *In the matter of Lydian International Limited* establishes precedent for recognition of Canadian insolvency proceedings in Jersey, and contains informative analysis as to the factors that the court will balance when deciding whether to exercise its jurisdiction to assist foreign courts in insolvency matters.

Background

Lydian International is a Jersey company and the ultimate holding company for the wider Lydian Group. The Lydian Group is a complex, integrated, international structure with underlying subsidiary entities in multiple jurisdictions including Canada, the USA, the British Virgin Islands, the UK, Armenia and Georgia.

The business of the Lydian Group is focussed on the construction of its wholly owned development stage gold mine in Armenia known as the 'Amulsar Project'. The Amulsar project has run into catastrophic financial difficulties, mainly due to (allegations of) arbitrary conduct on the part of the Government of Armenia.

Lydian International, along with certain other entities within the Lydian Group, applied for protection from its creditors in Canada under a statute known as the Companies' Creditors Arrangement Act (**the CCAA**). The CCAA is a Canadian federal statute which allows insolvent debtor companies to restructure their business and financial affairs. It bears some similarity to English administration proceedings in that it is a rescue/restructuring focussed regime. Unlike administration proceedings, however, the debtor remains in possession of its property and retains its ability to carry on its business whilst it seeks to make arrangements with its creditors. The proceedings are carried out under the supervision of the Canadian Court with the assistance of a corporate insolvency practitioner known as the 'Monitor' (who, in this case, was Alvarez & Marsal).

Upon issuing its initial order in the CCAA proceedings in Canada, the Canadian Court issued a letter of request to the Royal Court of Jersey seeking its assistance in recognising its orders in relation to the insolvency of the Lydian Group. The letter of request sought that certain of the orders and directions made in the CCAA proceedings be recognised in Jersey. This included ensuring that no creditor action could be commenced in Jersey while the CCAA proceedings were on foot, that Lydian International would remain in

control of its business and affairs for the duration of the insolvency process, that the appointment of the Monitor would be recognised in Jersey and notified to the JFSC, and that both Lydian international and its creditors had the right to apply for further orders if necessary. Recognition of the Canadian Court orders in Jersey was to help ensure that there remained a single system of restructuring and insolvency pertaining to the Lydian group.

Decision

The Royal Court was principally concerned with two questions. Firstly, whether it had jurisdiction to make the orders sought, and secondly, if it did, whether it should exercise it to grant those orders.

There was no statutory basis for the Royal Court to assist. While Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 provides that the Royal Court will assist certain prescribed foreign courts in insolvency matters, Canada was not one of the countries to which that legislation applied. Accordingly the Royal Court looked to customary law and the principles of international comity and reciprocity.

The authority of most assistance was the decision of the Royal Court in *Tacon –v- Nautilus Trust Company Limited, John Grimshaw and Montrow International Limited* [2007] JRC 107 and the decision of the Court of Appeal on appeal in *Montrow International –v- Tacon* [2007] JCA 144. In that case, the provisional liquidator of a company in the British Virgin Islands was seeking to exercise various powers as liquidator over Jersey companies including obtaining certain information from directors. The Court of Appeal held that the appointment of the provisional liquidator should be recognised in Jersey, notwithstanding that Jersey did not have such a concept.

In this case, the Court recognised that it would be going somewhat further, given that Jersey had no comparable process: there is no such thing as CCAA proceedings or even a 'Monitor' in Jersey.

Notwithstanding this, the Royal Court accepted that there was nothing about the relief that was sought which was inconsistent with public policy or contrary to any fundamental principles of Jersey law. The Court therefore accepted that it had jurisdiction.

In deciding whether to exercise its jurisdiction, the Court considered the following points: -

1. The insolvency process was not contested;
2. The secured creditors of Lydian International were represented in the Canadian proceedings and had been given notice of the Jersey proceedings;
3. There were no material unsatisfied Jersey creditors;
4. The only objecting creditor had had its position considered recently before the Canadian Court and would have the opportunity to make submissions at further hearings in Canada;
5. The letter of request indicated that the Canadian Court would consider giving effect to equivalent orders by the Royal Court;
6. It was consistent with Jersey's status as a responsible and international financial centre for it to lend assistance to the Canadian Court;
7. The CCAA process was designed to benefit the creditors as a whole;
8. The Lydian Group was a complex international structure and it would likely lead to a better outcome if the process was being supervised in one jurisdiction (Canada).

Conclusion

This welcome decision shows the willingness of the Royal Court to take a pragmatic approach when it comes to assisting foreign Courts with complicated international insolvencies. It shows that the Jersey Court will recognise foreign insolvency processes even where there is no equivalent process in Jersey, if it is appropriate to do so in the circumstances. Jersey retains a sophisticated and flexible judicial system which facilitates collaboration in cross-border insolvencies, and this decision adds to its prominence as an important international insolvency centre.

Contacts



Stephen Alexander
Partner, Mourant Ozannes
Jersey
+44 1534 676 172
stephen.alexander@mourant.com



Max Galt
Associate
Jersey
+44 1534 676 310
max.galt@mourant.com

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