



**In the matter of Part XXI of The Companies (Guernsey) Law, 2008 (as amended) and in the matter of an Application for an Administration order in respect of Esquire Realty Holdings Ltd**

Royal Court  
17th April, 2014

**JUDGMENT  
19/2014**

Application under section 374 of The Companies (Guernsey) Law, 2008 (as amended), to place in administration a Guernsey registered company.

Approved Text  
17.04.2014

**IN THE ROYAL COURT OF GUERNSEY**

**ORDINARY DIVISION**

**IN THE MATTER OF PART XXI OF  
THE COMPANIES (GUERNSEY) LAW, 2008  
(AS AMENDED)**

**IN THE MATTER OF AN APPLICATION FOR AN  
ADMINISTRATION ORDER IN RESPECT OF  
ESQUIRE REALTY HOLDINGS LTD**

**Judgment handed down: 17<sup>th</sup> April 2014**

**Before: Richard John Collas, Esq., Bailiff**

**Jurats: B J Bartie, S M Jones & P S T Girard**

**Advocates for the Applicant: Advocates A M Davidson & J J Barclay**

**Advocate for the Company: Advocate M C Newman**

**Legislation, Cases and References relied upon in this Judgment:**

The Companies (Guernsey) Law, 2008, sections 374 and 527

In the Matter of the Representation of Collections Group [2013] JRC 096

Kayley Vending Ltd [2009] EWHC 904

Halliwells LLP [2010] EWHC 2036

DKLL Solicitors v HMRC [2007] EWHC 2067(Ch)

IFS Investments Ltd v Manor Park (Guernsey) Ltd [2003-04] GLR 77

Re Delphi Trust Ltd, High Court of Justice of the Isle of Man Civil-Chancery Division, 4 February 2014

1. This is an application under section 374 of The Companies (Guernsey) Law, 2008, as amended, to place in administration a Guernsey registered company, Esquire Realty Holdings Limited (“the Company”) (“the Application”). The Application is brought by Lloyds Bank PLC (“the Applicant”) in its capacity as Security Agent on behalf of certain principal creditors of the Company. The Application is one piece in a jigsaw of arrangements designed to preserve the operations of a large group of companies known as the European Care Group which are principally engaged in operating specialist adult and children’s care homes throughout the UK, as well as three specialist children’s schools and a resource centre. The Application was supported by the Company.
2. The group is structured in two parts with the operating companies separated from the companies that own or lease the premises from which the group operates. The Company is an intermediate holding company within the group. It owns the group’s property companies through a number of direct and indirect subsidiaries incorporated in Guernsey, the British Virgin Islands, England and Wales and Scotland.
3. Section 374 provides as follows (as far as is relevant to the Application):

**“Administration orders.**

374. (1) *Subject to the provisions of this section, if the Court –*

(a) *is satisfied that a company (or a cell of a protected cell company) does not satisfy or is likely to become unable to satisfy the solvency test, and*

(b) *considers that the making of an order under this section may achieve one or more of the purposes set out in subsection (3).*

*the Court may make an order under this section (an “administration order”) in relation to that company (or that cell, as the case may be).”*

4. There are two “threshold” matters for the Court: (1) to be satisfied that the Company fails or is likely to fail the solvency test; and (2) that the grant of an administration order may achieve a more advantageous realisation of the Company’s assets than would be effected on a winding-up. The word “may” in the penultimate line of the sub-section means that if the threshold criteria are satisfied, the Court has a discretion whether or not to make an order.
5. The evidence sworn in support of the application seeks to establish that the Company fails, or is likely to fail, two aspects of the solvency test as defined in section 527 of the Law. The Company satisfies the solvency test if: “(a) the company is able to pay its debts as they become due” and “(b) the value of the company’s assets is greater than the value of its liabilities”.
6. The Court has the benefit of four affidavits sworn by the following:
  - (a) Two affidavits from Andrew Stephen Moore, an Associate Director within the Loans Agency, Commercial Banking Client Services team at Lloyds Bank plc, (“the Applicant”). The Applicant is acting in its capacity as a security agent on behalf of the lenders and hedge counterparties who are the principal creditors of the Company. The second of his affidavits, sworn yesterday, outlines the developments over the last few days that have led to the Application today.
  - (b) David Lindsay Manson, a director of the Company. Mr Manson confirmed that the Company supports the Application; and
  - (c) James Robert Toynton, one of the proposed Administrators. Mr Toynton exhibited a draft Administrators’ Disclosure Report pursuant to ‘Statement of Insolvency Practice (SIP) 16 – pre-packaged sale of business or assets’ (“the SIP 16 report”).

