

## “Rescue by Any Other Name”: Adopting the Practice of “Pre-Packs” in Jersey

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*Abstract: This article considers the recent adaptation by Jersey courts of the just and equitable winding up framework under Article 155 of the Companies (Jersey) Law 1991 to authorise the conduct of a “pre-pack” sale of a business using a model normally only seen in the context of insolvency administrations in the United Kingdom.*

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### Introduction<sup>1</sup>

1 In Jersey, the view has been taken that there are no rescue procedures in corporate or insolvency law.<sup>2</sup> Within the company law context, the domestic legislation, the Companies (Jersey) Law 1991, predominantly based on the Companies Act 1985 (United Kingdom), contains a Part 21 dealing with the winding up of companies with procedures analogous to those available in companies' legislation in other common law jurisdictions across the globe. There are three such procedures, the summary winding up,<sup>3</sup> which requires the company to be solvent, the creditors' winding up,<sup>4</sup> where the company is not, and the just and equitable winding up, which may be instituted under certain conditions as determined by the court.<sup>5</sup> Unlike in many other jurisdictions, however, creditors have no right to petition the court for the winding up of a debtor on grounds of non-payment of debts. In fact, access to summary and creditors' winding up is based on the members resolving that a winding up takes place.<sup>6</sup> In the case of the just and equitable winding up, however, an application to the court may be made, not only by the company as well as a director or member, but also the Minister for Economic Development or the Jersey Financial Services Commission (JFSC).<sup>7</sup> The last two may also apply for what is known as a public interest winding up, usually invoked in relation to companies carrying out regulated activities.<sup>8</sup>

2 Within companies' legislation though, there are no rescue procedures as such, unlike those known in the law in the United Kingdom, where the Companies Act 1985 (United Kingdom) was joined a little later by the Insolvency Act 1986 (United Kingdom), the latter making provision for

<sup>1</sup> This is a substantial reworking of a case comment first published as *Insolvency Practice in Jersey: The Novelty of Pre-Packs* (2013) 6 CRI 148.

<sup>2</sup> See, by this author, *Finding Rescue: Creative Alternatives to the Classic Insolvency Procedures in Jersey* (2012) 16 JGLR 248.

<sup>3</sup> Article 145 *et seq.*, Companies Law (Jersey) 1991.

<sup>4</sup> *Ibid.*, Article 156 *et seq.*

<sup>5</sup> *Ibid.*, Article 155(1).

<sup>6</sup> *Ibid.*, Articles 146 and 157 respectively.

<sup>7</sup> *Ibid.*, Article 155(2).

<sup>8</sup> *Ibid.*, Article 155(3).

corporate voluntary arrangements and administration as rescue processes.<sup>9</sup> In Jersey, more recently though, the scheme of arrangements procedure,<sup>10</sup> which is also a feature of companies' legislation around the common law world, has acquired a use for restructurings at the threshold of insolvency.<sup>11</sup> The advantage of the scheme of arrangements is two-fold, in that its outcomes are generally flexible and it avoids the formality of insolvency procedures, although it is not a procedure that is by any means a "light-touch" one, necessitating time and considerable expense. Nonetheless, it is notable that, in other jurisdictions also inheriting versions of the United Kingdom Companies Acts, but where insolvency procedures have not been developed for some time, the scheme procedure has undergone a renaissance as a method for restructuring companies.<sup>12</sup> Other restructuring mechanisms in the company context, so far unrepresented in the case law, include the merger rules, renovated in 2011 to introduce a cross-border merger framework, which allow for the possibility for a merger with an insolvent company provided consent has been obtained from a court.<sup>13</sup>

3 Within what might be termed the bankruptcy or insolvency context proper, the procedures are largely derived from the customary law, although they have been partially codified by statute.<sup>14</sup> Creditors seeking a remedy against a debtor have available to them two such procedures to initiate: the *adjudication de renonciation* (adjudication of renunciation), also known as the *cession involontaire* (involuntary cession) and the *désastre* (disaster).<sup>15</sup> Both processes are quite complex and may require the creditor to undertake several steps before obtaining satisfaction.<sup>16</sup> The first, the *adjudication de renonciation*, contains features of a foreclosure-type procedure and begins with an order of the court, obtained by the creditor on the basis of a judgment

<sup>9</sup> Parts I and II (respectively), Insolvency Act 1986 (United Kingdom), which were remodelled by (respectively) the Insolvency Act 2000 (United Kingdom) and the Enterprise Act 2002 (United Kingdom). The administration procedure has also been adopted by a number of Commonwealth jurisdictions, including Guernsey (Companies (Guernsey) Law 2008) and Singapore (Part VIIIA, Companies Act 1967 (cap. 50)).

