JERSEY COMPANIES AND THE “FREEDOM OF MOVEMENT” IN INSOLVENCY

Paul J. Omar

The “passporting” of Jersey companies into insolvency proceedings in the United Kingdom is a practice that has a certain vintage, being used in cases for the past 15 years, in which it has been seen as desirable for the companies concerned to have the advantage of rescue proceedings (particularly administration) available in England and Wales, but not yet in Jersey. Although in 2013, the practice came under scrutiny in the High Court in London in the Tambrook case, on appeal, the practice was sanctioned and continues to be available for use through the letter of request process being invoked.

Introduction

1 In the Commonwealth, there is a family of statutory provisions descended from a common ancestor,1 serving to structure a framework for cross-border cooperation. In the United Kingdom, s 426 of the Insolvency Act 1986 enables foreign courts with insolvency jurisdiction to seek the assistance of the courts in the United Kingdom with a similar jurisdiction by the issue of a letter of request.2 On its receipt, the courts in the United Kingdom are bound to assist and may apply the insolvency law applicable by either court to any matters specified in the request, subject to any considerations of private international law deemed relevant. The number of countries to which the rules on assistance apply is limited by a requirement to designate jurisdictions susceptible to being assisted,3 although the section itself does stipulate that automatic assistance will be given to courts in the constituent countries of the United Kingdom and others in the British Isles, Jersey, Guernsey and the Isle of Man being expressly mentioned.

1 Section 208, Bankruptcy Act 1861.
2 Other descendants of the common ancestor include art 49, Bankruptcy (Désastre) (Jersey) Law 1990, s 104, Bankruptcy Act 1967 (Act 360) (Malaysia) and s 580, Corporations Act 2001 (Australia).
3 Assistance to designated jurisdictions has been enabled through the passing of the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Orders of 1986, 1996 and 1998 (SI 1986/2123; SI 1996/253; SI 1998/2766).
2 Section 426 has been used in a number of ways to effect cooperation between courts, including to recognise foreign insolvency orders and the appointments of office-holders, to permit the bringing of vulnerable transaction actions under domestic law, to allow for proceedings against directors to recover a deficiency in the insolvent debtor’s assets, to bind creditors to a foreign composition, to recognise and give effect to a stay authorised by the application of a foreign rule in relation to set off, to permit the public examination of persons connected to an insolvency as well as to endorse the remittance of funds to an overseas proceeding despite the very different priority rules that would apply. One limitation, however, is where giving assistance would prejudice the conduct of proceedings already on foot within the jurisdiction. Subject to that, the courts have consistently interpreted s 426 widely to permit any form of assistance domestic courts feel should be given in the exercise of their equitable discretion.

3 One of the most innovative ways in which s 426 has been used is to extend domestic rescue proceedings to foreign debtors. While an ancillary liquidation provision has long existed, it served simply to allow the liquidation of a foreign company carrying on business within the jurisdiction and was limited to assisting main proceedings occurring elsewhere. With the advent of rescue in the Insolvency Act 1986, it was not long before courts were faced with the question of whether domestic procedures, such as the corporate voluntary arrangement or administration, could also be the subject of assistance. It was the Re Dallhold case, that determined that rescue provisions, in the instant case administration, could be extended to a foreign debtor on the basis that s 426 conferred jurisdiction on the United Kingdom courts to apply any available domestic remedy. Somewhat

---

5 Re BCCI [1993] BCC 787.
7 Re Bell Lines Ltd (unreported) 6 February 1997.
12 Sections 221 and 225, Insolvency Act 1986.
later, in the 2002 case of *Re TTR*, assistance under s 426 was held to also include the extension of corporate voluntary arrangements to a foreign company.

**The Jersey dimension: the desire for rescue**

4 The precedent set by *Re Dallhold* appeared particularly useful, given that at the time Australia did not have a rescue procedure that could be invoked. In other jurisdictions facing the same issue, including Jersey, the precedent must have been viewed with some interest. In fact, at about the same time as the decision in *Re TTR*, the practice of making of a letter of request invoking s 426 began in Jersey. This practice, referred to by this author as “passporting”, was first noted in *In re OT Computers*. Other cases following this precedent, though limited in number, include *Re First Orion*, *Re St John Street*, *Re REO* and *Re Control Centre*.

