COLLAS CRILL

The Collas Crill guide to: Winding up a Jersey company on just and equitable grounds

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Jersey is a popular place to establish an asset holding company. It is well regulated, creditor friendly, and the Companies Law is modern, flexible and modelled on English companies legislation.

But what happens when things go wrong?

This guide looks at the key things you need to know about winding up a company on just and equitable grounds.

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

What is a winding up on just and equitable grounds?

A winding up on just and equitable grounds is a procedure that is used to end the life of a company when, for some reason, other procedures to wind up or liquidate the company cannot be used, or are not appropriate, in the circumstances.

Although, strictly speaking, an **application** to wind up a company on just and equitable grounds is not an insolvency procedure, in the circumstances discussed below, it can nonetheless be used to wind up an **insolvent** company.

Background to the remedy

This remedy has existed in English legislation since the nineteenth century.

It is a remedy of last resort and is intended to provide a flexible procedure to wind up a company and protect the interests of, or give a result that is most advantageous to, its stakeholders.

The provisions in the **Companies Law** relating to winding up on just and equitable grounds are based on section 122 of the **UK Insolvency Act**. Consequently, the **Court** has said that it will have regard to English cases when interpreting the meaning of the words *just and equitable*. Interestingly, this is an area where there is a growing body of Jersey case law, and the **Court** has been prepared to give the words just and equitable a wider interpretation than the English courts.

Unlike the position in England and elsewhere, the Court does not have a statutory duty to consider whether:

- another remedy is available; or
- the shareholder is acting unreasonably in making an **application** rather than pursuing another remedy.

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Eligibility

An application may only be made if the company's assets are not the subject of a **declaration**.

Who may make an application?

An **application** may be made by the company, a director, a shareholder, the Chief Minister, the **JFSC** or a **supervisory body**.

A creditor of a company is unable to make an **application**.

However, amendments to the **Companies Law** in 2022 introduced a new jurisdiction whereby a creditor can now apply to the **Court** to wind up an **insolvent** company.

The **application** will set out the factual background in a pleading called a representation (which is similar to a petition in England and Wales). The representation is supported by an affidavit (which is similar to a witness statement) sworn before a qualified lawyer or notary public.

The **Court** is likely to require other interested parties (including the **Viscount**) to appear at the hearing.

Suspension of proceedings for arbitration

A party responding to an **application** may apply to the **Court** to stay the application (i.e. suspend the process) where there is an **arbitration agreement** in place.

There are circumstances where the **Court** has no discretion in applying the **Arbitration Law**, and so will order the stay of the **application** in favour of arbitration even where there might be good reason(s) not to.

For example, the **Court** has ordered such a stay in circumstances where there were significant disadvantages to arbitration on the evidence, including that it would cost more and take longer than **Court** proceedings; may not deal with all of the salient issues or involve all relevant parties.

The fact that an arbitrator cannot determine whether an entity should be wound up on the just and equitable basis, (a matter which is reserved for the **Court**), does not mean that the underlying dispute is not arbitrable by reason of public policy.

Order

The **Companies Law** empowers the **Court** to order that a company be wound up if it considers that it is just and equitable to do so. The **Court** may also, on the application of the Chief Minister or the **JFSC**, order that a company be wound up if the **Court** considers it expedient in the public interest to do so.

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Before it will make an order, the **Court** must be satisfied that there is a valid reason for the company to be wound up on just and equitable grounds, rather than a summary winding up, creditors' winding up or *désastre* proceedings. The **Court** has recently described the remedy as a 'drastic' one, explaining that the **Court** must carefully balance competing arguments.

Whether an **application** is granted is a matter for the **Court's** discretion. Therefore, even if an applicant shows good reasons why a winding up order should be made, the **Court** is not bound to make an order.

If the **Court** orders a company to be wound up on just and equitable grounds, it may:

- appoint a liquidator;
- direct the way in which the winding up is to be carried out; and
- make any order it thinks fit to ensure the winding up is carried out in an orderly way.

A copy of the order must be delivered to the registrar of companies within 14 days of being made.

Traditional grounds on which an order is made

The **Court** has said that the words *'just and equitable'* must be given a wide and flexible interpretation.

Whether the **Court** will grant an **application** will depend on the facts and context of each case. The **Court** has said that there is no exhaustive list of circumstances in which a winding up order could be made on a just and equitable basis, although there are recognised traditional categories. A company may be wound up on a just and equitable basis where there are no practical alternatives, and the phrase ‘just and equitable’ must be given a flexible and broad interpretation. In exercising its discretion as to whether to wind up a company, the **Court** is entitled to take account of the age and likely stress of individuals involved in the proceedings, and the effect any ongoing proceedings will have on the company and its underlying assets.

Grounds on which successful **applications** have been brought, include:

- The purposes for which the company was created have been achieved in full or it has become impossible to achieve them (this is frequently referred to as a loss of the company's substratum);
- Where there is insufficient shareholder support for a summary winding up or where the shareholders no longer exist;
- A deadlock arising in the management of the company as a result of which decisions cannot be made regarding the company's business or an 'impasse' falling short of deadlock, the effect of which is that the company has lost its substratum;
- A justified loss of confidence in the management of a company. This can include situations where the controlling director treats the business as his own; fraud; dishonesty; or serious mismanagement of the company's business, by directors and/ or majority shareholder;
- Conduct deliberately calculated to 'freeze out' a minority shareholder, driving him to sell his shares at an undervalue;

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- A breach of an agreement in the company's articles of association and/or shareholders' agreement; or
- A breakdown in mutual trust and confidence between the shareholders where the company is properly characterised as a partnership (called a corporate quasi partnership) despite its corporate form (e.g. excluding a shareholder from participating in the company's management). The Court has accepted that the participants in a quasi-partnership could themselves be companies.

