

JERSEY / JUDGMENT

Representation of Collections Group [2013] JRC 096 (20 May 2013)

[2013] JRC 096

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judgment

the bailiff: 1. On 5 th February, the Court ordered that each of Collections Holdings Limited ("Holdings"), Collections Group Limited ("Group"), Pierretoni 1999 Limited ("PT"), Axle Clothing Company Limited ("Axle") and Dive and Ski Sports Limited ("DS") be wound up pursuant to Article 155 of the Companies (Jersey) Law 1991 ("the Law") on the ground that it was just and equitable to do so. The Court also authorised the liquidators to enter into an agreement for the sale of the business and assets of the companies to a new company ("Newco"). The Court now gives its reasons for that decision.

Background

2. The companies constitute a group of companies involved in the sale of clothing and other items from retail outlets in Jersey. Holdings is owned by Mr Kevin Leech and another member of his family. Holdings owns 100% of Group which in turn has two subsidiaries. It owns 80% of PT, which employs thirteen staff and operates the menswear department at De Gruchy. It also owns 100% of Axle which trades as Axle Kids in De Gruchy, Axle Woman in Voisins and Axle Man at 55 King Street. Axle also holds leases for 33 Queen Street, currently occupied by Quiksilver and 25 Halkett Street, currently occupied by Surf Dive and Ski. There are fourteen employees within Axle.
3. The same beneficial owners own 100% of DS. That company operates under a number of names from a number of outlets, namely Freedom Surf Shop at Quennevais precinct, Jersey Surf School at The Watersplash and the Surf Dive and Ski brand, which trades as SDS and Quiksilver from 25 Halkett Street, as SDS Woman in Colomberie and as Quiksilver at 33 Queen Street. It also holds the lease of a shop at 13 Colomberie, where there are asbestos problems and an ongoing dispute with this landlord.
4. In total, forty seven full time staff are employed by the companies, together with approximately ten seasonal workers.
5. The representor is a director of all the companies. However, he has no shareholding or financial interest in any of them. The Court has received affidavit evidence from the representor and from Mr Alan Roberts of Grant Thornton, one of the proposed liquidators.
6. We do not think it necessary to go into detail as to the financial position of the companies for the purposes of this judgment. Suffice it to say that we are satisfied that they are in a dire financial position, being insolvent both on a

cash flow and balance sheet basis. The representor explained that the companies had been hit by poor retail trading conditions, especially in the last quarter of 2012. The shareholders have confirmed they are not willing to inject any further funds. 7. As to assets, although the companies hold stock, much of that stock is subject to retention of title agreements. Because there are substantial outstanding liabilities to suppliers, this means that much of the stock is not owned by the companies. Furthermore, the stock is very low in quantity because of an inability to acquire any new stock and is one season old. Because the companies are low in stock, the shelves look empty and accordingly it is difficult to sell the stock for a good price as every potential buyer is seeking to negotiate down already reduced "sale" prices. There are minor fixed assets in terms of office equipment, shop fitting out etc. but this is of minimal value. 8. The companies have substantial liabilities to various banks, to suppliers and to others such as the Comptroller of Income Tax in respect of GST and ITIS, to Social Security, to landlords and to many others. Employees within Group, PT and Axle have not been paid their wages up to date as the bank will not increase the overdraft. So far, employees in DS have been paid because the bank to that company has honoured wage payments. 9. In summary, as stated by Mr Roberts in his affidavit, these companies cannot pay their staff, they cannot pay their obligations for their premises, they cannot pay for stock, and they cannot buy any more stock. Accordingly there is no goodwill in the business at present and if the order requested is not made, the companies will have to shut immediately. This will result in virtually no payment to any creditor and in all the staff becoming unemployed. The Proposal 10. The representor believes that if the companies were free of their historic debts, if they could be restructured and if they could be the recipients of new investment, it would be possible for a substantial proportion of the businesses to become successful and profitable even in these difficult times. He has obtained agreement from a private investor to inject at least £400,000 if the businesses are acquired by a new company ("Newco"), which will be owned by the representor and the investor. 11. If the companies are placed in liquidation, it is proposed that the liquidators will immediately enter into an agreement along the lines of the draft agreement produced to the Court. Essentially that provides that the companies will sell to Newco such of their business and assets as Newco wishes to acquire, with the consideration being an amount equal to 20% of the net profits of the acquired businesses arising within one calendar year of acquisition. Newco would also agree to pay 25% of any net sale proceeds in the event of it disposing of any part of the acquired businesses within one calendar year of acquisition. There is no realistic prospect of the consideration clearing all the debts of the companies but, with a fair wind, the preferential creditors may be paid in whole or in part, although it is unlikely that the proceeds will be sufficient to pay ordinary unsecured creditors. The Law 12. This application is brought under Article 155 of the Law, which provides that a company may be wound up by the Court if the Court is of the opinion that it is just and equitable to do so. In a number of cases the Court has emphasised that this confers a wide discretion on the Court. Thus, in *Jean-v-Murfitt* (Jersey Unreported 11 th December 1996) Bailhache B said at page 8:- "We conclude by observing that the words "just and equitable" in Article 155 of the 1991 Law should be given a flexible interpretation. Justice and equity cannot be confined