<sup>10</sup> Articles 125-127, Companies Law (Jersey) 1991.

<sup>11</sup> *Re Drax Holdings Ltd; Re Inpower Ltd* [2004] 1 BCLC 10 (in part a Jersey case).

<sup>12</sup> See I. Kawaley, Cross-Border Insolvency in the British Atlantic and Caribbean World: Challenges and Opportunities, Chapter 14 in B. Wessels and P. Omar (eds), *Insolvency and Groups of Companies* (2011, INSOL Europe, Nottingham), who charts the use of scheme of arrangements procedures in the geographical area under scrutiny.

<sup>13</sup> Article 127A *et seq.*, Companies (Jersey) Law 1991, introduced by the Companies (Amendment No. 5) (Jersey) Regulations 2011.

<sup>14</sup> In the cases of the *cession volontaire*, by the *Loi (1832) sur les décrets*, the *remise de biens*, by the *Loi (1839) sur les remises de biens*, and the *désastre*, by the Bankruptcy (*Désastre*) (Jersey) Law 1990. For those areas unregulated by the written law, the customary law as interpreted by the judges continues to be applicable.

<sup>15</sup> See A. Dessain and M. Wilkins, *Jersey Insolvency Law and Asset-Tracking* (4th ed) (2012, Key Haven Publications, Oxford), Chapter 5 and, by this author, *Law relating to Security on Movable Property and Bankruptcy Study Guide* (2013, Institute of Law Jersey, St Helier), Chapters 8-15.

<sup>16</sup> Recently, and exceptionally, the court, in the case of *Re Estates and General Developments Limited (in liquidation)* [2013] JRC 027, permitted a foreign receiver, appointed in the United Kingdom, to take control of and sell immovable property without applying for any local proceedings on the basis of Article 49 of the Bankruptcy (*Désastre*) (Jersey) Law 1990. No such facility is available, however, to the local debtor-creditor in a purely domestic transaction.

debt. That order will normally provide that, unless the debtor pays those debts or applies for a *cession générale* (general cession), also known as the *cession volontaire* (voluntary cession), the debtor is deemed to have renounced his property. A *dégrévement* (discumberment of security) procedure is then used to purge the secured interests from any immoveable property and to convey that property to whichever of the creditors is prepared to accept it on condition that any prior secured claims are settled by that creditor. Any movable property belonging to the debtor is normally disposed of alongside the *dégrévement* or in a parallel procedure called *réalisation* (realisation). Thus, out of this procedure, given its orientation towards a liquidation-style outcome, there is no surplus and no possibility for the rescue of a business.<sup>17</sup> Furthermore, the biggest disadvantage for the debtor in this process is that, in addition to the foreclosure element, there is no discharge after the procedure is concluded and the debtor will remain liable for any outstanding amounts.<sup>18</sup> In such situations, the debtor tends to apply for another of the customary law procedures, the *remise de biens* (surrender/handover of goods),<sup>19</sup> provided that the debtor has the pre-requisite qualification, which is to be *fondé en heritage* (vested in property) or its equivalent.<sup>20</sup>

4 The *remise de biens* procedure is available for an *ab initio* application, where the debtor is not subject to any procedure, and is also notionally available in a *dégrévement* at any time up till when the property in question has been taken by a *tenant après dégrévement* (the tenant after the discumberment). If the application is successful and the procedure succeeds in delivering its outcomes: payment of the secured creditors in full and the delivery of a dividend to the unsecured creditors, no matter how small, then the debtor will obtain a discharge.<sup>21</sup> In theory also, what property is not required to meet the creditors' claims is returned to the debtor, thus providing the potential, however unlikely, of a surplus. As such, the *remise de biens* has been described as the only Jersey procedure of a suspensory type specifically to enable the rehabilitation of the debtor.<sup>22</sup> This may be contrasted with the *cession générale*, in which, albeit a discharge is also available,<sup>23</sup> the surplus value of the property not required to meet creditors' claims accrues to the

<sup>17</sup> The older procedures were not designed in an age when incorporated forms were commonly available for use in business, the joint-stock company only appearing as an innovation in the early 19th century. It is only with some difficulty that the extension to companies can be envisaged as the definition of "person" in the Schedule to the Interpretation (Jersey) Law 1954 would suggest.

