

Collas Crill guiding you through... Potential insolvency challenges under Jersey law

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Jersey is a popular place to establish an asset holding company because the **Companies Law** is modern, flexible and modelled on English companies legislation.

Where a Jersey company becomes **insolvent**, the primary objective of the **Viscount** or a liquidator will be to maximise the return to the company's unsecured creditors.

This guide looks at the key things you need to know about the possible grounds on which the **Viscount** or a liquidator may try to achieve this objective by:

- challenging a transaction entered into by the company; or
- seeking a contribution to the company's assets from a director, shareholder or other person.

Words in bold text are defined at the end of this guide.

Insolvency procedures

There are two main insolvency procedures that are used to liquidate an **insolvent** company.

Désastre proceedings

Désastre proceedings, which are the only Jersey insolvency procedure for an **insolvent** company that may be started by a creditor.

The **Viscount** is the insolvency officeholder for *désastre* proceedings.

For more information on *désastre* proceedings, see our guide *Désastre proceedings for a Jersey company* ([click here](#))

Creditors' winding up

A creditors' winding up, which despite its name, may only be started by the company's shareholders – a creditor cannot start it.

A liquidator is the insolvency officeholder for a creditors' winding up.

For more information on a creditors' winding up see, our guide *A creditors' winding up of a Jersey company* ([click here](#))

When is a company insolvent?

For the purposes of both the **Companies Law** and the **Bankruptcy Law**, a company is **insolvent** if it is unable to pay its debts as they fall due.

Preferences

When does a company give one?

A company enters into a transaction with a person that is a preference if:

- the person is a:
 - creditor of the company; or
 - surety or guarantor for a debt or other liability of the company;
- the transaction is entered into during the **challenge period** ;
- the transaction is an **insolvency transaction** ; and
- the company does anything, or allows anything to be done which, in the event:
 - a **declaration** is made; or
 - the company enters into a creditors' winding up,

has the effect of putting the person in a better position than the position in which the person would have been if that thing had not been done.

The time at which a company gives a preference is the time at which the decision to enter into the transaction was taken and not when the preference is actually given or implemented.

Desire to prefer

The **Court** may not make any order on the grounds that a company has given a preference to a person unless the company, when giving the preference, was influenced by a desire to put the person into a position which, in the event:

- a **declaration** is made; or
- the company enters into a creditors' winding up,

would be better than the position in which the person would be if the preference had not been given.

Where a preference is given to an **associate** or a **connected person**, unless the company shows otherwise, it is presumed to have been influenced by the desire to prefer the **associate** or **connected person**.

Orders

If the **Court** finds that a company has given a preference, it may make any order it thinks fit for restoring the position of the company to what it would have been had the company not given the preference, including any **specified order**.

Who may apply for an order?

The **Viscount** or a liquidator may apply for an order.

Third parties

Except as noted below, an order may affect the property of, or impose an obligation on, any person, whether or not the person is the person to whom the preference was given.

No order may:

- prejudice an interest in property, or any interest derived from it, that was acquired:
 - from a person other than the company; and
 - in good faith and for value; or
- require a person who, in good faith and for value, received a benefit from the preference to pay a sum to the **Viscount** or the company, except where the payment is in respect of a preference given to the person while the person was a creditor of the company.

When considering whether a person has acted in good faith, the **Court** may take into account whether:

- the person had notice of the:
 - circumstances that amounted to the company giving a preference; and
 - fact that the company was **insolvent** or would likely become **insolvent** as a result of giving the preference; and
- the person was an **associate** or **connected person** of the company or the person to whom the company gave a preference.

Transactions at an undervalue

When does a company enter into one?

A company enters into a transaction at an undervalue with a person if:

- the transaction is entered into during the **challenge period** ;
- the transaction is an **insolvency transaction**; and
- the company:

- makes a gift to the person; or
- enters into a transaction with the person:

- on terms for which there is no **cause**; or
- for a **cause**, the value of which in money or money's worth, is significantly less than the value, in money or money's worth, of the **cause** provided by the company.

