VOISIN LAW

Interpretation of “liquidated sum” in relation to a creditor’s winding up under the Companies (Jersey) Law 1991 | 1

Prior to 1st March 2022, the main recourse in Jersey for the creditor of an insolvent Jersey company was to seek a declaration en désastre.

However, although a company may still be declared en désastre, the Companies (Jersey) Law 1991 (the “Law”) was amended to create another option by permitting a creditor to issue an application to the Royal Court seeking an order commencing the winding up of a debtor company and the appointment of their proposed liquidator.

In relation to who can make an application, Article 157A (1) of the Law states:

“A creditor may make an application to the court for an order to commence a creditors’ winding up if the creditor has a claim against the company for not less than the prescribed minimum liquidated sum and –

(a) the company is unable to pay its debts;

(b) the creditor has evidence of the company’s insolvency; or

(c) the creditor has the consent of the company.”

However, the Court of Appeal in the case of Representation of HWA 555 Owners, LLC [2023] JCA085 rather surprisingly held a creditor did not need to have a liquidated claim (a sum which is undoubtedly due and payable by the debtor.) in order to make an application to the court for an order to commence a creditors’ winding up under the Law and that in certain cases a contingent or
unliquidated claim would suffice.

This judgment has come as a surprise to many practitioners given that the commonly held view in Jersey was that in order to have standing to make an application under Article 157A of the Law a creditor must have a liquidated claim against the debtor company.

Interestingly, in this case, there was a strong dissenting judgment on this point made by Wolffe JA who held that “the natural and ordinary interpretation” of Article 157A of the Law was that the creditor must have a claim against a company for a liquidated sum which is not less than the prescribed minimum (currently £3,000) and that a claim which is unliquidated, such as claim for damages not yet quantified by judgement or agreement does not give standing to initiate a creditors winding up.

Wolfe JA further went on to state that “The application for a declaration of désastre was one of those tried and tested and widely understood procedures” and that Article 3(1) of the Bankruptcy (Désastre) (Jersey) Law 1990 had “hitherto been understood, including by this Court, to require the creditor’s claim to be for a liquidated sum.”

This was important as Wolffe JA noted that the intention of the legislature had been that the same test be applied to both creditors winding up and désastre applications.

This indeed further appears to supported in the Royal Court Practice Direction 22/01 which states that an application under Article 157A of the Law must be supported by an affidavit which must among other things “state that the creditor has a claim against the company for a liquidated sum, that to the best of the

creditor’s knowledge and belief is not subject to a genuine dispute and arguable defence or counterclaim, and which has not been paid.”

However, in light of the majority judgment, the breadth of creditors who may bring an application for creditors winding up appears to be much broader than once widely understood, with creditors with a contingent or unliquidated claim also having standing to make an application under Article 157A of the Law, as long as the claim can be demonstrated to be of value exceeding the prescribed amount.

That being said, given the strong dissenting judgment and the view that this is a departure from previously widely held interpretations of the requirements under Article 157A of Law, it is likely that this issue may well surface again in the near future.