<sup>18</sup> *Birbeck v. Midland Bank Ltd* 1981 JJ 121.

<sup>19</sup> For details of the operations of the procedure, see F. Benest and M. Wilkins, Can we be at Ease with the Remise? (2004) 8(1) Jersey Law Review, copy available at the <[www.jerseylaw.je](http://www.jerseylaw.je)> website (last viewed 9 February 2014).

<sup>20</sup> *Re Taylor* (1999) (unreported) includes share transfer properties as equivalent to the pre-requisite.

<sup>21</sup> This *sine qua non* has been consistently reiterated in the more recent cases on its use, such as *Re Mickhael* [2010] JRC 166A; *Re Gibbins* [2011] JRC 033; *Re Venton* [2011] JRC 102; *Re Pitman* [2014] JRC 008 and *Re Reva Holdings Ltd* [2014] JRC 026.

<sup>22</sup> Jersey Law Commission Consultation Paper No 2 (November 1998), at paragraph 2.5.1., copy available at: <<http://www.lawcomm.gov.je/consultation2.htm>> (last viewed 9 February 2014).

<sup>23</sup> Article 10, *Loi (1832) sur les décrets*.

creditor who takes the property during the *dégrévement* process. The advantage of an application in this context is also that, even where the *remise de biens* procedure itself later fails, what happens is that a *cession générale* is instituted with the usual outcomes, including the discharge. Despite the attractiveness of the *remise de biens*, it cannot strictly be called a rescue procedure, because during the realisation of the debtor's property in order to achieve the outcomes of the procedure, the debtor has no choice as to what property is realised and in what order, thus rendering the planning of a rescue difficult, if not impossible. Thus, the procedure can be described as more akin to liquidation in substance.

5 The creditors' second option, the *désastre* procedure, is more of a collective procedure and does provide a discharge,<sup>24</sup> but is similarly liquidation-oriented. The process involves the Viscount, an officer of the Royal Court, administering the debtor's estate in a role very similar to that of a trustee in bankruptcy. Although the most modern of all the bankruptcy procedures and thus containing the features expected of a developed law, such as vesting, estate management, debtor control, claim-proving and distribution, claw-back and liability as well as discharge provisions, the essence of the procedure is to liquidate the debtor's estate and to distribute the proceeds to creditors. It does, nevertheless, offer the opportunity, however unlikely, for any surplus to be returned to the debtor, which may assist any eventual return to business. In terms of creditor choice, although the *adjudication de renonciation* may involve a debt of any size, a creditor can only apply for the *désastre* of a debtor if there is a liquidated claim of at least JEP 3000.<sup>25</sup> In addition, the Viscount's costs may be a considerable charge on the estate in a *désastre*, which may explain why creditors continue to prefer the *adjudication de renonciation* as a route for enforcement of their claims. The same issue of costs also applies where it is the debtor who initiates a *désastre*. In fact, the case-law has recently evidenced a trend for debtors to apply for a *remise de biens*, albeit for the most part unsuccessfully, stating that costs are an issue. The lack of success may also be due to the fact that the court's preference is now to subject all estates, even the simplest that once could have been appropriately dealt with by one of the older procedures,<sup>26</sup> to the purview of *désastre*.<sup>27</sup>

### The Flexibility of the Just and Equitable Winding Up

<sup>24</sup> Article 40(1), Bankruptcy (Désastre) (Jersey) Law 1990 for individuals, albeit only 4 years from date of the order opening the procedure, while Article 38(2) subjects a company, foundation or incorporated limited partnership to dissolution upon the notice of the payment of the final dividend being received from the Viscount by the Registrar of Companies.

<sup>25</sup> Rule 2, Bankruptcy (Désastre) (Jersey) Order 2006.

<sup>26</sup> As contemplated by the rule in *Re Superseconds Limited and Others* 1997 JLR 112. Note also the hierarchy explicit in Article 5, Bankruptcy (Désastre) (Jersey) Law 1990, which enforces a duty on the court not to make a declaration where any order relating to one of the older procedures (*cession générale*, *adjudication de renonciation* or *remise de biens*) has been made.

<sup>27</sup> *Re Venton* [2011] JRC 102; *Re Pitman* [2014] JRC 008 and *Re Reva Holdings Ltd* [2014] JRC 026 being recent examples of this preference.