7. There was no statutory requirement for an SIP16 Report in this jurisdiction, but the Report was of great assistance to the Court and we recommend that in any similar application, such a report be produced unless there are overwhelming reasons not to do so. The special concerns and issues which may arise with a pre-pack administration order were considered by the Joint Insolvency Committee in England and Wales in a Statement of Insolvency Practice (SIP 16). It is particularly important that the administrators should have regard to the interests of the full body of creditors, especially those who are not represented in the application to court many, if not all, of whom will be totally unaware of what is proposed. The professionals advising on the arrangements must be mindful of their duties owed to the company and its creditors, not just to the directors and/or principal creditors who may stand to gain from the proposed arrangements.
8. In terms of its statutory duty, the Court is required to be satisfied that the requirements of section 374 are met. The Court does not expressly approve the detailed arrangements that will follow the making of the order although, by implication, it may appear to be doing so. Indeed in the present case, those proposed arrangements are a material factor in the Court's considerations. The special risks of a pre-pack administration were considered carefully by the Royal Court of Jersey in In the Matter of the Representation of Collections Group [2013] JRC 096. We were also referred to guidance given by HHJ David Cooke (sitting in the Chancery Division of the High Court) in Kayley Vending Ltd [2009] EWHC 904 and the decision of Kitchen J in Halliwells LLP [2010] EWHC 2036.
9. In the present Application, Advocate Davidson was at pains to point out that the proposed Administrators, in their draft SIP16 report, had carefully considered the position of all creditors including those who will not benefit from the proposed arrangements. If there are any creditors who were not party to the intercreditor agreement, they would not stand to benefit from any recovery because the Company has no assets other than assets over which security has been granted to the principal creditors.
10. As to the discretion which the Court must exercise if the threshold criteria in section 374 are met, a helpful decision was given in DKLL Solicitors v HMRC [2007] EWHC 2067(Ch). Andrew Simmonds QC (sitting as a Judge of the High Court, Chancery Division) held that the court, in the exercise of its discretion, may take account of the interests of the other stakeholders of the company including, in that case, its 50 or so employees.
11. In the present Application, the “other stakeholders” would include the employees of the group and those for whom the group provides services. That includes about 5,000 staff and approximately 3,200 service users in 128 facilities together with, in many cases, their close family members.
12. In the affidavits and the several exhibits thereto, the Court has been provided with a large volume of evidence relating to the financial position of the group and of the Company in particular.
13. The evidence shows that the group has been experiencing financial difficulties since 2010, as a result of a number of factors including the poor economic climate, challenging market conditions, difficult trading conditions and a variety of problems which appear to have resulted from the over-expansion of the group's activities at a time when there were inadequate internal financial and management controls and supervision. A financial restructuring took place in 2012 which moved the group's facilities from a bilateral to a syndicated basis.
14. An intercreditor agreement completed on 25 July 2012 operates so as to rank liabilities such that certain liabilities and hedging liabilities held by parties defined in this Application as the “New Lenders” have first priority and rank pari passu up to £158 million (plus deferred

amounts set out under the lending arrangements). The broad net effect is that unless a sum in excess of £158 million is returned, only those creditors will receive any benefit.

15. The group's present borrowings are not sustainable. The principal lenders have worked closely with the group (and the Company) to restructure their arrangements. With the assistance of their professional advisors, they explored all possible options, including a sale of the group's business, before they concluded that the proposed course of action is the best way forward as recommended to the Court in the Application. A priority for the group has been to continue its operations so as not to cause distress to the vulnerable children and adults for whom it provides services and whose welfare has been carefully considered throughout.
16. The agreed sequence of arrangements that will follow the granting of the Application is designed to ensure that residents and their relatives suffer the minimum of disturbance and disruption. The relevant service regulators and the Department of Health have been kept informed and are aware of the group's position.
17. The group has been able to continue trading only as a result of concessions and indulgences granted by its principal creditors. The Court has received a detailed explanation of the history of the group's borrowings. It is sufficient in this judgment to summarise the present position of the Company.
18. Several events in particular have precipitated today's Application:
  - (a) A cash flow forecast prepared by Mr Manson on 28 March 2014 indicated that the group would have a cash shortfall after payment of the payroll on 11 April and an increased shortfall following payment of the payroll on 11 May.
  - (b) On 28 March a threat was issued to wind up two UK incorporated companies within the group unless outstanding rent arrears and interest of £6.2 million were paid. That threat was postponed subject to a standstill agreement which expired on 16 April.
  - (c) The principal lenders to the group (referred to by Mr Manson as the "New Lenders") have not renewed Deferral and Extension Agreements that expired at 11.59 p.m. on 14 April. That has triggered various events of default under financing agreements whereby all amounts owed under what is referred to as the Senior Facilities Agreement became immediately due and payable.
  - (d) The Applicant, on the instructions of the New Lenders has demanded immediate repayment of £296,302,420.38.
  - (e) The Company has confirmed it cannot meet the demand.
  - (f) The total liabilities owed to those lenders by the company are approximately £340 million, significantly more than the value of the assets of the group.
19. The SIP 16 report confirms that the total debt owed to the financiers of the group amounts to £391.1 million.
20. Mr Manson, a director of the Company advised in paragraph 32 of his affidavit that:

*"It is therefore plain that the Company is unable to pay its debts as they fall due. It is also clear from the nature of the offers outlined at paragraphs 20 to 28 above that the value of the Group is significantly less than the value of even just its liabilities of £340 million owed to the Lenders and Hedge Counterparties as set out in paragraph 10 of the Affidavit of Andrew Stephen Moore."*
21. In the face of such overwhelming evidence of insolvency, the Jurats have no hesitation in finding that the Company fails both limb (a) and limb (b) of the solvency test and therefore the first of the threshold criteria in section 374 of the Law is satisfied.

