The Companies (Amendment No.8) (Jersey) Regulations 2022 came into force on the 1 st March 2022 and amended the Companies (Jersey) Law 1991 (the "Companies Law").

This amendment introduced a new insolvency remedy for creditors of Jersey companies and represents an important development for the insolvency legislation of Jersey.

Prior to 1 st March 2022, the main recourse in Jersey for an unsecured creditor of an insolvent company was to seek a declaration en désastre.

This recent amendment to the Companies Law, creates a creditor-driven winding up regime which allows a creditor to apply to the Royal Court for an order that the company in question be wound up and a liquidator appointed.

Who is entitled to make an application?

A creditor, with a claim of not less than £3,000 against a Jersey company, may make an application to the Royal Court for an order commencing a creditors' winding up.

A creditor is not permitted to make the application where the creditor has agreed not to make an application or in cases where the creditor's only claim is for repossession of goods.

What is required to make the application?

Pursuant to article 157A (1) of the Companies Law, a creditor must also demonstrate that:

(a) the company is unable to pay its debts;

(b) the creditor has evidence of the company's insolvency; or

(c) the creditor has the consent of the company.

Establishing whether a company is unable to pay its debts Pursuant to Article 157A (2) of the Companies Law, a company will be deemed to be unable to pay its debts if:

(a) the creditor to whom the company is indebted in a sum exceeding the sum of £3,000 has served on the company, by way of personal service, a statutory demand (in the prescribed form) requiring the company to pay the sum so due; and

(b) the company has for 21 days after service of the statutory demand failed to pay the sum or has otherwise dispute the debt due to the reasonable satisfaction of the creditor.

It is envisaged that service of a statutory demand on the company will be the usual practice, prior to a creditor applying to the Royal Court for a creditors' winding up. This procedure is highly similar to the English statutory demand procedure (which some Jersey directors may be familiar with).

Procedure for a creditors' winding up The creditor must give the company (except in exceptional

circumstances) 48 hours' notice before making the application to the Royal Court.

The application to the Royal Court must be commenced by a representation and be accompanied by:

(a) an affidavit (which would need to include, amongst other things, a statement that the creditor has a claim against the debtor company for a liquidated sum and that to the best of the creditor's knowledge is not subject to a genuine dispute and arguable defence or counterclaim, and which has not been paid); and

(b) an exhibited and completed statement in the prescribed form as set out in the practice direction. The representation and supporting documents would need to be provided to the Bailiff's Chambers and the Judicial Greffe by no later than 5pm on the Tuesday immediately preceding the Friday upon which the application will be heard by the Royal Court. Notice of the application should also be placed by the creditor in the Jersey Gazette on the gov.je website to appear no later than 24 hours before the application is made before the Royal Court.

Appointment of provisional liquidator

The new winding up regime also introduces the concept of a provisional liquidator into Jersey law.

An application for the appointment of a provisional liquidator must be supported by an affidavit stating that the applicant believes that it is likely that a winding up order will be made by the Royal Court and such appointment is necessary in the interim to preserve the debtor company's assets and books and records, together with the grounds for such belief.

The Royal Court will usually expect such grounds to include the immediate risk of dissipation of company assets or loss or destruction of the company's books and records.

On the appointment of the provisional liquidator, no action can be taken or proceeded with against the company except with the permission of the Royal Court and subject to such terms as the Royal Court may impose.

Provisional liquidation applications are designed to preserve the underlying assets and prevent dissipation by the current management and, accordingly, are a useful addition to Jersey's insolvency legislation.

Power of the Royal Court

The Royal Court may then, after considering the application:

(a) make an order that a creditors' winding up must commence in respect of the company from the date the application is made or such other date as the Royal Court deems fit and appoint a person nominated by the applicant or selected by the Royal Court as the liquidator; or

(b) dismiss the application and make such order as it thinks fit.

The Royal Court also has the power to adjourn the hearing of an application for such time as the Royal Court thinks fit, require the applicant to furnish such further information as the Royal Court requires or

order other parties to be convened to the application.