Defence

The **Court** may not make an order on the grounds that a company has entered into a transaction at an undervalue if it is satisfied that:

- the company entered into the transaction in good faith for the purpose of carrying on its business; and
- at the time it entered into the transaction, there were reasonable grounds for believing that the transaction would be of benefit to the company.

Orders

If the **Court** finds that a company has entered into a transaction at an undervalue, it may make any order it thinks fit for restoring the position of the company to what it would have been had the company not entered into the transaction, including any **specified order**.

Who may apply for an order?

The **Viscount** or a liquidator may apply for an order.

Third parties

Except as noted below, an order may affect the property of, or impose an obligation on any person, whether or not the person is the person with whom the company entered into a transaction at an undervalue.

No order may:

- prejudice an interest in property, or any interest derived from it, that was acquired:
 - from a person other than the company; and
 - in good faith and for value; or
- require a person who, in good faith and for value, received a benefit from the transaction to pay a sum to the **Viscount** or the company, except where the person was a party to the transaction.

When considering whether a person has acted in good faith, the **Court** may take into account whether:

- the person was aware that the company:
 - had entered into a transaction at an undervalue; and
 - was **insolvent** or would likely become **insolvent** as a result of entering into the transaction; and
- the person was an **associate** or **connected person** of the company or the person who entered into the transaction.

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Extortionate credit transaction

When does a company enter into one?

A company enters into an extortionate credit transaction with a person if:

- the transaction involves the person providing credit to the company;
- the transaction is entered into during the **challenge period**; and
- having regard to the risk accepted by the person providing the credit, the:
 - terms of the transaction require grossly exorbitant payments to be made by the company for the credit; or
 - transaction otherwise grossly contravenes ordinary principles of fair dealing.

Presumption transaction is extortionate

In any application, the **Court** will presume that the transaction is extortionate unless the credit provider is able to prove that it was not.

Orders

If the **Court** finds that a company has entered into an extortionate credit transaction, it may make an order to:

- set aside, in whole or part an obligation created by the transaction;
- vary the terms of the transaction or the terms upon which a security interest for the purposes of the transaction is held;
- require a party to the transaction to repay to the **Viscount** or a liquidator sums paid to the party by the company;
- require a person to surrender to the **Viscount** or a liquidator property held by the person as security for the transaction; or
- accounts to be taken between any persons.

Who may apply for an order?

The **Viscount** or a liquidator may apply for an order.

Onerous property

Disclaiming onerous property

The **Viscount** or a liquidator may disclaim any **onerous property** of a company within six months of the date on which the:

- **declaration** is made; or
- company enters into a creditors' winding up.

The **Viscount** or a liquidator must give notice that **onerous property** has been disclaimed to each person who has an interest in, or any liability in respect of, the **onerous property**.

Effect

Where the **Viscount** or a liquidator disclaims **onerous property**, the disclaimer:

- ends, from the date of the disclaimer, the rights, interests and liabilities of the company in, or in respect of, the **onerous property** disclaimed; and
- discharges the **Viscount** or the company from all liability in respect of the **onerous property** with effect from the date on which the:
 - **declaration** is made; or
 - company enters into a creditors' winding up.

A disclaimer does not, except to the extent necessary to release the **Viscount** or company from liability, affect the rights or liabilities of any other person.

In the case of a contract lease, the disclaimer does not take effect until:

- written notice has been served on each person claiming to be a secured creditor or have an interest in the lease; and
- either:
 - no application has been made to the **Court** to have the lease vested in the applicant within 14 days of the notice being served; or
 - the **Court** has upheld the disclaimer.

Rights of affected person

A person who suffers loss or damage as a result of **onerous property** being disclaimed:

- is taken to be an unsecured creditor of the company to the extent of the loss or damage; and
- may prove for that amount in the company's *désastre* proceedings or creditors' winding up.

