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UPDATE

Setting a Precedent: Jersey's First Wrongful Trading Order

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A note on *In the matter of Restore Builders Limited En Désastre* [2024] JRC 290.

The Royal Court of Jersey has recently held, for the first time, that the actions of a Jersey company director constituted wrongful trading and ordered that he be personally liable for the company's debts and disqualified as a director for ten years.

Introduction

In Jersey, when a company becomes insolvent, it can either be wound up through one of the statutory winding up processes detailed in the Companies (Jersey) Law 1991 (the **Companies Law**) or a process led by the Viscount[1] of Jersey's office set out in the Bankruptcy (Désastre) (Jersey) Law 1990 (the **Désastre Law**): *désastre*.

In the matter of Restore Builders Limited En Désastre [2024] JRC 290, the sole director and shareholder (the **Director**) of Restore Builders Limited (the **Company**) successfully applied for the Company to be declared *en désastre* on 25 November 2022. The Director was also declared *en désastre* in his personal capacity on the same day.

After investigating the Company's affairs for two years and making repeated attempts to secure the Director's cooperation in the investigation, all of which were largely unsuccessful, the Viscount applied to the Royal Court for two orders:

(a) for the Director to be disqualified as a company director; and

(b) that the Director be held personally responsible for the debts of the Company on the grounds that he had engaged in wrongful trading.

The Royal Court granted both orders and, in doing so, gave directors a stark reminder that it will not hesitate to take action against them should they fail to fulfil their statutory obligations or act appropriately in the interests of creditors when the company is in financial difficulties, and this notwithstanding the lack of any previous case in Jersey finding a director liable for wrongful trading.

Background

The Company was incorporated in July 2022. Prior to that, the Director had already accumulated nearly £1 million in personal debts. Not long after the Company was incorporated, it experienced financial difficulties and, on its own application, was declared *en désastre*. By this time, proceedings had been successfully pursued against the Company by a creditor in the Petty Debts Court.

Over the next two years, the Director repeatedly failed to engage with the Viscount's office in the *désastre* process, which included misrepresenting the value of the Company's assets and debts, and refusing to

[1] The Viscount is a public official who, in the context of insolvency proceedings, has a role akin to the Official Receiver in England and Wales.

provide all the information sought by the Viscount. The Director also failed to meet or simply ignored several deadlines that were set by the Viscount.

On 10 August 2023, the Viscount issued a summons seeking orders that the Director be disqualified as a company director and be held personally responsible for the debts of the Company. The Viscount served the summons at the correspondence address he had for the Director in St Helier, but in response, received an email from a person whom the Viscount believed to be the Director's partner, stating that she was not a point of contact for him. The Director's failure to notify the Viscount of his new address constituted a breach of Article 18(2)(a) of the Désastre Law, which requires the Viscount to be informed of any change to, *inter alia*, a director's address, employment, or name in the context of a company *en désastre*.

In October 2024, through use of tracing agents, the Director was located in rural Cumbria and served with a summons to attend a hearing before the Royal Court to consider the Viscount's application. Six days before the hearing, the Director wrote to the Court in an attempt to explain his actions but, in doing so, provided an account that was tantamount to an admission of acting dishonestly, which included using customers' deposits not for the purpose for which the Company received them, but for other purposes entirely.

The hearing took place on 25 November 2024 without the Director or a legal representative for the Director in attendance. As mentioned above, the Court found in the Viscount's favour, and made both orders sought.

Decision

Disqualification as director

Article 24(7) of the Désastre Law provides that, where a debtor is a company, the Court may, upon the Viscount's application, make any order regarding a person who is or was a director of the company, as it could under Article 78 of the Companies Law in relation to such a person. Article 78 of the Companies Law, in turn, allows certain designated individuals to apply to the Royal Court for an order disqualifying a director of a Jersey company from acting as a director for a specified period.

After considering the evidence before it, the Court found the actions of the Director in this matter, which included, failing to keep in contact with the Viscount, failing to attend appointments with the Viscount, and failing to provide genuine assistance to the Viscount, to be a flagrant breach of the obligations under the Désastre Law, which affected the Viscount's ability to discharge his functions.

The Court concurred with the findings in the recent Royal Court case, *SPARC Group Limited* [2022] (2) JLR 65, that the power to disqualify a director is designed to protect the public, rather than to punish the director. This is particularly relevant in light of Jersey's position as a financial centre, where ensuring directors meet their statutory obligations is crucial. The Court further affirmed that the test for disqualification is whether a director's conduct renders them unfit to manage a company.

In light of the Director's actions over the past two years, as set out above, the Court found ample evidence to support an order for disqualification for a period of 10 years.

Wrongful trading

Article 44 of the Désastre Law provides that if a company is *en désastre*, the Court may order a director or manager to be personally liable for the company's debts if it finds that, at a time before the declaration *en désastre*, they:

(a) knew that there was no reasonable prospect that the company would avoid a declaration en désastre or a creditors' winding up; or

(b) on the facts known to him or her was reckless as to whether the company would avoid a declaration en désastre or such a winding-up.

However, the Court will not impose personal liability if, after either condition specified above was first satisfied, the individual took reasonable steps to minimise the potential loss to the company's creditors.

In this case, the Court found that the Director knew, or should have known, that the Company had no reasonable prospect of avoiding bankruptcy. This was evident from the fact that, as its sole shareholder, he had already accumulated nearly £1 million in personal debts before incorporating the Company, causing

the Court to conclude that incorporation was merely a tactic to shield the Director from personal bankruptcy, with the Director fully aware that the Company had no realistic chance of avoiding a declaration of *en désastre*.

The Court was therefore satisfied that the statutory test set out under Article 44 of the Désastre Law had been met and ordered that the Director be personally liable for the debts of the Company.

Commentary

This case serves as a timely reminder of two important points.

First, the Royal Court will not hesitate to disqualify a director under the Désastre Law or the Companies Law if it deems it necessary to do so in order to protect the public. Furthermore, to safeguard Jersey's status as a leading financial centre, the Royal Court will ensure that directors are held accountable for breaching their statutory obligations. It is therefore of paramount importance for directors to fully understand those obligations, especially when a company is facing serious financial difficulties that could lead to a declaration of *en désastre* or a winding-up under the Companies Law. We have previously written about the issues Jersey directors can face when managing an insolvent or potentially insolvent company in our Guide titled Directors' concerns: Facing insolvency and wrongful trading dated February 2023.

Second, notwithstanding the lack of a previous example of the Jersey Court finding a director liable for wrongful trading, it will have no hesitation in doing so, and rendering them personally liable for the debts of the Company, when the circumstances justify it. Thus directors of a Jersey company facing financial difficulties must ensure they act appropriately, including by seeking advice from Jersey lawyers and/or insolvency practitioners to determine the most appropriate strategy moving forward. Additionally, it is crucial for directors in such circumstances to maintain thorough written records of all meetings and decisions. This documentation will be invaluable in demonstrating to the Court, if required, that they duly considered the interests of creditors and took reasonable steps to minimise any losses. A failure to take appropriate steps could potentially lead to the directors being held personally liable for the debts of the company.

Lastly, and closely related to the above, directors should bear in mind that even if they can show that they did not know the company had no reasonable prospect of avoiding a declaration of *en désastre* or a creditors' winding-up, they could still be held personally liable for the company's debts if they were reckless in their assessment of the company's financial situation. This underscores the importance of directors actively monitoring the company's financial position and taking appropriate action and advice if there are concerns regarding its viability.

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