6 Returning to the options available, however, in recent years the courts in Jersey have begun to develop a wider conception of what a just and equitable winding up might include. The procedure is in fact already quite flexible and enables the court which opens proceedings to also appoint the liquidator and direct the manner in which the winding up is to be conducted.<sup>28</sup> Often, the order appointing the liquidator will specify the powers the liquidator will enjoy, usually formulated by analogy with those available in the other winding up procedures. In fact, in one case,<sup>29</sup> the court referred to its disinclination to agree to a winding up in the hands of the directors as justification for the appointment of liquidators, whom it regarded as capable of investigating matters relating to the losses the company had suffered fairly and impartially.

7 Because Article 155 is derived from an equivalent United Kingdom provision,<sup>30</sup> the Jersey courts have confirmed that it is permissible to look to English case law to guide Jersey courts as to the interpretations to be placed on the meaning of the words “just and equitable”.<sup>31</sup> Generally, the court must be convinced that no other remedy is suitable, because winding up is deemed a drastic and terminal remedy.<sup>32</sup> That said, applications of the just and equitable procedure are found, just as they would be in the United Kingdom, where the company is being run as a quasi-partnership,<sup>33</sup> where there has been deadlock in management<sup>34</sup> or where the company’s *substratum* (fundamental purpose) has disappeared.<sup>35</sup> What is interesting about the Jersey case-law<sup>36</sup> is that the courts have also stated that modern developments in this procedure might require a more flexible interpretation of the term “just and equitable” and have reiterated the need for a more modern approach to the definition of this term in a number of cases.<sup>37</sup>

8 One of these modern interpretations was introduced into the case-law in 2009, where the court held that it must also consider what is in the best interests of the creditors.<sup>38</sup> It also extended the scope of “just and equitable” to include what was convenient and would expedite the procedure, particularly since, in that case, it was clearly in the best interests of all the creditors for liquidators to be authorized to seek to secure the stock as soon as possible and to continue to trade to dispose of it on a retail basis. This appeared to enable the substitution of the just and equitable procedure for the usual creditors’ winding up, although originally it was only intended as an exceptional procedure for use in problematic cases, such as the quasi-

<sup>28</sup> Article 155(4), Companies (Jersey) Law 1991.

<sup>29</sup> *Re EVIC* [2013] JRC 004.

<sup>30</sup> Section 122(1)(g), Insolvency Act 1986 (United Kingdom).

<sup>31</sup> *Re Leveraged Income Fund Limited* [2002] JRC 209.

<sup>32</sup> Although, paradoxically, it is preferred, in the case of shareholder disputes, to derivative litigation and/or the bringing of a remedy for unfair prejudice, as stated in *Re Northwind Yachts* 2005 JLR 137.

<sup>33</sup> *Bisson v Bish* 2008 JLR Note 46, applying *Ebrahimi v Westbourne Galleries* [1973] AC 360.

<sup>34</sup> *Jean v Murfitt* 1996 JLR Note 8c, considering *Re Yenidje Tobacco Co Ltd* [1916] Ch 426.

<sup>35</sup> *Re Leveraged Income Fund Limited*, above note 31, applying *Re German Date Coffee* (1882) 20 Ch D 169.

<sup>36</sup> Beginning with *Re Leveraged Income Fund Limited*, above note 31.

<sup>37</sup> *Re Belgravia* [2008] JRC 161 and *Bisson v Bish*, above note 33, being examples.

<sup>38</sup> *Re Poundworld (Jersey) Limited* 2009 JLR Note 12, one of the cases that epitomises the cross-border nature of operations in Jersey.

partnership, management deadlock and *substratum* cases referred to earlier. The court in that case also formed the view, however, that a creditors' winding up should normally apply to the situation of an insolvent company and that the court should be cautious before ordering a just and equitable winding up in the case of an insolvent debtor.