Security

Where a company has created security over its assets (whether located in Jersey or elsewhere), the **Viscount** or a liquidator:

- will examine the circumstances surrounding the security; and
- if there appears to be any irregularity, may challenge the validity of the security.

Possible grounds for challenging security include:

- a failure to validly create or perfect the security;

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- a failure to register the security where registration is necessary for the validity of the security;
- a procedural irregularity, for example, entry into the security document was not properly authorised or the security document was not properly executed;
- a charge which was intended to be a fixed charge only takes effect as a floating charge; and
- the granting of the security is capable of being challenged on other grounds mentioned in this briefing, such as breach of duty or a preference.

Breach of directors' duties

Who is a director?

The **Companies Law** defines as director as a person who occupies the position of director no matter the title given to the person.

This means that a person who has not been formally appointed or elected as a director may nonetheless be treated as a director and subject to the duties and liabilities of a director.

General duties

A director owes a number of statutory and customary law duties to a company, including duties:

- to exercise care, diligence and skill;
- to act in good faith in the best interests of the company;
- to exercise the director's powers for proper purposes;
- to disclose (see Failure of director to disclose interest below) and avoid conflicts of interest;
- not to fetter the director's discretion; and
- not to make a personal profit from the position of director or misuse the company's property.

Consequences of breach

In general terms, the consequences of a breach of a director's statutory or customary law duties include, depending on the duty which has been breached, an order that the:

- relevant transaction is to be set aside;
- director must return property to the company;
- director must compensate the company for any loss suffered by it as a result of the breach; and/or
- director must pay to the company any profit or gain made by the director.

Where a company is **insolvent**, or of doubtful solvency, the directors have a duty to consider the interests of the company's creditors as paramount. This is because the creditors are the ultimate beneficiaries of an **insolvent** company's assets. This duty is, however, owed to the company rather than to its creditors.

Relief from liability

If proceedings are brought against a director alleging a breach of duty, the director can apply to the **Court** to be relieved from liability.

The **Companies Law** gives the **Court** the power to relieve the director, in whole or part, from any liability for negligence, default or breach of duty or trust on any terms the **Court** thinks fit if it appears to the **Court** that:

- the director acted honestly; and
- having regard to all the circumstances of the case, the director ought fairly to be excused from liability.

In practice, it would be very unusual for the **Court** to exercise these powers in favour of a director.

Failure of director to disclose interest

Duty to disclose interests

Under the **Companies Law**, a director must disclose to the company the nature and extent of any interest (whether direct or indirect) of which the director is aware in any transaction entered into, or proposed to be entered into, by the company or any of its subsidiaries which conflicts, or may conflict, to a material extent with the interests of the company.

Consequences of failure to disclose interests

If a director has failed to disclose an interest, the **Viscount** or a liquidator (acting on behalf of the company) or a shareholder may apply to the **Court** for an order:

- setting aside the transaction; and
- directing the director to account to the company for any profit or gain made.

The **Court** will not, however, set aside a transaction unless the **Court** is satisfied that:

- the interests of third parties who have acted in good faith would not be unfairly prejudiced; and
- the transaction was not reasonable and fair and in the interests of the company at the time at which the company entered into it.

Wrongful trading

A director engages in wrongful trading if, before a **declaration** is made or the company enters into a creditors' winding up, the director allows the company to carry on business where the director:

- knew that there was no reasonable prospect; or
- on the facts known to the director was reckless as to whether,

the company would avoid a **declaration** or a creditors' winding up.

Personal liability

If, in the course of *désastre* proceedings or a creditors' winding up, it appears that a director allowed wrongful trading to occur, the **Court** may order that the director be personally liable for all debts and other liabilities incurred by the company while the wrongful trading occurred.

If the **Court** makes an order against a person who is a creditor of the company, it may also order that the whole or part of the debt owed by the company to that person (and any interest accrued on it) is to rank after all other debts owed by the company and any interest accrued on those debts.

Who may apply for an order?

