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Collas Crill explains... The administration process in Guernsey

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Introduction

The Companies (Guernsey) Law, 2008 (**Law**) provides for companies to be placed into administration and for an administrator to be appointed to manage the company's affairs, by order of the Royal Court of Guernsey (**Court**).

Administration is intended to be a temporary process where in certain circumstances insolvent companies can be provided with 'breathing space' in order to maximise realisations and/or save all or parts of a company's business. It does this through its most significant feature, a moratorium on most creditors' claims.

When will the Court make an administration order?

The Court will only make an administration order if two requirements are fulfilled:

1. First, the company must be insolvent or likely to become insolvent. Solvency is based on the application of the 'solvency test': s.527 the Law (and detailed below).
2. Second, that one or both of the *purposes* of administration may be achieved by the making of the administration order.

The two purposes for which an administration order may be made are:

1. for the survival of the company or parts of it as a going concern; and/or
2. for a more advantageous realisation of assets than would be effected on a winding up.

The Court will expect to see reasons, supported by evidence, as to why an applicant believes an administration order will promote either (or both) purposes, and the Court must specify which of them (or both) it has found as justifying the administration order.

Solvency Test

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For the purposes of the Law, a company satisfies the solvency test if:

- the company is able to pay its debts as they become due;
- the value of the company's assets is greater than the value of its liabilities; and
- in the case of a supervised company, the company satisfies any solvency requirement imposed by applicable regulation.

Who can make the application?

Pursuant to section 375 of the Law, an administration application may be made by;

- the company itself;
- its directors;
- its members; or
- a creditor.

Further, if the company is supervised, then the Guernsey Financial Services Commission (**GFSC**) may make the application.

The effect of an administration order

Once an application for an administration order is made, a moratorium prevents any 'proceedings' being commenced or continued against the company by unsecured creditors, and any pre-existing application for the company's winding up will be dismissed. The moratorium continues during the course of the administration – absent leave of the Court or consent from the administrator. Whilst the administration order is in effect, the company cannot be placed into liquidation (either by its shareholders or by the Court) except with the leave of the Court.

Importantly, secured creditors, including but not limited to those creditors with security granted under Guernsey law, remain entitled to enforce their security regardless of the moratorium. In addition, any creditors with rights of set off may also enforce those rights.

Remuneration and swearing in of the administrator

Once the administrator is appointed, they will be sworn into office by the Court. Joint appointments are permitted and the Court may order that the office holders may act jointly or alone.

The remuneration of the administrator and the related expenses incurred in the administration are payable from the company's assets in priority to all other claims, and their remuneration will be fixed (or at least the basis of their remuneration determined) by the Court when the application is made.

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The administrator's duties and functions

The administrator's primary functions are to collect in and realise assets for the benefit of creditors.

The administrator has broad management powers (similar to those powers of a director of the company), a list of which is set out in schedule 1 to the Law. Whilst the directors remain in office, they must not do anything that interferes with the operation of the administrator's functions.

Upon their appointment, the administrator takes into their custody and control all of the property to which the company is entitled and manages its affairs and business in accordance with any directions from the Court. The administrator can commence or continue proceedings brought in the name of the company but are unable to bring actions in their own name. The administrator may do all things necessary for the management of the affairs, business and property of the company. When exercising this power, they are deemed to be an agent of the company but do not incur any personal liability - except where they act in a fraudulent, reckless or grossly negligent manner or act in bad faith.

An important power that may be exercised by an administrator is that they are able to remove and appoint directors of the company and to call meetings of members and creditors of the company.

Information and documents to be submitted by and to administrator

Once an administration order has been made by the Court, the administrator is obliged to give immediate written notice of the order to the company and to give, within 28 days from the date of the order, written notice to all the company's creditors, the Registrar, and in the case of a supervised company, the GFSC.

The administrator may also require the following persons to submit a 'statement of affairs' to them within 21 days of being requested to do so:

- current and former officers of the company;
- parties who have taken part in the formation of the company within one year before the administration order was made;
- current and former employees of the company, who are or were employed within the preceding year.

The statement of affairs must be verified by affidavit of the person submitting it and show, inter alia:

- particulars of the company's assets, debts and liabilities;
- the names and addresses of the company's creditors; and
- the security held by any of the creditors and an indication when the security was given.

The directors have a statutory duty to comply with the administrator in relation to the management of the affairs of the company.

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Conclusion of administration

Unlike similar administration regimes in other jurisdictions, in Guernsey there are few time limits an administrator needs to comply with. Whilst administration is designed as a temporary process, in practice it can last several years.

Ultimately, the period in which the administration order is in force is governed by the purposes. When an administrator takes the view that the purpose for which they were appointed can no longer be achieved, they should take steps to discharge the administration order and, if the company remains insolvent, petition for its winding up.

Conclusion

An administration order empowers a company to initiate mechanisms to realise assets, ultimately to be distributed to creditors, without facing debt recovery proceedings and other enforcement measures from those same creditors.

Administration will also often facilitate the sale of the company's business as a going concern as goodwill is preserved. It is also often more advantageous to effect a sale of assets through an administration because events of default in funding arrangements (leading to potential enforcement of security) may not be triggered. As a result, the company may survive the procedure, or at least ultimately provide a better return to creditors than might have resulted if the company had simply been wound up.

Please note that Administration under the Companies (Guernsey) Law 2008 will be significantly reformed by the The Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020, the commencement of which is anticipated later in 2021.

About this guide

This guide gives a general overview of this topic. It is not legal advice and you may not rely on it. If you would like legal advice on this topic, please get in touch with one of the authors or your usual Collas Crill contacts.

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We are a leading offshore law firm. We are easy to do business with and give practical advice to overcome tough challenges. Through our network of offices, we practise British Virgin Islands, Cayman Islands, Guernsey and Jersey law.

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