22. As for the second of the threshold criteria in section 374, the Jurats have received detailed evidence of the steps that were taken, with the assistance of KPMG Corporate Finance LLP to run a mergers and acquisition process that produced, after negotiations, offers for the business of £57.2 million and £69.8 million.
23. Valuations were also obtained from Knight Frank LLP who valued the properties if they had to be sold during a liquidation at £59.0 million. Their valuation assumed the properties would be sold during a 180 day distressed sale period.
24. The proposals that have been agreed and that will follow the making of an administration order will result in an offer of £80.1 million to purchase the assets of the group, £70 million of which will be paid in respect of the assets of the Company. In paragraphs 18 and 19 of his Affidavit, James Toynton concluded:
  - “18. *In summary, if the Company is placed into administration followed by the immediate sale of the business and its assets to Newco, this should lead to an enhanced realisation of the Company’s assets as well as the reduction of the level of claims made against the Company. It will also preserve the jobs for those employed by the subsidiaries in the Group and lead to minimal disruption to the trading companies of the Group.*
  19. *Therefore, the Proposed Administrators are of the view that placing the Company into administration and selling the business and the assets of the Company to Newco represents the best outcome for all of the creditors of the Company as a whole and will achieve the statutory purpose of the administration as set out at Section 374(3)(b) of the Companies (Guernsey) Law, 2008 (as amended): a more advantageous realisation of the assets of the Company than would be effected on a winding-up.*”
25. Addressing the Court’s wider discretion as identified in the English judgments cited above, there are only two creditors who stand to benefit from the proposed recovery. They support the Application and indeed have instructed the Applicant to make the Application. Other creditors would not stand to benefit unless there were a recovery of at least £158 million and possibly £168 million taking account of hedging liabilities. That level of debt is so far in excess of the value of the assets of the group that they could not realistically have opposed the making of this application.
26. The other risks associated with pre-pack administration orders, have all been adequately addressed in the SIP 16 Report.
27. Having reviewed all the evidence produced to the court, the Jurats are satisfied that an administration will achieve a more advantageous realisation of the assets of the Company than would be effected in a winding-up.
28. Insofar as the Court has a residual discretion to take into account the interests of other stakeholders, the Court is satisfied that the proposed arrangements will ensure the continuity of the business of the Group without disturbance to the care services provided. There will also be continuity of employment for the Group’s employees.
29. The Court approved the appointment of Mr Toynton of Grant Thornton’s Guernsey office and Alastair Paul Beveridge of Zolfo Cooper LLP, London, as the joint administrators on the terms as to their remuneration set out in the Application.
30. The Bailiff adds a note to this judgment to explain the order he made on 4 April 2014 that the Application be heard in private; that the Court files be sealed; and that the matter be given an anonymised heading, pending further order of the Court.

31. The reason for doing so was that Affidavit evidence outlined the perilous financial position of the group of companies and the risk to the operations of the group if other creditors of group companies, including service providers, became aware of the situation. There would be a risk of disruption of care services provided to the vulnerable adults and children who are looked after by the group. In particular, there was a real risk of distress being caused to such persons and to their families if they were to worry that they could be rendered homeless.
32. The concerns for the welfare of the vulnerable adults and children persuaded the Bailiff to order that the Application remain confidential until such time as it were granted, or further order.
33. He had in mind the magisterial judgment of Lieutenant-Bailiff Day in IFS Investments Ltd v Manor Park (Guernsey) Ltd [2003-04] GLR 77 in which he held at paragraph 24:

*“in simple terms, legal principle required that justice must be done in public, but that where justice would thereby be frustrated, privacy should prevail, but only to the extent necessary.”*
34. He also had regard to the masterly judgment of Deemster Doyle in Re Delphi Trust Ltd, High Court of Justice of the Isle of Man Civil-Chancery Division, 4 February 2014, in which he reviewed the law in a number of jurisdictions, including Guernsey and in which he cited the said decision of Day, L-B.
35. In the Bailiff’s judgement this Application was a classic case of where justice could be frustrated if the hearing were held in public. Hence justice requires that the Application remain in private, out of the public eye, until such time as an administration order might be granted at which point it would become public knowledge. However, there is certain sensitive and confidential evidence in the affidavits produced to the Court which the Court orders shall remain private.
36. For the same reasons the Court also ordered, in the interests of justice, that the making of the Administration Order shall not be disclosed publicly until 9.00 am on Thursday 17 April to enable other proposed arrangements to take place without disruption by parties who might be concerned that the group is insolvent. The Court directed that the Registrar of Companies shall be informed of the order as soon as reasonably practicable after 9.00 am on Thursday 17 April 2014.