Wood and Ors v Khumalo: Jersey Court holds company directors to account in £77m judgment for transaction at an undervalue

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The judgment in *Wood and Ors v Khumalo* [2026] JRC 202 offers a recent illustration of the Jersey Court's (the **Court**) commitment to holding individuals personally to account who fail to act in accordance with their duties under the Companies (Jersey) Law 1991 (the **Jersey Companies Law**) and the customary law, including breaches of directors duties.

In finding two directors, who did not defend the proceedings or appear at the hearing, jointly and severally liable to pay over £77 million to the liquidators of a Jersey company, the Court addressed:

1. The legal tests applied to assess whether:
   - a transaction falls to be unwound pursuant to Article 176 of the Companies Law as a transaction at an undervalue; and
   - a director is in breach of their fiduciary duty and their directors' duties of care, skill and diligence pursuant to Article 74 of the Companies Law.
2. The mechanics of dealing with cross border litigation in circumstances where defendants living abroad do not wish to engage and/or submit to the jurisdiction of the Jersey Court, in particular the Joint Liquidators over the Jersey Company's (the **JLs**) election to seek summary judgment as an alternative to default judgment, so as to obtain a determination on the merits, to aid enforcement abroad.

The 'transaction at an undervalue'

The transaction under scrutiny was a transfer of valuable shares by Gold & General Limited (the Jersey Company) in a key subsidiary (the **Shares**), to one of its directors, Mr Khumalo (the **Share Transfer**).

The Share Transfer had taken place within the five years immediately preceding the appointment of the JLs following a creditors' winding up made under Article 157A(2) of the Companies Law.

The JLs persuaded the Court that the Share Transfer had been procured by two directors of the Jersey Company, namely Mr Khumalo, being the recipient of the Shares, and a co-director, Mr Sikwila.

The Court's finding of liability under Article 176 of the Jersey Companies Law

The transfer was made without contractual cause

The Court accepted the inferences drawn by the JLs on the evidence, to conclude that the Share Transfer was a transaction at an undervalue within the meaning of Article 176 on the basis that it was made without contractual cause, which is a Jersey contract law term that essentially means that there was no reason for the Share Transfer from the Jersey Company's perspective. The Share Transfer had simply brought no benefit to the Jersey Company or its creditors.

The JLs had not identified any written agreement documenting its terms. The first defendant, Mr Khumalo, had seemingly received the Shares with no discernible benefit, notably no payment, flowing the other way.

The Jersey Company's deemed insolvency

In order for a Jersey Court to make a finding of liability under Article 176, the company must have been insolvent when it entered into the relevant transaction (Article 176(9)(a)) or have become insolvent as a result of it (Article 176(9)(b)).

That insolvency is deemed to have taken place where the transaction was entered into by the company with a person connected with the company or with an associate of the company, unless the disponee proves that not to be the case.

On the basis that Mr Khumalo, as director and recipient of the Shares, was a person connected with the Jersey Company within the meaning of the Companies Law, the burden of proving that the Jersey Company was not insolvent or did not become insolvent as a result of the Share Transfer rests on him.

There was no evidence before the Jersey Court supporting Mr. Khumalo in this respect. Therefore, the Jersey Company is deemed to have been insolvent either at the time of the Share Transfer, or as a result of it.

Further and in any event, the JLs provided evidence that by the date of the Share Transfer the Jersey Company had a debt of US$11.25m plus interest that was outstanding and overdue (the **Debt**).

The Court found that an inference of cash flow insolvency can properly be drawn from that unpaid Debt, applying the English authority of Cornhill Insurance plc v Improvement Services Ltd [1986] 1 WLR 114.

Redress ordered by the Jersey Court

Article 176(3) confers a broad remedial discretion on the Court, including, in particular:

'…requir[ing] a person to pay in respect of a benefit received by him or her from the company such sum to the company as the court directs.'

The JLs sought, and were granted, an order for payment by Mr Khumalo of over £77 million. The statutory purpose of that payment would be:

'to restore the position to what it would have been if the company had not entered into the transaction." (Article 176(1))

Quantum: The Shares to be valued as at the date of the Share Transfer

The Court accepted the JL's submission that the proper payment award ought to be made with reference to the estimated value of the Shares at the date of the Share Transfer, which was taken to have been made on the 14 October 2021.

This finding was extremely material on the facts.

The value of the Shares as at the date of the Share Transfer, was **£77,041,670**. Had the Shares been valued as at the date that the JLs commenced the Court action, the liability would have been less than half of that, at £33,415,760.

The Court acknowledged that the defendant, if present, might argue that the Shares ought to have been valued at the date of the Order of Justice, or the date of the Court's decision. These counter arguments were not, of course, placed before the Court, and a wide discretion is built into the statutory framework of Article 176.

The Court very much selected the date of valuation having regard to the evidence before it, and there may therefore be circumstances where a Court will select a date of valuation other than the date of the transaction itself.

Liability for breach of directors duties under Article 74

A claim for breach of fiduciary duty and duties of care, skill and diligence under Article 74 may still properly lie against directors notwithstanding that liability under Article 176 is not established (following *GHLM Trading Ltd* v Maroo [2012] EWHC 61 (Ch)).