9 Because of the trading-out features which appeared in *Re Poundworld*,<sup>39</sup> the just and equitable procedure has also found use in cases involving companies carrying out regulated business. One of the first of these involved a company licensed to carry on trust company business and manage assets on behalf of third parties held in other trusts and companies.<sup>40</sup> The company had been the subject of close regulatory attention by the JFSC and presumably could have been the subject of a public interest winding up.<sup>41</sup> In this case, the court accepted that a just and equitable winding up was the most appropriate remedy for the insolvent company, not least because a creditors' winding up would not permit activity going beyond that required to ascertain and distribute the debtor's estate. Furthermore, with the intended managed and orderly transfer of the company's business to one or more third parties, there was a clear public interest in allowing this to occur without adverse publicity for the financial services industry in Jersey, in particular because these clients would be likely to have more confidence in a procedure that allowed for trading-out to occur. Invoking *Re Belgravia*,<sup>42</sup> the court stated that a just and equitable winding up would be the appropriate way of proceeding for a number of reasons, including the need for flexibility, the avoidance of conflict with the creditors, the need to protect the interests of the investors and the need for the appointment of an appropriately experienced liquidator.

10 Later cases have referred to these factors as militating for a trading-out approach to this type of regulated company. In one of these,<sup>43</sup> the court referred to arguments in support put forward by the JFSC for the need for the company to continue trading to carry out the orderly transfer of client entities, which would incidentally represent the only real prospect of further income being available to the company. The flexible route that this procedure represented would also ensure the JFSC's Guiding Principles<sup>44</sup> would be ideally achieved. Also, the application of the procedure would also result in a suitably qualified and experienced liquidator being appointed and answerable to court, given they were already engaged within the company's business and had a working knowledge of the issues needing to be addressed. Further, a

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<sup>39</sup> Above note 38.

<sup>40</sup> *Re Centurion Management Services* [2009] JRC 227.

<sup>41</sup> As contemplated by Article 155(3), Companies (Jersey) Law 1991.

<sup>42</sup> Above note 37.

<sup>43</sup> *Re Horizon Investments (Jersey) Limited* [2012] JRC 039, which is the subject of comment in the article previously mentioned, above note 2.

<sup>44</sup> Art 7, Financial Services Commission (Jersey) Law 1998, states these to be: "(a) the reduction of the risk to the public of financial loss due to dishonesty, incompetence or malpractice by or the financial unsoundness of persons carrying on the business of financial services in or from within Jersey; (b) the protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters; (c) the best economic interests of Jersey; and (d) the need to counter financial crime both in Jersey and elsewhere."

winding up of this type was preferable, in view of the company's insolvent status, to the creditors' winding up procedure, under which the company would be required to cease to carry out its business except as far as may be required for the purposes of the winding up, thus limiting the scope of the liquidators' capacity to act in the best interests of clients.<sup>45</sup> There would also be a statutory framework and timetable to follow which could impede the process of transfer as well as the possibility of a conflict between creditors and shareholders as to the choice of a liquidator. Finally, the court canvassed the alternative of a *désastre* procedure, which it said would be unattractive given the limited assets available and the high probability that the Viscount would be required to spend time and resources investigating the company's business and would perhaps need to engage external advisors and service providers, thus increasing the burden on the estate.<sup>46</sup>

11 The result of these cases appeared to sanction a procedure at the very least akin to the "enhanced liquidation" facility available in administration in the United Kingdom.<sup>47</sup> They also incidentally appear to favour an approach that could lead to the rescue of the business itself through using the flexibility of the procedure itself to sanction a transfer of the business. This would also reflect the "rescue" imperative featured within the same United Kingdom provision. Although this is particularly useful in the financial and trust company sectors where client interests are at stake, it is of potential application to all types of company. It was thus perhaps inevitable that the appropriateness of a trading out approach would be canvassed in the case of a non-regulated company. This occurred in 2013 with the case of *Re Collections Group*.<sup>48</sup> In this case, the Jersey court<sup>49</sup> thought it appropriate to extend the scope of the just and equitable winding up procedure to include a situation where the procedure is initiated in order to conduct a "pre-pack" sale, a type of procedure more commonly seen in the context of United Kingdom administration proceedings.<sup>50</sup> This is the first time, apparently, that the Jersey court has done so within the jurisdiction.

<sup>45</sup> Article 159(1), Companies (Jersey) Law 1991.

<sup>46</sup> *Re Horizon Investments*, above note 43, at paragraph 35. A later case taking a similar view is *Re Horizon Nominees Limited* and *Re Horizon Corporate Directors Limited* [2012] JRC 113, involving companies belonging to the same group.

<sup>47</sup> Rule 3(1)(b), Schedule B1, Insolvency Act 1986 (United Kingdom), states the purposes of administration as: (a) the rescue of the company as a going concern (the "rescue" function); (b) achieving a better result for the creditors than would be the case in liquidation (the "enhanced liquidation" function); and (c) the making of a distribution to one or more preferential or secured creditors (the "receivership" function).