Dissatisfied shareholder(s) may bring an **application** (either on its own or together with an unfair prejudice claim under the **Companies Law**) if the company's affairs are, have been, or threaten to be conducted in a manner which is unfairly prejudicial to them.

Unfair prejudice to a member or group of members can constitute grounds for winding up the company on just and equitable grounds. That said, the **Court** has emphasised that a shareholder does not have to demonstrate unfair prejudice to their interests in order to persuade the **Court** to grant an **application**, as a wider range of considerations is available. Conversely, establishing unfair prejudice does not automatically lead the **Court** to conclude that it would be just and equitable to wind up the company.

Insolvency

Although the **Court** has said that an **insolvent** company should normally be liquidated using a creditors' winding up or *désastre* proceedings, it has recognised that there are situations where a just and equitable winding up is appropriate.

While Jersey does not yet have any formal rescue or administration process, a just and equitable winding up can be used to achieve a similar outcome to an administration, as is demonstrated by the following examples:

- where a company, a licensed trust company, needed to continue trading after the start of its winding up to be able to transfer its clients to another trust company because (among other things) a creditors' winding up would not allow the liquidator to:
  - continue carry on trading to allow its client transfers to take place; or
  - take into account the interests of its clients;
- where a retailer company needed to take steps to quickly sell its remaining stock (its only material asset) because:
  - some of its creditors were threatening to exercise Jersey customary law rights, which would have resulted in the stock being sold at its wholesale value;
  - it was likely those creditors would exercise their Jersey customary law rights before the company could be placed into a creditors' winding up and a liquidator appointed;
  - the company could be placed into a just and equitable winding up and a liquidator appointed more quickly; and
  - it was likely that those creditors would enter into an arrangement with a court appointed liquidator to allow the company to continue to trade and sell its stock at its retail value, which would benefit all of the company's creditors;

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- where it facilitated a pre packaged sale of a company's business and assets to a new vehicle set up by one of the company's directors (who was not a shareholder of the company) because the sale would:
  - allow the company's business to continue operating;
  - result in a payment being made to the creditors where no payment was likely if the company were placed into a creditors' winding up or a **declaration** made; and
  - save the jobs of the company's employees.

Failed UK administration

The **Court** has ordered that a company be wound up on a just and equitable basis where that company has been the subject of a failed administration process in the UK.

Where a Jersey company holds assets located in the UK and encounters financial difficulty or becomes insolvent, the company may be placed into administration under the **UK Insolvency Act**. See our guide *Placing a Jersey company into UK administration* which explains how this may be achieved.

Investigate the affairs of the company

The **Court** has ordered that an **insolvent** company be wound up on just and equitable grounds where it is necessary to appoint a liquidator to investigate potential wrongdoing in connection with the company, including misappropriation of assets and breaches of fiduciary duties.

The **Court** has shown a particular willingness to do so where the company carries on a regulated business. The **Court** has said that:

- it is in the interests of stakeholders to have the liquidation process, including the investigation of potential claims of wrongdoing, carried out by a liquidator directly accountable to it; and
- its appointment of an independent and adequately resourced liquidator can increase stakeholder confidence in the winding up process and avoid any suggestion of a conflict of interest.

Urgency

The **Court** has ordered that an **insolvent** company be wound up on just and equitable grounds where it is necessary to appoint a liquidator to take steps quickly to protect the interests of stakeholders. Examples include the need to quickly take action to:

- preserve and gather in the company's assets located in jurisdictions considered to be high risk;
- protect investor funds;
- sell a company's remaining stock at its retail value for the benefit of the company's creditors; and
- investigate possible misappropriation of assets and breach of fiduciary duties.

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Only option available

Ordinarily, a creditors' winding up is commenced by the company's shareholders passing a **special resolution** to place the company into a creditors' winding up, or by order of the **Court** following an application made by a creditor.

However, the company may be in a position where it has no shareholders because they have been dissolved or struck off, or they cannot be located and so there is no-one available to pass a **special resolution**. In that scenario, the company can seek the assistance of the **Court** in order to draw the company's affairs to a close, by making an **application**. Although the directors of an **insolvent** company may apply for a **declaration** (which does not require a **special resolution**), there may be circumstances where a **declaration** is not appropriate. For example:

- if the company does not have realisable assets;
- the **Viscount** would need to employ external advisers to assist carrying out the désastre proceedings at additional expense; or
- a liquidator with specific experience or expertise would be better placed to wind down the company's business.

The **Court** has held that, in the case of a company that carries on a regulated business, simply allowing it to be struck off the register of companies is inappropriate.

Terms used

Arbitration Law means the Arbitration (Jersey) Law 1998.
Application means an application to have a company wound up on just and equitable grounds.
arbitration agreement means a written agreement to submit present or future differences to arbitration under the Arbitration Law.
Bankruptcy Law means the Bankruptcy (Désastre) (Jersey) Law 1990.
Companies Law means the Companies (Jersey) Law 1991.
Court means the Royal Court of Jersey.
Declaration means the declaration by the Court that the assets of a company are en désastre pursuant to the Bankruptcy Law.
Insolvent means that a company is unable to pay its debts as they fall due.
JFSC means the Jersey Financial Services Commission.
Special resolution means a resolution that is required to be passed as a special resolution by a majority of two thirds (or any higher majority specified in the company's articles of association) of shareholders who (being entitled to do so) vote at a meeting of the company of which not less than 14 days' notice has been given.
Supervisory body means the **JFSC** or a body designated as a supervisory body by the Chief Minister under the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008.
UK Insolvency Act means the Insolvency Act 1986, as applicable in the UK.

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

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