The **Viscount** or a liquidator may apply for an order.

Defence

A director may avoid liability for wrongful trading if the director can establish to the satisfaction of the **Court** that, upon becoming aware that the circumstances mentioned above existed, the director took reasonable steps with a view to minimising the potential loss to the company's creditors.

Fraudulent trading

A person, including a director, engages in fraudulent trading if any business of a company is carried on:

- with the intention of defrauding the company's creditors or the creditors of another person; or
- for a fraudulent purpose,

and the person was knowingly involved in carrying on the company's business in that way.

Liability to contribute

If, in the course of *désastre* proceedings or a creditors' winding up, it appears that fraudulent trading has occurred, the **Court** may order that any person, including a director, who was knowingly involved in fraudulent trading, make any contribution to the company's assets the **Court** thinks proper.

If the **Court** makes an order against a person who is a creditor of the company, it may also order that the whole or part of the debt owed by the company to that person (and any interest accrued on it) is to rank after all other debts owed by the company and any interest accrued on those debts.

Who may apply for an order?

The **Viscount** or a liquidator may apply for an order.

Distributions

Liability of directors

Under the **Companies Law**, a director of a company (other than an open ended investment company) who authorises a distribution must make a solvency statement in the required form.

A director who makes a solvency statement without having reasonable grounds for the opinion expressed in it is guilty of an offence and, upon conviction, is liable to a fine, imprisonment for up to two years, or both.

In addition, if:

- a director authorises a distribution;
- the company subsequently becomes **insolvent**; and
- the **Court** finds that the director breached the director's duties to act in the best interests of the company and to exercise the necessary care, diligence and skill,

the director will be liable to the company for any damage suffered by it.

Liability of shareholders

If:

- a company makes a distribution to a shareholder;
- at the time the distribution is made, the shareholder knows, or has reasonable grounds for believing, that the distribution (or part of it) is made in breach of the **Companies Law**; and
- the company has not applied to the **Court** for an order that the distribution be treated as having been made in accordance with the **Companies Law**,

the shareholder is liable to repay the distribution (or part of it) to the company.

If the unlawful distribution was a non-cash distribution, the shareholder is liable to pay to the company a sum equal to the value of the distribution (or part of it) at the time at which the unlawful distribution was made.

Share buybacks and redemptions

Liability of directors

Under the **Companies Law**, a director of a company (other than an open ended investment company) who authorises the buyback or redemption of shares must make a solvency statement in the required form.

A director who makes a solvency statement without having reasonable grounds for the opinion expressed in it is guilty of an offence and, on conviction, is liable to a fine, imprisonment for up to two years, or both.

In addition, if:

- a director authorises a buyback or redemption of its shares;
- the company subsequently becomes **insolvent**; and
- the **Court** finds that the director breached the director's duties to act in the best interests of the company and to exercise the necessary care, diligence and skill,

the director will be liable to the company for any damage suffered by it.

If:

- a **declaration** is made or the company enters into a creditors' winding up;
- the company has made a payment to buy or redeem shares in the 12 month period before the **declaration** was made or the creditors' winding up started;
- the payment was not lawfully made; and
- the aggregate realisable value of the:
 - company's assets; and
 - amount contributed to the company's assets by its shareholders,

is insufficient to pay the company's liabilities and the expenses of the *désastre* proceedings or creditors' winding up,

the **Court** may, on the application of the **Viscount** or a liquidator, order a director to contribute to the assets of the company to enable the shortfall to be met.

A director who has made a solvency statement in connection with the buyback or redemption of shares, may be ordered (individually and jointly with any other person liable to contribute) to contribute to the assets of the company an amount not exceeding the amount of the unlawful payment, unless the **Court** is satisfied that the director had grounds for holding the solvency opinion.

Liability of shareholders

In the circumstances mentioned in Liability of directors above, where a company has made a payment to buy or redeem shares in the 12 month period before a **declaration** was made or it started a creditors' winding, a person from whom shares were bought or redeemed is liable to contribute to the assets of the company an amount not exceeding the amount of the unlawful payment received by the person.