5 These “passporting” cases involved the issue of a letter of request to a United Kingdom court for the opening of rescue proceedings, usually administration. In most of these situations, the corporate debtors involved had a close connexion with the United Kingdom, through the conduct of business, the location of assets or the law applicable to contractual obligations, albeit not a sufficient connexion to enable jurisdiction on the basis of a finding that the debtor’s centre of main interests (“COMI”) was in that jurisdiction.

6 The Jersey court readily assented to this step, based on an appreciation of its own inherent jurisdiction as well as the facility provided under s 426, particularly since Jersey is one of a limited number of jurisdictions the United Kingdom courts are bound to assist.

---

14 *Re Television Trade Rentals Ltd* [2002] EWHC 211 (“*Re TTR*”).


16 *In re OT Computers Ltd* 2002 JLR N[10].

17 *Re First Orion Amber Ltd* [2009] JRC 126.

18 *Re St John Street Ltd* [2010] JRC 087.


20 *Re Control Centre General Partner Ltd* [2012] JRC 080.

21 Except perhaps in the *Re OT Computers* case, where the court noted that the facts peculiar to the debtor could perhaps have underpinned such a finding. The COMI test is an innovation first introduced by Regulation (EU) 1346/2000 (now replaced by Regulation (EU) 2015/848).
The disadvantages of locally available procedures were often the subject of explicit note in the Jersey reports in these cases, while the comparative merits of the administration process, comforted by counsel’s opinions, were extolled, particularly by reference to the benefit for creditors. In most of these cases also, there were no local proceedings in Jersey, nor any intention to open one, largely attributable to the disadvantages of taking such a step. The debtor companies were simply “passported” via the letter of request route into the jurisdiction of the courts of the United Kingdom.

**The Tambrook case: passporting doubted**

7 In light of this practice, a 2013 case, *Re Tambrook*, appeared to tread a familiar and well-worn path in making an approach to the Jersey court for the issue of a letter of request addressed to the United Kingdom courts, whose subject was to be the making of an administration order in relation to the company. This was duly done in a succinct judgment relying entirely on the strength of previous precedent. The surprise came when, within proceedings before the High Court in London, the judge (Mann, J) imposed a pre-requisite on the practice of “passporting”, holding that there must be insolvency proceedings afoot in the jurisdiction making the request for the purposes of providing cooperation under the provision.

8 As in the instant case, there were no such proceedings, he held that he had no jurisdiction under s 426 to assist the Jersey court and denied the application. In view of the effect in the instant case as well as the limitation it posed to the useful practice of “passporting”, the claimant in the case was persuaded to appeal. This was heard by the Court of Appeal on 1 May 2013, which reversed the judgment below, with reasons that followed subsequently being published on 22 May 2013.

---

23 *HSBC Bank v Tambrook Jersey Ltd* [2013] EWHC 866 (Ch) (12 April 2013) (“HC judgment”). These cases were noted, by this author, in “Visa Denied: An End to the Jersey Practice of Insolvency ‘Passporting’”? (2013) 17 Jersey & Guernsey Law Review 182.
24 *HSBC Bank v Tambrook Jersey Ltd* [2013] EWCA Civ 576 (22 May 2013) (“CA judgment”). This case was noted, by this author, in “Passport Renewed: Extension of Rescue Proceedings to Foreign Companies under Section 426 of the Insolvency Act 1986” (2013) 10 ICR 310, of which this section is a summary.
9 Prior to a recitation of the brief facts of the company’s history and indebtedness and the previous steps in the proceedings, the Court of Appeal noted that the appeal involved a question of interpretation of s 426. The court provided a brief legislative history of the provision, noting the view in the Cork Report that there should be only one insolvency administration within the British Isles and that it was the paramount objective of the legal systems of the various component countries and dependencies to achieve this in respect of any insolvent debtor falling within their jurisdiction.