In England, a director’s duties to act honestly and in the interests of a company’s creditors are modified when the company is insolvent or on the verge of insolvency (BTI 2014 LLC v Sequana SA [2024] AC 211), known as the Sequana principle. The Jersey Court stopped short of adopting the principle as a matter of Jersey law, having regard to the fact that the defendants were unrepresented, however said that if the principle is part of the law, then where a company is insolvent or bordering on insolvency, the director must act in a manner that takes the interests of creditors into account.

The Court found that Mr Khumalo had no prospect of successfully defending the Article 176 claim or any prospect of successfully defending a claim against him under Article 74. The Jersey Company was insolvent or on the verge of insolvency at the time of the Share Transfer, given the Debt.

The Share Transfer was for no cause and brought no benefit to the Company. It benefitted Mr Khumalo alone. It was a straightforward misappropriation of the Jersey Company's assets to the detriment of its creditors, a clear breach of Article 74(1)(a) and 74(1)(b).

A Jersey director who breaches their duties but acts honestly may be relieved of liability under Article 212 of the Companies Law. This provision was not engaged, on the facts. The Court found that, even if Mr Khumalo was not dishonest in procuring or allowing the Share Transfer, it is difficult to see how a director exercising reasonable care and skill would have permitted it to be made.

Summary judgment obtained against non participating defendants, in aid of enforcement

Rule 7/1 of the Jersey Royal Court Rules 2004 provides that a plaintiff may obtain summary judgment if the defendant has no real prospect of successfully defending the claim or issue and there is no other compelling reason why the case or issue should be disposed of at a trial.

The JLs sought, and obtained, summary judgment against the defendants as an alternative to default judgment, to ensure that they had a judicial determination on the merits to facilitate enforcement abroad, following the English judgment of Duferco SA v CVG Ferrominera Orinoco CA [2021] EWHC 824 (**Duferco**).

As the Court found in Duferco, where a respondent to a summary judgment application has been properly served with the proceedings and is aware that they are taking place, and has declined to defend, there may be good and proper reasons to allow an application to proceed for summary judgment.

In such circumstances, it is standard, and good practice to draw to the attention of the judge any potential defences that might have been raised had the defendants chosen to be present (see Duferco).

In adopting this approach, the Jersey Court found it to be unlikely that there is a full blown duty of full and frank disclosure in the true sense in circumstances where - as here - the respondent to the application is aware of the proceedings and has elected not to participate. However, the Court would expect the applicants, in this case the JLs, to draw any material to the Court's attention which may undermine their applications, following their review of the material available to them.

Joint and several liability of co-director who did not directly benefit from the Share Transfer, for breach of directors duties

There are conflicting English authorities and no Jersey authority as to whether there is a jurisdiction under Article 176 to make an order against directors who receive no benefit from an antecedent transaction but simply direct or permit the company to enter into it.

The Jersey Court did not make a finding on this issue, as it was content to enter summary judgment against the co-defendant Mr Sikwila in the alternative that he breached his duties as director under Article 74(1)(b) of the Companies Law, namely that he failed to 'exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.'

The Court found that Mr Sikwila either facilitated the Share Transfer by approving and assisting Mr Khumalo to procure it or negligently failed to take proper steps to scrutinise Mr Khumalo’s conduct of the company and the transaction. In other words, at best he was ‘asleep at the wheel’ (see the principles relating to the aggregation of duty by one director, as summarised in Re Westmid Packing Services [1988] 2 BCLC 646 at 653).

There was no reasonable prospect of defending the JL's claims against Mr Sikwila under Article 74.

Conclusions from Wood and Ors v Khumalo

This case offers a serious reminder to directors of Jersey companies that the Jersey courts will not shy away from invoking their powers to require individuals to pay hefty compensation where they have procured a transaction at an undervalue, and/or their breach of duty has caused or contributed to a company's loss.

The fact that an individual, as in the case of Mr Sikwila, did not directly benefit from his breach of duty under Article 74 of the Companies Law, was no bar to a finding that he was joint and severally liable for the full £77 million.

An individual will not avoid liability by simply ignoring proceedings. Jersey has clear mechanisms in place to be able to navigate the challenges of serving proceedings abroad, including on defendants who do not wish to engage. The Courts have also demonstrated a willingness to give judgment on the merits in order to aid enforcement, in circumstances where a defendant has been properly served, and has chosen not to take part in proceedings.

At Collas Crill, we have extensive experience in cross border litigation and insolvency matters, including enforcement. We regularly advise on matters relating to directors duties, including investigating, and bringing and defending office holder claims.

Please do not hesitate to contact any member of our team to discuss any of the matters that arise in this article, and how we may assist you and your clients.

COLLAS CRILL

For more information please contact:

Daisy Bovingdon

Senior Associate (Advocate) **|** Jersey

t: +44 (0) 1534 601757 **| e:** daisy.bovingdon@collascrill.com

Jonathan Barham

Partner (Advocate) **|** Jersey

t: +44 (0) 1534 601641 **| e:** jonathan.barham@collascrill.com

Karen Stachura

Of Counsel* **|** Jersey

t: +44 (0) 1534 601671 **| e:** karen.stachura@collascrill.com