The **Court** will not order the person to contribute to the assets of the company unless the **Court** is satisfied that, when the person received the unlawful payment:

- the person knew; or
- ought to have concluded from facts known to the person,

that immediately after the unlawful payment was made the:

- company would be unable to discharge its liabilities as they fall due; and
- realisable value of the company's assets would be less than its aggregate liabilities.

Liability of shareholders to contribute

Where a **declaration** is made or the company enters into a creditors' winding up, each present and past shareholder of the company is liable to contribute to its assets an amount sufficient to:

- pay its liabilities;
- the expenses of the *désastre* proceedings or creditors' winding up; and
- to adjust the rights of the contributories among themselves.

A past shareholder who held limited shares is not liable to contribute to the assets of the company:

- unless it appears to the **Court** that the present shareholders are unable to satisfy the contributions required to be made by them;
- if the shareholder ceased to be a shareholder for 12 months or more before the **declaration** is made or a creditors' winding up of the company started; or
- in respect of a liability of the company incurred after the shareholder ceased to be a shareholder.

A past or present shareholder who held or holds limited shares is not liable to contribute an amount in excess of the amount, if any, unpaid on its shares.

Other provisions apply in the case of a past or present shareholder who held or holds unlimited shares and past and present guarantor members.

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Disguised or unintended distributions

English case law has established a rule that a company may only distribute its assets to its shareholders in accordance with specific statutory provisions which allow it to do so. According to this rule, a distribution that is not made in accordance with those provisions is an unlawful distribution and invalid.

Although decisions of English courts are not binding on the **Court**, it will frequently look to English decisions for guidance and it is generally thought that it will follow the cases in this area.

Historically, this rule sought to preserve the capital of a company to ensure that it would be available to satisfy the claims of its creditors.

Although the maintenance of capital rule has been significantly relaxed and the **Companies Law** allows distributions to be paid from a far wider range of sources, the unlawful distribution rule is still capable of applying to invalidate a transaction which:

- is structured to appear as though it is an arm's length transaction, but which is in substance, a disguised distribution; or
- although not intended to be a distribution, is in substance a distribution and it has not made in accordance with the provisions of the **Companies Law**.

In most cases, a distribution is clear. A company intends to make a distribution to a shareholder by paying it money, transferring an asset or forgiving a debt.

However, in some cases, a transaction may not be intended to be, or may not appear to be, a distribution.

Examples of transactions which have been held to be unlawful distributions include:

- an exorbitant rate of interest payable under a debenture issued to a parent company;
- the transfer of an asset between commonly owned companies at less than market value; and
- the payment of remuneration to a person who was a director and shareholder of a company where the person had done no work for the company.

The English courts have said that, in considering whether a transaction constitutes an unlawful distribution, it is necessary to examine all of the relevant facts and look at the purpose and substance of the transaction rather than its form.

If the transaction is:

- genuine and made at arm's length, then it will be valid, even if it is a bad bargain; and
- an attempt to improperly extract value from the company on the pretence of an arm's length transaction, it will be invalid.

Anti deprivation rule

The English case law rule known as the anti deprivation rule may also give rise to a possible ground for the **Viscount** or a liquidator to challenge a transaction entered into by a company. Although the rule has not yet been considered by the **Court**, it is generally considered that the **Court** would apply the rule.

Under the rule, a contractual provision is void if:

- it requires a company to transfer an asset to another person; or
- its effect is to deprive the company's creditors of the benefit of the asset,

once the company becomes **insolvent**.

The rule will not apply to a commercial transaction entered into in good faith which does not have a predominant or main purpose of depriving the company of its property on its insolvency.

The principle behind this rule is that a company's assets should be distributed among its unsecured creditors in accordance with the applicable insolvency laws and a person cannot seek to gain an advantage by contracting out of those laws.