It should be noted that the Royal Court will not allow this new insolvency procedure to be used to "side-step" the normal process of bringing a claim (i.e. by bringing a creditors' winding up application in preference to issuing proceedings in the normal manner). The general position in England (which may be persuasive in Jersey) is that if the debtor company is able to establish a genuine and substantial dispute, the petitioning creditor will be injuncted and prevented from proceeding any further with the application (Tallington Lakes Ltd v Ancasta International Boat Sales Ltd [2012] EWCA Civ 1712).

The issue of costs will be at the discretion of the Royal Court although if an application is unsuccessful, depending on the circumstances, it may well be the case that the creditor will be required to pay the company's costs of and associated with defending the winding up application.

Appointment of liquidator

Upon being appointed, a liquidator must within 14 days, give notice of the appointment to the Jersey company registry, the Jersey Viscount and the directors and creditors of the company (to the extent known to the liquidator). The liquidator must also within 14 days of his or her appointment give notice of that fact in the Jersey Gazette.

The Royal Court will also only appoint a liquidator who is a member of the newly created "Register of Approved Liquidators" which will be administered by the Viscount.

Upon the liquidator being appointed and publicising their appointment, the liquidator will then be required to call a meeting of the creditors of the company and, in advance of the creditors' meeting, the directors of the company must produce a statement as to the affairs of the company. The liquidator may then exercise all powers of the company to realise the company's assets, pay the company's debts and wind up the company.

Effect of commencement of creditors' winding up

The corporate state and capacity of the company will continue until it is dissolved, but from the commencement of the winding up, the company must cease to carry on its business except as may be required for its winding up.

All of the powers of the directors will cease (except to the extent sanctioned by the liquidator) and such powers are vested in the liquidator who stands in the shoes of the directors.

In addition, no action may be taken or proceeded with against the company except with the leave of the Royal Court and subject to such conditions as the Royal Court may impose.

However, a secured creditor may still take action to enforce its security. For example, a secured creditor will be able to enforce its security as long as it has a valid and perfected security interest under the Security Interests (Jersey) Law 2012 before the company became insolvent.

Can a Company make an application to terminate a creditors' winding up?

A company may, at any time during the course of the creditors' winding up which has been ordered by the Royal Court, apply to the Royal Court for an order terminating the creditors' winding up.

However, the Royal Court may refuse such an application if the Royal Court is not satisfied that the property of the company is at the time of the application sufficient to pay in full claims filed with the liquidator or claims which the liquidator has been advised will be filed within the prescribed time.

In considering such an application the Royal Court must have regard to:

(a) the interests of creditors who have filed a proof of debt;

(b) creditors whose claims the liquidator has been advised will be filed within the prescribed time; and

(c) the company.

In the event that the Royal Court grants such an application, the creditors' winding up terminates from the date of the order unless the Royal Court orders otherwise. However, such an order would not prejudice the validity of any act of the liquidator relating to the company between the date the application for the creditors' winding up is and the date of the termination of the creditors' winding up.

If it is later established that the company was not insolvent as at the date of the application, the company may apply to Royal Court to recover damages in respect of any loss sustained by the company as a consequence of a winding-up order.

Creditors' winding up searches

It is now also possible to carry out a creditors' winding-up search against a Jersey company to ascertain the existence or otherwise of an application under Article 157A of the Companies Law.

Such searches can be carried out by email to the Judicial Greffe which would need to be received no later than midnight to be able to reply to the search during the following working day. Such searches incur a small fee (currently £35).

Conclusion

The introduction of a creditor-driven winding-up regime in Jersey is very welcome. For the first time in Jersey, creditors will be able to commence a winding-up of an insolvent company under the Companies Law. This new regime will sit alongside the existing winding-up regimes under the Companies Law and the désastre regime under the Bankruptcy (Désastre) (Jersey) Law 1990, and will introduce a further layer of protection to creditors. It is also helpful that this creditor mechanism follows a form already familiar to many other jurisdictions, such as England and Wales.