



## Practical Effects Of Significant Reforms To Guernsey's Insolvency Law

With reference to practical examples from England & Wales, this briefing note seeks to highlight three areas of change that will be of particular interest to Insolvency Practitioners, directors involved with Guernsey companies and their professional advisors once the Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020 (the “Ordinance”) comes into force.

### Enhanced Investigatory Powers

The Ordinance extends insolvency professionals’ powers in four important respects.

First, it widens the category of persons from whom an administrator can compel a statement of affairs. The existing regime<sup>1</sup> permits an administrator to require a statement of affairs from a limited range of persons including:

- a company’s officers or former officers;
- a company’s employees (including those who were in its employment at any time in the year preceding the administration order);
- those who took part in the company’s formation at any time in the year preceding administration; and
- those who within the year preceding administration were officers or employees of a corporate director of the company.

The Ordinance will now also enable administrators to seek a statement of affairs from “any other person” with the leave of the Court. This change gives a Guernsey administrator a wider power than the equivalent power given to an administrator in England & Wales<sup>2</sup> and we wait with interest to see how far the Courts in Guernsey will allow this power to extend.

Second, the Ordinance will give liquidators (for the first time in Guernsey) the power to seek a statement of affairs in the same way as administrators. Similarly, the extension of the power to “any other person” with the leave of the Court means that the Ordinance goes wider than the category of persons that the Official Receiver in England & Wales can compel to provide a statement of affairs in a liquidation<sup>3</sup>. Once again, the practical scope of the power will be of significant interest.

Third, liquidators will be able to compel the production of documents and information reasonably required for the performance of their functions from the same individuals who may be compelled to provide a statement of affairs<sup>4</sup>. As above, this is wider than the equivalent power given to English liquidators<sup>5</sup> since a Guernsey liquidator’s power will extend to “any other person” with the leave of the Court.

Fourth, Guernsey liquidators are to be given the power to apply to Court for the appointment of an Inspector to conduct a private examination of any officer or former officer as to the formation, management or promotion of the company, its business and affairs, and the officer’s conduct or dealings

<sup>1</sup> Section 387 of the Companies (Guernsey) Law 2008.

<sup>2</sup> Under para 47(3) of Sched B1 to the Insolvency Act 1986

<sup>3</sup> Under section 131 of the Insolvency Act 1986

<sup>4</sup> Section 419B of the Companies (Guernsey) Law 2008.

<sup>5</sup> Under section 235 of the Insolvency Act 1986

in relation to the company<sup>6</sup>. This new power is something of a hybrid between a public examination and a private examination under English law<sup>7</sup>. In particular:

- The range of individuals who may be called for an examination by an Inspector in Guernsey is narrower than those who are susceptible to a public or private examination in England. Only officers or former officers are in scope in Guernsey<sup>8</sup>;
- As with a public examination in England, a Guernsey liquidator must make an application for an examination if requested to do so by one half in value of the company's creditors;
- However, the examination will be conducted in private and therefore does not give an opportunity for creditors or members of the company directly to ask questions of the officer.

On its face the new power to call for an examination of officers and former officers appears to give the Court an unfettered power. It is likely that the Guernsey Courts will draw from English jurisprudence in this area, where it is well-settled that the Court must be satisfied that a private examination should be necessary in the interests of the winding up and that it should not be oppressive or unfair to the respondent<sup>9</sup>.

Guernsey's Royal Court will need to assess each case on its facts and merits, but it is clear that these new powers available to liquidators and administrators are potentially far-reaching. For example, it is conceivable that professional advisors (e.g. accountants, lawyers and investment advisors) and service providers (e.g. bankers) may be called upon to prepare statements of affairs and to produce documents for officeholders. It seems very likely, particularly in light of English experience, that this change may lead to litigation over the disclosure of confidential and privileged material by such professionals.

## Antecedent Transactions

Whilst there are already routes for dealing with transactions at an undervalue under Guernsey's customary law or via equity<sup>10</sup>, the practical application of these has been relatively limited.

The Ordinance will introduce<sup>11</sup> a statutory claim for liquidators and administrators for the recovery of transactions at an undervalue<sup>12</sup>. On such an application, the Guernsey Court will have the widest power to make such order as it thinks fit for restoring the position. The 2-year time period which applies in England is not adopted wholesale by the Ordinance. Instead, the new statutory claim is limited to transactions taking place 6 months before the insolvency event (the "relevant date") or 2 years in the case of transactions with connected parties.

