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Real Estate Finance Deals: Jersey Law Update

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Jersey LLPs: a new dawn as investment and property holding vehicles

A recent amendment to the Limited Liability Partnership (Jersey) Law 1997 (the "Law") could see Jersey Limited Liability Partnerships (Jersey LLPs) gain popularity as investment or real estate holding vehicles.

Although the Law has been in force for nearly 15 years, no Jersey LLPs have ever been established. The principal reason for this is that, until January 2013, the Law required Jersey LLPs to maintain creditor protection in the form of a £5m bond which would pay out if the Jersey LLP became insolvent. The cost of such protection made the Jersey LLP a prohibitively expensive vehicle.

In January 2013 an amendment to the Law came into effect, removing the requirement for Jersey LLPs to maintain a £5m bond and replacing it with the simple rule that no partner or former partner of a Jersey LLP should be allowed to withdraw any property of the Jersey LLP unless that Jersey LLP has made a solvency statement within the previous 12 months. The solvency statement is made in the form specified by the Law, and looks forward 12 months, confirming the Jersey LLP's anticipated solvency over that period.

Comment

It is anticipated that this amendment will make the Jersey LLP a viable alternative to Jersey's other investment structures, often used for holding UK assets such as real estate.

Jersey Royal Court recognises appointment of English fixed charge receiver

The decision of the Jersey Royal Court in *Re Estates and General Developments Limited* earlier this month is the first time that the appointment of an English fixed charge receiver has been recognised in Jersey.

Background: Estates and General Development Limited ("EGD") is an English company which was party to a trust deed relating to mortgage debenture stock issued by its parent company. The stock was secured against various assets held within the parent's corporate group. These included real estate in Jersey (the "Property") held by EGD over which a Jersey law charge (known as a judicial hypothec) was taken and registered in Jersey.

EGD and its wider group got into financial difficulties. EGD was put into liquidation in 2011. The trustee under the trust deed exercised its power to appoint two individuals as joint English fixed charge receivers over the Property. Those receivers made an application to the English High Court which resulted in the English Registrar in Bankruptcy issuing a letter to the Jersey Royal Court asking it to ratify and recognise the receivers' appointment and their powers under the trust deed, including the power of sale over the Property. Following the issue of that letter, the receivers applied to the Jersey Royal Court for recognition of their appointment and an order that they should have power, among other things, to sell the Property.

Decision: The Jersey Royal Court ruled that this was an appropriate case in which to exercise the discretion afforded to it under the Bankruptcy (Désastre) (Jersey) Law 1990 to assist the courts of

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another jurisdiction in matters relating to the insolvency of a person. Although the appointment of a fixed charge receiver under English law is a matter of contract as opposed to an insolvency procedure, the Jersey Royal Court considered that such appointment was a matter relating to the wider insolvency of the group. As such, it had discretion to assist at the request of the English Registrar in Bankruptcy.

In deciding that it should exercise its discretion the Jersey Royal Court had regard to three possible obstacles in conflicts of law principles to the recognition of an English receiver by foreign courts:

- first, whether the charge under which the receivers had been appointed was repugnant to Jersey law. This was clearly not the case as the charge was a valid Jersey law charge;
- secondly, whether that charge was defective for some reason under Jersey law (such as failure to comply with formalities or registration). Again, there was no defect in the charge under Jersey law; and
- thirdly, whether a foreign court recognises the capacity of an English law receiver to act on behalf of the relevant company. As EGD was incorporated in England, the question was whether English law recognised that the receivers had such capacity. The Jersey Royal Court concluded that it did.

Under Jersey law, creditors with the benefit of a charge would not have the power to sell the Property, but would have to follow one of the established Jersey insolvency procedures. The judgment concluded that there would be no advantage to creditors in requiring a Jersey insolvency procedure to be followed. Such procedures would end in the same result as recognising the appointment of the English fixed charge receivers and their power to sell the Property, but would take longer and incur greater costs.

Comment

Although based upon specific facts, this decision demonstrates that the Jersey Royal Court is willing, in certain circumstances, to take a pragmatic approach and exercise its discretion to assist overseas courts in the interests of ensuring maximum recovery for creditors. In this case that approach was followed, even though alternative established Jersey insolvency procedures were available. The fact that EGD was already in liquidation, a procedure comparable to the Jersey law procedure *Désastre*, may well have influenced the Jersey Royal Court's decision to recognise the appointment of an English fixed charge receiver. Whether it would have reached the same conclusion if only a fixed charge receiver had been appointed and EGD had not been subject to such a procedure is not yet clear.

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