within the four corners of specific instances". 13. In *Re Poundworld (Jersey) Limited*

[2009] JRC 042 the Court said this at paragraph 10:- "Article 155 is based upon a similar provision of the Companies Act of the United Kingdom. English authorities are therefore of assistance. Although the English Courts have developed certain categories of cases where the court will exercise its power under the just and equitable jurisdiction the Court is not confined to such categories. The words 'just and equitable' are general words." 14. The Court is therefore satisfied that it has jurisdiction to make the order requested in this case. The question is whether it should in its discretion do so. Counsel's submissions 15. In *Poundworld*, the Court made it clear that the Court could make an order winding up a company under Article 155 even where the company was insolvent and it did not have to insist upon a creditor's winding up under Article 157 if satisfied that there was good reason in the interests of creditors or otherwise for preferring the Article 155 route. 16. What is unusual about the proposal in this case is that it is intended that, immediately following their appointment, the liquidators should enter into an agreement for the sale of much of the business and assets of the companies to Newco, in which the representor, who as stated is an existing director of the companies, has an interest. This is what is known in England as a "pre-packaged sale". It is something which is done on occasion by administrators, although of course we do not have the concept of administration in Jersey. Such a sale may in some circumstances be in the best interests of creditors. Nevertheless, because of the potential for abuse, the Joint Insolvency Committee in England and Wales has issued a Statement of Insolvency Practice (SIP16) setting out guidance for insolvency practitioners in connection with pre-packaged sales in administrations. 17. Paragraph 1 of SIP16 defines a pre-packaged sale (or "pre-pack") as an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the administrator effects the sale immediately on, or shortly after, his appointment. 18. SIP16 goes on to advise insolvency practitioners to exercise caution in relation to pre-packs. In paragraph 2 it states:- "Practitioners who are party to a pre-packaged sale, whether as adviser to the company before the appointment, as the appointed administrator, or both, should bear in mind the duties which they, and those who act on their advice, owe to parties who might be affected by the arrangement, and should have regard to the associated risks. They should keep a detailed record of the reasoning behind the decision to undertake a pre-packaged sale, and should be able to explain and justify why such a course of action was considered appropriate." 19. In paragraph 5 it is stated:- "Practitioners should be clear about the nature and extent of their role and their relationship with the directors in the pre-appointment period. Where they are instructed to advise the company, they should make it clear that their role is to advise the company and not to advise the directors on their personal position. The directors should be encouraged to take independent advice. This is particularly important if there is a possibility of the directors acquiring an interest in the assets in the pre-packaged sale." 20. In paragraph 8:- "It is in the nature of a pre-packaged sale in an administration that unsecured creditors are not given the opportunity to consider the sale of the business or