<sup>48</sup> *Re Collections Group* [2013] JRC 039.

<sup>49</sup> *Coram* Sir Michael Birt, Bailiff and Jurats Fisher and Nicolle.

<sup>50</sup> A "pre-pack" is a sale of the business conducted by the company, assisted by an office-holder, to a third party without necessarily all the creditors (apart from the secured ones) knowing this is the case. This is largely so as to guard against reputational loss were the company known to be insolvent or nearing insolvency. In the United Kingdom, an administration procedure is then opened (with the office-holder as administrator) and closed rapidly once the sale is sanctioned. Concerns over the possibility of "phoenix companies" have resulted in the drafting of a Statement of Insolvency Practice No. 16 (SIP 16) by the Joint Insolvency Committee to advise the office-holder as to the appropriate course of action in such cases to safeguard the various stakeholder interests. SIP 16 has recently been reviewed, with an updated version entering into effect on 1 October 2013.

### ***Re Collections Group: The Facts***

12 The facts involved a group of companies, which were active in the retail trade in Jersey selling ordinary clothing and surfing wear.<sup>51</sup> As a result of poor retail trading conditions, particularly in the last quarter of 2012, the group was in some difficulty and the shareholders had proved unwilling to inject any further investment.<sup>52</sup> The group's bankers were also unwilling to extend the overdraft any further.<sup>53</sup> As a result, the group's employees, some 47 full-time staff and 10 seasonal workers or so, had mostly gone unpaid since the difficulties began.<sup>54</sup> The group also owed substantial liabilities, not just to the banks, but also to their suppliers, landlords and to the Comptroller of Income Tax and others.<sup>55</sup> What stock the companies had was subject for the most part to retention of title clauses and had been substantially discounted for sale. The shelves in the retail outlets were bare and what items remained were at least a season out of date.<sup>56</sup> Any other assets the company had were of little value. In addition, there was a dispute with a landlord involving asbestos contamination in one of the retail outlets.<sup>57</sup> All in all, the court accepted the group was in a "dire financial situation" and that the companies were insolvent on both cash-flow and balance sheet bases.<sup>58</sup> The challenge for the court was to determine whether the order could be made, given that, with the collapse in the company's goodwill, not making the order would result in the businesses immediately closing and the likelihood that creditors would remain "virtually" unpaid.<sup>59</sup>

13 The proposal to the court was brought by the representor, a director of the company,<sup>60</sup> who believed that the companies could be restructured, provided they were able to free themselves from their historic debts and that new investment was forthcoming. In fact, a new private investor had been solicited on the basis that a sum of at least JEP 400,000 would be injected if the business of the group companies could be acquired by a NewCo to be owned jointly by the director and investor.<sup>61</sup> As such, the director proposed that the companies be placed in liquidation and that the liquidators immediately enter into an agreement, a draft of which was produced to the court. Under this agreement, the group companies would sell such assets and business as NewCo wished to acquire with the price being met by a consideration (or *cause*) equivalent to 20% of the net profits of the acquired business arising within 1 year after the proposed acquisition. A sum equivalent to 25% of net sale proceeds would also be paid if any part of the acquired business were disposed of within the same time-frame. The consideration was estimated as

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<sup>51</sup> *Re Collections Group*, above note 48, at paragraphs 2-3, where the group structure is set out.

<sup>52</sup> *Ibid.*, at paragraph 6.

<sup>53</sup> *Ibid.*, at paragraph 8.

<sup>54</sup> *Ibid.*, at paragraph 4.

<sup>55</sup> *Ibid.*, at paragraph 8.

<sup>56</sup> *Ibid.*, at paragraph 7.

<sup>57</sup> *Ibid.*, at paragraph 3.

<sup>58</sup> *Ibid.*, at paragraph 6.

<sup>59</sup> *Ibid.*, at paragraph 9.

<sup>60</sup> *Ibid.*, at paragraph 5.

