CAREY OLSEN

Discovery and applications for a creditors' winding up – developments in Jersey Law

Service area / Dispute Resolution
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1. Montague Goldsmith AG v Goswick Holdings Limited and Ors [2024] JRC 170

What happened?

This was an interlocutory hearing which, among other things, concerned: (i) specific disclosure requests; (ii) repetition of certain searches on the basis that the searches carried out were insufficient; (iii) the requirement to file a discovery protocol; and (iv) various declaratory orders in the context of discovery. The underlying dispute related to a real estate profit share arrangement. Procedurally, a key feature of the litigation was the parties' failure to agree a discovery protocol.

The decision

For the most part, the relief sought by both sides was dismissed. Instead, the Royal Court focused on specific discovery. The judgment provides interesting commentary on third party discovery orders and, in particular, proportionality considerations relevant to the making of such orders.

The Court also emphasised the importance of judicial co-operation between the parties when discovery arises. For instance, at paragraph 99 of the judgment, Commissioner Thompson held:

"Had the parties focused on these missing documents, rather than spending time making extensive criticism of the process the other had followed, then a more proportionate approach might have been taken to the issues I had to determine."

Discovery in Jersey

Under Jersey Law, each party to a dispute is required to identify all relevant documents: (i) which it has or used to have in its physical possession; (ii) where it has or had a right to possession of the document; (iii) where it has or had a right to inspect or take copies of a document; or (iv) where it has the right to compel someone else to provide a document to that party. Relevance is tested by reference to the *Peruvian Guano* test. In simple terms, this means that relevant documents in Jersey constitute those which: (i) advance a party's own case; (ii) damage the adversary's case; or (iii) may – not must – lead a party down a train of inquiry leading to either (i) or (ii). Jersey does not distinguish between "standard" and "extended" discovery.

The default requirement to give discovery of "train of inquiry" documents is arguably an onerous aspect of litigating in Jersey. However, the trade-off is that the parties have flexibility to agree their own discovery protocol and can approach the Court for directions at relatively short notice. This flexibility, coupled with good cooperation between the parties, can be used to drive efficiency and further the overriding objective of resolving disputes justly and at proportionate cost.

Practical conclusions

Discovery is a crucial stage in proceedings and remains an ongoing obligation for all parties to the dispute. Although the scope of relevant documents is arguably wider under Jersey law (as compared with English law), the flexibility of the Royal Court Rules mean that discovery issues can be dealt with creatively and efficiently – provided there is good cooperation between the parties.

2. Representation of HWA 555 Owners, LLC and Thieltgen [2023] JCA 085

What happened?

This case concerned an application for a winding up order under Article 157A of the **Companies (Jersey) Law 1991** (the "**CJL 1991**"). The Royal Court dismissed the application on the basis that, in the exercise of its discretion, it would be in best interests of the creditors for bankruptcy matters to be conducted in Luxembourg (which was considered to have a closer nexus than Jersey in the circumstances).

Among other things, Article 157A of the **CJL 1991**, requires that an applicant for a creditors' winding up must have a claim for not less than the prescribed minimum liquidated sum (currently £3,000). One of the points arising in the Court of Appeal was whether the Royal Court was correct in holding that a claim in a liquidated sum could include a contingent claim. The contingent claim in issue was a foreign costs judgment which had not yet been assessed.

The decision

The Court of Appeal held that the proper construction of **Article 157A of the CJL 1991** permits an application to be made for a creditors' winding up by a contingent creditor, so long as the claim can be demonstrated to be of a value exceeding the prescribed amount (currently £3,000). This appears to be on the basis that a contingent creditor would have standing to prove a claim in the liquidation and therefore ought to have standing to bring about the liquidation in the first place. While this is a cogent position at a policy level, it is challenging to reconcile with the statutory wording, which requires the applicant creditor to have *"a claim against the company for not less than the prescribed minimum **liquidated** sum"* (emphasis supplied).

There was a strong dissenting judgment on this point, with Wolffe JA stating at paragraph 133 of the judgment:

*"In order to have standing to make an application, the creditor must have a claim against the company for a liquidated sum which is not less than the prescribed minimum. It follows that a claim which is **unliquidated**, such as a claim for damages not yet quantified by judgment or agreement, **does not give standing to initiate a creditors' winding up under this provision**." (emphasis added)*

Practitioner's view

The creditors' winding up regime, in its current form, has only been in existence in Jersey for the last 2 years following amendments to the **CJL 1991.** However, the phrase *"liquidated sum"* also appears in **Article 3 of the Bankruptcy (Désastre) (Jersey) Law 1990.**

Until ***HWA 555***, it was broadly accepted that a contingent creditor could not make an application for désastre (bankruptcy). Similarly, there was little reason to think that this would be possible in a creditors' winding up, given the near identical wording in the legislation governing désastre and the creditors' winding up regime. The current position would appear to be that a contingent creditor (whether seeking a declaration of désastre or a creditors' winding up) would have standing.

Practical conclusions

Arguably, ***HWA 555*** presents a novel interpretation of "liquidated sum", which was previously understood to exclude contingent claims. The phrases "liquidated sum" and "liquidated demand" are used widely across Jersey legislation and within the Royal Court Rules. At its highest, this case could represent a breach of the once well-guarded perimeter of "liquidated" claims. Arguably, the perimeter ensured that only sufficiently certain claims could form the basis of insolvency proceedings or shortcut judgments. What precisely is meant by "liquidated" post ***HWA 555*** – and where the new perimeter lies – is likely to be a matter of not insignificant further debate.

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FIND US

Carey Olsen Jersey LLP
47 Esplanade
St Helier
Jersey JE1 0BD
Channel Islands

T +44 (0)1534 888900
E jerseyco@careyolsen.com

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