assets before it takes place. It is important, therefore, that they are provided with a detailed explanation and justification of why a pre-packaged sale was undertaken, so they can be satisfied that the administrator has acted with due regard to their interests". 21. The SIP goes on in paragraph 9 to emphasise a number of matters which must be disclosed, including in particular the identity of the purchaser and any connection between the purchaser and the directors, shareholders or secured creditors of the company. 22. This is the first occasion on which the Court has been asked to authorise liquidators to enter into a pre-packaged sale. Supported by the evidence of the representor and Mr Roberts, Advocate Pallot submits that it would be the right thing to do. We would summarise his reasons for so contending as follows:- (i) The companies are hopelessly insolvent. Without the injection of further funds, they will have to cease trading immediately; otherwise the directors will be guilty of wrongful trading. (ii) It is clear that no further funds will be forthcoming from the shareholders, nor has any other source of funding for the companies been identified. (iii) It follows that if the Court does not approve the pre-packaged agreement, the companies will immediately cease trading and this will lead to 47 employees becoming unemployed. That will bear heavily on the public purse as well as being highly unfortunate for them personally. (iv) Immediate closure would be a further blow to retail confidence in Jersey and would have a considerable impact on the appearance of the shopping environment by reason of the increased number of empty shops. (v) If the companies cease trading immediately, there will be no dividend for any creditor. (vi) Conversely, if the pre-packaged agreement is approved, there is a realistic prospect of preserving approximately 40 jobs, the damage to the retail sector in Jersey will not be as great and there is a realistic possibility of a dividend for preferred creditors within a twelve month period. (vii) Neither a desastre nor a creditor's winding up would achieve the same purpose in this case because of the time which will have to elapse before any sale could take place. Any delay would result in the companies having to cease trading, in which event it was unlikely that any purchaser would be willing to proceed. 23. The Court was concerned to ensure that it was not approving some form of "Phoenix" agreement which would result in companies with the same or similar beneficial ownership emerging (after the agreement) with the assets of the business but free of creditors. As SIP16 makes clear, this is a highly material factor. In his affidavit, the representor stated specifically that the existing beneficial owners have no interest in Newco and that he and the investor have no existing interest in the companies. We asked him to go into the witness box specifically to confirm this before us, which he did. Conclusions 24. We are satisfied that it would be in the best interests of the creditors for the companies to be wound up under Article 155 with the liquidators being authorised to enter into the proposed agreement with Newco. Our reasons for so concluding are essentially those put forward by Advocate Pallot, which we accept. However, we required an alteration to the wording of the draft orders suggested in the representation, which seemed to us to imply that we were directing the liquidators to enter into the agreement with Newco. That is not the role of the Court. We are authorising the liquidators to do so, but the judgment as to whether ultimately the terms of the agreement are in the interests

of creditors or not falls upon the liquidators, not the Court. This was accepted by Mr Roberts. We are also satisfied that it would be proper for the pre-packaged agreement to be entered into notwithstanding the lack of notice to creditors because it seems to be the only way in which there may be a return for creditors. However, we emphasise that there are risks involved in any form of pre-packaged agreement, particularly where the directors or shareholders of the company being placed in liquidation have an interest in the purchasing company and liquidators must therefore pay careful attention to the guidance given in SIP16. 25. Nevertheless, for the reasons given, we are satisfied that entering into the agreement is an appropriate course in this case even allowing for the interest of the representor in Newco and accordingly we ordered that the companies be wound up under Article 155 on the grounds that it was just and equitable to do so and we made various directions conferring appropriate powers upon the liquidators as set out in the Act. Authorities Companies (Jersey) Law 1991. Jean-v-Murfitt (Jersey Unreported 11th December 1996). Re Poundworld (Jersey) Limited

[2009] JRC 042 . Joint Insolvency Committee in England and Wales - Statement of Insolvency Practice. Page Last Updated: 16 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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