<sup>61</sup> *Ibid.*, at paragraph 10.



being sufficient to enable payments to be made to the preferential creditors, whether in whole or in part, although there would be no dividend for the ordinary unsecured creditors.<sup>62</sup>

### ***Re Collections Group: The View of the Court***

14 The court wais mindful of the wide discretion it had in determining what would be just and equitable under the law and to decide whether to make the order requested in the case.<sup>63</sup> Citing *Re Poundworld*,<sup>64</sup> the court reiterated~~de~~ its capacity to order a winding up under Article 155 even in the case of an insolvent company,<sup>65</sup> provided it were satisfied that there would be a good reason to exercise its discretion to do so.<sup>66</sup> It stated that it could order a just and equitable winding up even where the company were insolvent, provided this step was preferable to the institution of a creditors' winding up, by reference to the interests of creditors or for some other reason.<sup>67</sup> The court noted~~de~~ the unusual feature of this case, which was the intention to enable the liquidators to enter into an agreement for the sale of the business and/or assets of the group companies to NewCo, in which the representor, an existing director of the group companies, had an interest. This was to be a type of "pre-packaged sale" which the court noted~~de~~ was quite often performed by administrators in the United Kingdom. The procedure of administration itself did not of course exist in Jersey. Although in some circumstances, the Jersey court accepte~~de~~s such a sale might be in the best interests of creditors, given that there is also a potential for abuse, the court referr~~re~~des to SIP 16 and its content. In particular, the court referred to the way in which SIP 16 dealt with the issues surrounding "pre-packs" by reference to a number of principles contained in its text, serving as guidance to insolvency office-holders involved in such sales.<sup>68</sup>

15 Four paragraphs of the text of SIP 16 weare cited by the court, including paragraph 2 on the duties of practitioners and the associated risks they should bear in mind when conducting such a sale, ideally recording and detailing the reasons for such a sale in order to justify and explain why it was appropriate in the circumstances.<sup>69</sup> Reference was also made to paragraph 5, which required practitioners to be clear about their role as advisors to the company and not its directors, while the directors should be encouraged to seek independent advice, particularly important if there was a possibility, as in the instant case, of the directors acquiring an interest in the assets subject to a "pre-pack".<sup>70</sup> Also cited was paragraph 8, on the need to provide a detailed explanation and justification to unsecured creditors, who are not normally consulted in the sale, so that they can be satisfied the practitioner did have

<sup>62</sup> *Ibid.*, at paragraph 11.

<sup>63</sup> *Ibid.*, at paragraph 12, referring to *Jean v Murfitt*, above note 34.

<sup>64</sup> Above note 38.

<sup>65</sup> *Re Collections Group*, at paragraph 13.

<sup>66</sup> *Ibid.*, at paragraph 14.

<sup>67</sup> *Ibid.*, at paragraph 15.

<sup>68</sup> *Ibid.*, at paragraph 16. Paragraph 17 goes on to cite what SIP 16, at paragraph 1, defines as a pre-pack.

<sup>69</sup> *Ibid.*, at paragraph 18.

<sup>70</sup> *Ibid.*, at paragraph 19.

due regard to their position and interests.<sup>71</sup> Finally, mention was made of paragraph 9 on disclosure requirements in relation to the identity of the acquirer as well as any relationship they might have with directors, shareholders or creditors of the company.<sup>72</sup>

16 As it was apparently the first occasion on which the court was invited to consider the possibility of a “pre-pack”, the court **was** particularly concerned that it **was** not being asked to approve a “phoenix” agreement which would simply continue the beneficial ownership in the assets of the business with the existing creditors being left behind. As SIP 16 viewed this as a highly material factor, the court required the representor to confirm the statements in his affidavit, not only that he has no interest in the existing group apart from serving as director, but that the existing beneficial owners would not have any interest in NewCo.<sup>73</sup> That done, the court **was** satisfied that it would be in the best interests of the creditors to wind up the group **of** companies under Article 155 and for the liquidators to enter into the proposed arrangements. Nonetheless, it was not up to the court to direct the liquidators to enter into the agreement sought, but simply to authorise them to do so. It would fall to the liquidators to assess whether, in their judgment, the terms of the agreement would be in the interests of creditors. Furthermore, because of the lack of notice to creditors in the instant case, the liquidators should pay particular attention to the guidance given in SIP 16.<sup>74</sup>

17 In doing this, the court **accepted** the arguments put forward by counsel for the representor as to the suitability of the proposed course of action, particularly mindful of the fact that: (i) the companies were hopefully insolvent and, without further funds, the directors could not continue business without risking accusations of wrongful trading; (ii) no further funding would be forthcoming from the shareholders or any other source for the existing group; (iii) the employees would be **at** risk with a potential burden on the public purse; (iv) the closure of the activities would be a particular blow to the confidence of the retail sector in Jersey, not to mention leaving shop-fronts empty; (v) there would be no dividend likely for any creditor if the businesses closed; (vi) no other procedure would achieve the same purpose as in the instant case because of the time that might elapse before any sale could be agreed. Were the proposal approved, not only would a number of the jobs be saved, about 40 in total, but there would be a realistic possibility of a dividend to creditors within a 12-month period.<sup>75</sup> Consequent directions were also given to the liquidators as to their powers to effect the sale should they choose to do so, although in principle the court thought it an appropriate course of action that the agreement be entered into.<sup>76</sup>

## Summary

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<sup>71</sup> Ibid., at paragraph 20.