Given the wealth of cases decided in England under the broadly equivalent section of the Insolvency Act 1986, it is anticipated that the transactions at an undervalue jurisdiction will be a valuable tool for liquidators and administrators in Guernsey. Drawing on English experiences, the new powers are likely to lead to scrutiny of a wide range of actions undertaken during the relevant period and could lead to challenges over transactions as diverse as the granting of a debenture that serves to deplete the company's assets<sup>13</sup>, the payment of otherwise lawful<sup>14</sup> dividends<sup>15</sup>, or sales undertaken without any prior exposure to the open market<sup>16</sup>.

<sup>6</sup> Section 419C of the Companies (Guernsey) Law 2008.

<sup>7</sup> Sections 133 and 236 of the Insolvency Act 1986

<sup>8</sup> Under section 236(2)(b) and (c) of the Insolvency Act 1986, a private examination may be ordered against "any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company" or "any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company." A public examination under section 133 of the Insolvency Act 1986 may be ordered against a former liquidator or administrator.

<sup>9</sup> See for example *Re British & Commonwealth Holdings plc (No.2)* [1993] AC 426.

<sup>10</sup> These would include a Pauline action on the basis of a transaction intended to defraud creditors where a transferring (debtor) company was insolvent at the time or as a result of the transaction in question and/or establishing a constructive trusteeship where it can be shown that the recipient party was aware of the transaction being in breach of the transferring directors' fiduciary duties and it, thus, being unconscionable for the recipient to be allowed to retain the transacted assets.

<sup>11</sup> Section 426D of the Companies (Guernsey) Law 2008.

<sup>12</sup> Which is modelled upon section 238 of the Insolvency Act 1986

<sup>13</sup> *Koon v. Bowes* [2019] EWHC 3455 (Ch).

<sup>14</sup> In this regard the new power would complement the existing provisions of section 309 of the Companies (Guernsey) Law, 2008

<sup>15</sup> *BTI 2014 LLC v. Sequana SA* [2019] EWCA Civ 112.

<sup>16</sup> *Gil v Baygreen Properties Ltd (in liquidation) and others* [2004] EWHC 1732 (Ch)

## Duty to Report Delinquent Officers for the Purposes of Disqualification Proceedings

The pre-existing regime for directors' disqualification orders<sup>17</sup> permits an administrator or a liquidator to apply to the court for an order prohibiting a person from being a director, secretary or other officer of any company or any specified company. The Ordinance will, though, introduce a positive duty upon administrators and liquidators, if they consider there are grounds for the court to make a disqualification order, to report the matter to the Registrar of Companies (and the GFSC in the case of supervised companies<sup>18</sup>).

In their Consultation Response dated 15 February 2016, the Guernsey Commerce and Employment Department (which sponsored the Ordinance) recognised that this new obligation may lead to more actions against directors and officers for disqualification. In our view, though, there is reason to welcome this duty as it further reinforces the emphasis upon the investigation and deterrence of wrongdoing where any officer has improper motives or an insufficient regard to their duties.

### Conclusion

It is clear that the direction of the law in Guernsey and England & Wales is one of increased scrutiny of directors' conduct in the lead up to insolvency. In a similar vein, the recent decision of the Companies Court in *System Building Services Group Ltd v. Michie*<sup>19</sup> is particularly noteworthy as it confirmed that a directors' statutory and fiduciary duties continued into formal insolvency processes such as administration and Creditors Voluntary Liquidation. The Royal Court would very likely treat this decision as highly persuasive guidance and an equivalent view on directors' duties would not be a surprise in Guernsey. This also has the further potential to open up accessory claims against those who assist directors in wrongdoing, based for example on knowing receipt and dishonest assistance.

Given the pressures faced by many businesses in the current market, the prevalence of insolvency or 'zone of insolvency' events is likely to increase. This will, therefore, be a period in which directors face difficult decisions about whether and when to engage in formal insolvency processes. The Ordinance gives increased scope for such decisions to come under critical scrutiny by insolvency professionals and on each side of the equation there will be a need for a clear and consistent regard to officers' actions and the rationales behind them.

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<sup>17</sup> Set in Part XXV of the Companies (Guernsey) Law 2008

<sup>18</sup> Sections 387A and 421E of the Companies (Guernsey) Law 20008.

<sup>19</sup> [2020] EWHC 54 (Ch)