10 The court noted the enactment of the provision appears to clearly fulfill the principle of “modified universalism” as described by Lord Hoffmann in Re HIH. In that case, Lord Hoffmann stated first that the judicial approach to international cooperation was predicated on general principles of private international law, notably the desirability that bankruptcy should achieve unity and universality with unitary proceedings taking place in the domicile of the bankruptcy receiving worldwide recognition and applying universally to the assets of the debtor. A further statement suggested that the “golden principle” of “modified universalism” required courts to cooperate with the courts of the country of the principal liquidation, provided that justice and public policy so permit, so as to ensure the distribution to the creditors of the assets was achieved under a single distribution system by the remittance, as was the issue in that case, of assets located abroad.

11 Dealing with the High Court judgment, the Court of Appeal noted that the judge raised the issue of jurisdiction of his own motion, departing consciously from the decisions of the other Chancery judges where letters of request had been issued and orders made granting administration. The judge below held that he did not have jurisdiction using reasoning the Court of Appeal accepted was “clearly

---

26 Coram Lords Justice Longmore, McFarlane and Davis, with the last delivering the judgment in the case with which the others concurred (CA judgment, at paras 47–48).
29 CA judgment, at para 17, referring to the Cork Report, at para 1906.
30 Ibid, at para 18, referring to In re HIH.
31 In HIH, at para 6.
33 CA judgment, at para 20.
and lucidly put”. 34 Although the case was one the judge below admitted was appropriate for the appointment of administrators, 35 the refusal of jurisdiction was motivated on a reading of the word “assist” in sub-s (4), whose meaning and effect needed to be decided. Looking to what the High Court judge held, the Court of Appeal noted his findings to the effect that assistance under s 426 required three elements: (i) a United Kingdom court exercising jurisdiction; (ii) a foreign court exercising a similar jurisdiction; and (iii) a request received by the former from the latter.

12 The problem for the High Court was how the Jersey court was “assisted” for the purposes of the provision, its view being that it was not empowered to act simply because it was asked to assist. The foreign court was required to be an insolvency court, which the Jersey court was seen to be, but must also be assisted in its functions as an insolvency court. This presupposed that the foreign court was exercising some jurisdiction or proposing to exercise that jurisdiction and, in doing so, invited the English court to assist. 36 Referring to, inter alia, Re HIH, 37 the judge below held that the “natural habitat” of s 426 was one where there was some form of insolvency procedure taking place before the requesting court.

13 As such, it seemed to the judge that, as the terms of the request sought, not assistance in respect of any “endeavour” of the Jersey court, but the provision of insolvency proceedings in substitution of domestic ones, it was not the type of assistance that is relevant to the way in which s 426 was intended to work. 38 Also noting that there seemed to be no reasoned decisions in the other cases where the orders sought had been granted, the conclusion of the judge below was that assistance could not be engineered to cover a situation where there were no proceedings to be assisted. The intention behind the statute was that it was not there to “fill in gaps in another jurisdiction’s insolvency processes”, even if creditors and the foreign commercial community would be much assisted by the court doing so. In the last analysis, cooperation could only be between “actual processes”. 39

37 Lord Hoffmann’s second statement is referenced in HC judgment, at para 11.
38 CA judgment, at para 24.
14 Highlighting the two authorities to which the court had been referred in particular, Re Dallhold and Re TTR, the Court of Appeal remarked that the judge in the first case (Chadwick, J) was applying a purposive approach with view to facilitating the assistance requested and that the synthesis of the letter of request with the application of s 426 allowed for a result neither court could achieve on its own. Referring to the rationale of the judge below, the Court of Appeal was of the view that, were he correct in his views on assistance, he would be required to find that there were no proceedings that could be usefully assisted. Similarly, in the latter case, the court noted that the judge concerned (Collins, J) had made an order in a context where there had been no proceedings afoot in the Isle of Man. Were the judge below correct in his assertion, the court in that case would also have had no jurisdiction to assist.