<sup>72</sup> Ibid., at paragraph 21.

<sup>73</sup> Ibid., at paragraph 23.

<sup>74</sup> Ibid., at paragraph 24.

<sup>75</sup> Ibid., at paragraph 22.

<sup>76</sup> Ibid., at paragraph 25.

18 Among the many insolvency procedures in Jersey, some of which are limited in how creditors may access them, the just and equitable winding up has for some time now clearly offered the possibility of consideration of the creditors' interests. The paradox is, however, the fact that the procedure itself cannot be initiated by them. Nevertheless, the way in which the Jersey courts have used the Article 155 facility innovatively shows their capacity to respond to developments in practice aimed at offering a wider range of choices and reflection of relevant interests than are available under current insolvency law. As developed, the trading out procedure first seen in the case of companies in the regulated sector was a step that signified that creditor interests included enabling the equivalent of a work-out to take place and the orderly transfer of client business. This may be regarded as a clear extension of this concern for creditors and stakeholders in the process. The extension of such procedures to ordinary companies and the development of a "pre-pack" jurisdiction are particularly innovative steps which use the same domestic provision to enable a trading out type of practice that is regularly used in other jurisdictions, such as the United Kingdom, France<sup>77</sup> and the Netherlands.<sup>78</sup> Hitherto, to obtain administrations, companies in Jersey would have to resort to the use of the "passporting" procedure through the issue of a Letter of Request by Jersey courts to the courts in the United Kingdom so as to have rescue proceedings opened in their regard.<sup>79</sup> Now, a local functional equivalent may be available in its "pre-pack" form for suitable companies, whether regulated or not, that would benefit from a trading out process.

19 The underlying question, though, as to whether Jersey should introduce a rescue procedure, is not one that will easily go away. The Law Commission's view, expressed some time ago now, was that the older procedures were overdue for a review. This was especially true of *dégrévement*, the exit procedure for both forms of *cession*, which they recommended should be abolished.<sup>80</sup> They also suggested that *remise de biens* could eventually be replaced by a modern suspensory procedure with the Viscount taking over the administration of that process.<sup>81</sup> Benest and Wilkins have referred to proposals emanating in the same period issued by the Jersey Financial Services Commission for a new suspensory procedure that have failed to progress, which nonetheless they recommend for enactment, but to sit alongside a retained *remise de biens*.<sup>82</sup> This author's view is that the introduction of a rescue procedure is an overdue step, but the feeling at large is more nuanced, with advocates for both adoption and rejection existing. It is not a question that will be easily resolved in the near future, making

<sup>77</sup> France adopted this in 2010 as the *sauvegarde financière accélérée* (accelerated financial preservation) variant of the *sauvegarde* procedure in Article L. 611-10 *et seq.*, Commercial Code.

<sup>78</sup> See B. Rumora-Scheltema, Dutch Pre-Pack Alternatives on the Rise (2014) 11 ICR 000.

<sup>79</sup> See the article previously mentioned, above note 2, and, also by this author, Visa Denied: An End to the Jersey Practice of Insolvency "Passporting"? (2013) 17 JGLR 182 and Passport Renewed: Extension of Rescue Proceedings to Foreign Companies under Section 426 of the Insolvency Act 1986 (2013) 10 ICR 310, which collectively chronicle the 2013 Tambre case through its various stages in Jersey and the United Kingdom.

<sup>80</sup> Consultation Paper No 2 (November 1998), above note 22, at paragraph 4.3.

<sup>81</sup> *Ibid.*, at paragraph 4.7.

<sup>82</sup> Benest and Wilkins, above note 19, at paragraphs 20, 22-23.

developments, such as that seen in *Re Collections Group*, all the more necessary so as to provide Jersey debtors with a wider choice to permit the restructuring of their businesses in appropriate cases.

**9 February 2014**

