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Désastre proceedings and an applicant creditor's funding commitment: What you need to know

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Désastre proceedings are a **Court** initiated insolvency procedure that is used to liquidate an **insolvent** company. The purpose of *désastre* proceedings is to facilitate the orderly and fair distribution of the company's assets by treating the claims of all unsecured creditors equally and rateably.

An application for a **declaration** may be made by:

- a creditor owed a **liquidated sum** by a company in excess of the prescribed amount (currently £3,000);
- the company; or
- the **JFSC**.

Désastre proceedings are the only Jersey insolvency procedure for an **insolvent** company that may be started by a creditor. So, where a creditor wants to liquidate a company to recover a debt owed to it, its only option is to apply to the **Court** for an order that the company's assets be declared *en désastre (in disaster).*

Subject to limited exceptions, immediately on a **declaration** being made, all of the company's assets of any kind (irrespective of where its assets are located and whether its assets are present, future, vested or contingent) and powers vest in the **Viscount**.

One of the considerations for a creditor before applying for a **declaration** is that the **Court** may require the creditor to indemnify the **Viscount** against the costs and expenses of conducting the *désastre* proceedings to the extent it thinks fit.

The **Court** recently had to consider the extent of this indemnity in Re DP9 Limited [2020] JRC 047.

Background

DP9 Limited applied to the **Court** to seek a **declaration** in respect of the assets of a Jersey company, SPARC Group Limited, which owed £148,617.22 to DP9 Limited at that time. The **Court** was satisfied that a **declaration** should be made. However, the extent of the **Viscount**'s indemnity was a contentious matter that would need to be resolved first.

Article 5(2) of the **Bankruptcy Law** states as follows:

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'In the case of an application by a creditor the court may require the creditor to indemnify the Viscount against the costs of the désastre to the extent that it thinks fit'.

In summary, DP9 Limited was prepared to indemnify the **Viscount** up to the sum of £5,000; whereas the **Viscount** submitted that this was a case where an unlimited indemnity was appropriate and that DP9 Limited should make a payment on account of her likely costs of £25,000.

DP9 Limited argued, amongst other things, that the **Court** has no jurisdiction under the **Bankruptcy Law** to compel a creditor put the **Viscount** in funds to carry out the work that had not yet taken place. The **Viscount** disagreed with this and invited the **Court** to give a wider interpretation to article 5(2) of the **Bankruptcy Law**, namely that a payment on account of her future costs and expenses could be ordered.

Decision

In light of the relatively small value of DP9 Limited's claim, the **Court** did not consider an unlimited indemnity in favour of the **Viscount** to be appropriate. However, the **Court** confirmed that it can order an unlimited indemnity in the right circumstances.

The **Court** disagreed with DP9 Limited's narrower interpretation of article 5(2) of the **Bankruptcy Law**. The **Court** held that it can order a creditor to pay such sums as the **Court** thinks appropriate in order to indemnify the **Viscount** in advance of her incurring such costs. Consequently, DP9 Limited was ordered to provide the **Viscount** with £10,000 within 28 days and to provide a further sum of £5,000 should she require it. Thereafter, the **Viscount** and DP9 Limited would need to agree any further expenditure, in default of which they could apply to the **Court**.

In delivering its judgment the **Court** reminded DP9 Limited that the funding it provided to the **Viscount** would be repaid if and when the **Viscount** realises the assets of SPARC Group Limited prior to any distributions being made to its creditors. Furthermore, any funding not utilised by the **Viscount** would be returned to DP9 Limited.

Finally, the **Court** refused a request by DP9 Limited to make a conditional **declaration**, pending payment of the £10,000 (presumably on the basis that DP9 Limited was to revisit whether it wished to pursue the matter further). The **Court** held that a **declaration** is either made or it is not.

Conclusion

Upon making a **declaration**, all of the company's assets automatically vest in the **Viscount**. This is to be distinguished from the appointment of a liquidator with pre-agreed funding when winding up a company under the **Companies Law**. As the **Viscount** noted in this case, a liquidator cannot be compelled to take office.

The **Court** has confirmed its power to order a creditor applying for a **declaration** to provide the **Viscount** with an unlimited indemnity and to provide funding to the **Viscount** in advance of costs being incurred.

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To the extent that sufficient assets are realised, this funding will be repaid in priority to creditors. However, the extent of the indemnity that the **Viscount** might require can often be a material consideration for creditors. The **Viscount** must be given at least 48 hours' notice of an application for a **declaration** unless the **Court** allows less notice to be given. The creditor's potential funding commitment should form part of the discussion with the **Viscount** at the earliest opportunity.

For further information on *désastre* proceedings and how to bring them, see our guide *Désastre* proceedings for a Jersey company.

Terms used

Bankruptcy Law means the Bankruptcy (*Désastre*) (Jersey) Law 1990 (as amended).

Court means the Royal Court of Jersey.

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

Companies Law means the Companies (Jersey) Law 1991 (as amended).

insolvent means being unable to pay debts as they fall due.

JFSC means the Jersey Financial Services Commission.

liquidated sum means a debt that is not subject to any reasonably arguable defence, set-off or counterclaim.

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

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About this case note

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