Examples of provisions which have been held to breach this rule include a clause which sought to:

- create security over assets upon the owner becoming **insolvent**;
- forfeit assets upon the owner becoming **insolvent**;
- terminate an indemnity upon the indemnified party becoming **insolvent**; and
- require a shareholder to transfer shares in a joint venture company for nominal value to another shareholder upon the shareholder becomes **insolvent**.

The rule will not be offended by a provision which:

- requires a company to transfer an asset at market value to another person upon the company becoming **insolvent** because the company's creditors will not be deprived of the benefit of the asset; or
- terminates a licence or a lease upon a company becoming **insolvent** because it merely involves the termination of a limited interest.

Terms used

A person is an **associate** of a company if the person:

- is in partnership with the company;
- is an employee of the company;

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- is the trustee of a trust and the company:
 - is a beneficiary of the trust; or
 - has a power that may be exercised for the benefit of the company or any of its **associates** under the terms of the trust;
- is a company and either:
 - the same person controls both companies or a person controls one company and that person's **associates**, or that person together with its **associates**, control the other company; or
 - each company is controlled by a group of two or more persons and the groups:
 - consist of the same persons; or
 - could be regarded as consisting of the same persons by treating a member of either group as being replaced by a person of whom that member is an **associate**; or
- controls, or the person together with its **associates** control, the company.

Bankruptcy Law means the Bankruptcy (Désastre)(Jersey) Law 1990.

cause is a Jersey customary law concept that is roughly analogous to (though not the same as) the English common law concept of consideration. It has been described by the **Court** as basis of, or reason for, a contract.

challenge period means, in the case of:

- a preference, the period of 12 months;
- a transaction at an undervalue, the period of five years; or
- an extortionate credit transaction, the period of three years,

immediately proceeding the making of a **declaration** or the start of a creditors' winding up.

Companies Law means the Companies (Jersey) Law 1991.

A person is a **connected person** of a company if the person:

- is a director of the company;
- is an **associate** of a director of the company; or
- is an **associate** of the company.

Court means the Royal **Court** of Jersey.

declaration means the **declaration** by the **Court** that the assets of a company are *en désastre*.

insolvency transaction means a transaction:

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- that was entered into when the company was **insolvent**;
- that causes the company to become **insolvent**; or
- if entered into with a **connected person** or an **associate**, in respect of which it is not proved that the company:
 - was not **insolvent** at the time it entered into the transaction; and
 - did not become **insolvent** as a result of entering into the transaction.

insolvent is defined in the paragraph headed *When is a company insolvent?*

onerous property means any:

- movable property;
- contract lease; or
- other moveable property located outside Jersey,

that is unsaleable or not readily saleable or may give rise to a liability to pay money or perform any other onerous act and includes an unprofitable contract.

Security Law means the Security Interests (Jersey) Law 2012.

specified order means an order from the **Court** that:

- requires property transferred as a part of the transaction to be vested in the **Viscount** or the company;
- requires property which represents the application of the proceeds of sale of property transferred as a part of the transaction or of money transferred to be vested in the **Viscount** or the company;
- releases or discharges, in whole or part, any security given by the company;
- requires any person to pay, in respect of benefits received by the person from the company, any sum to the **Viscount** or the company the **Court** directs;
- requires any surety or guarantor whose obligation to any person was released or discharged, in whole or part, under the transaction to be under any new or revived obligation to the person as the **Court** thinks appropriate;
- requires:
 - security to be given for the discharge of any obligation imposed by or arising under the order;
 - the obligation to be secured on any property; and
 - the security to have the same priority as the security released or discharged, in whole or part, under the transaction; or
- provides that any person:

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- whose property is ordered to be vested in the **Viscount** or the company; or
- on whom an obligation is imposed by the order,

is to be able to prove in the *désastre* proceedings or creditors' winding up of the company for debts or other liabilities that arose from or were released or discharged (in whole or part) under or by the transaction.

Viscount means the head of the executive arm of the **courts** of Jersey.

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