15 In light of these cases especially, the Court of Appeal had no difficulty in holding that the judge below had erred in his construction of s 426 and in his approach to the application in the case. A number of reasons were advanced, the first being that the wording of s 426, in particular its sub-s (4), was applicable to courts “having” jurisdiction. The provision would not permit courts to assist in matters unrelated to insolvency, but “having” jurisdiction did not mean “exercising” jurisdiction in the sense of imposing a pre-requisite for insolvency proceedings to exist in the jurisdiction making the request. Furthermore, the clear words of the statute, read broadly and purposively, allowed for assistance in the way that the Jersey court had envisaged.

16 Although agreeing in part with the judge below that a “natural habitat” for the provision was where prior proceedings in the requesting jurisdiction are afoot, in effect using the letter of request route as a means of ensuring the opening of “ancillary” proceedings, the Court of Appeal stated that this did not mean orders could not be sought or made where there are no proceedings. The freedom for the court to do so was perfectly consonant with the statements by Lord

40 Ibid, at para 27.
41 Ibid, at paras 28–30 (Re Dallhold) and 33 (Re TTR) respectively, outlining the facts of and arguments in the two cases.
42 Ibid, at para 31. Mention is also made, at para 32, of cases which have approved Re Dallhold.
43 Ibid, at para 34.
44 Ibid. at paras 35–36.
46 Ibid, at para 38.
Hoffmann in *Re HIH* as well as with the recommendations in the Cork Report. It would also accord with the views of Lord Hoffmann uttered in *Cambridge Gas*,\(^{47}\) where he emitted the view that the purpose of recognising the office-holder appointed under the foreign insolvency law was to avoid the starting of parallel insolvency proceedings and to provide remedies they would have been entitled to had equivalent proceedings taken place in the home jurisdiction.

17 As such, the court receiving a request for assistance “must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency”.\(^{48}\) The Court of Appeal’s view was that, were the approach of the judge below to be maintained, it would require the initiation of formal insolvency proceedings before the requesting jurisdiction even where this step was undesirable and would serve no purpose, being potentially counterproductive and simply running up unnecessary costs.\(^{49}\)

18 The last point the Court of Appeal made was in connection with the use of the term “endeavour” by the judge below, on which assistance would be predicated.\(^{50}\) The Court of Appeal found that it was possible to demonstrate that the Jersey court was engaged on just such an endeavour, which the court stated to be the furtherance of the interests of the debtor and its creditors as well as to “facilitate the most efficient collection and administration of the [debtor’s] assets”. The company’s resolution for administration in the United Kingdom, the Jersey court’s consideration of the interests of creditors in acceding to the issue of the letter of request, the request it contained that the issue of priority of creditors be determined according to Jersey law; all these things, for the Court of Appeal, were “the very stuff of insolvency”. Accordingly, there was no good reason to refuse to see these things as the “exercise” of insolvency jurisdiction even though no formal proceedings had been initiated, nor were they contemplated.

19 Even were there proceedings afoot, which could be stayed, the logic of the judge below would not enable assistance to these proceedings, since such assistance could not be described as “meaningful”.\(^{51}\) The Court of Appeal also referred to the Jersey court’s own judgments in *In re OT Computers* and *Re REO*, where it saw that there had been careful consideration of the Jersey court’s jurisdiction.

---


\(^{48}\) *Ibid*, at para 22.

\(^{49}\) *CA* judgment, at para 39.

\(^{50}\) *Ibid*, at para 40.

\(^{51}\) *Ibid*, at para 41.
and desirability for the issue of the letters of request in those cases. For the Court of Appeal, this pointed to the fact that the making of these requests was part of Jersey insolvency law and the way it was exercised.\textsuperscript{52}

20 Accordingly, the recital in the letter of request that the Jersey court was exercising jurisdiction in Jersey insolvency law must be accepted.\textsuperscript{53} The Court of Appeal concluded by affirming that part of the High Court judgment which stated that, were jurisdiction to exist, it would be an appropriate case to appoint an administrator.\textsuperscript{54} For the avoidance of doubt, it also stated that the orders made in previous cases of this type in the United Kingdom were in fact orders that the relevant courts had jurisdiction to make.\textsuperscript{55}

21 The judgment of the Court of Appeal served to restore a wide interpretation of s 426 consonant with views from practice. Had the High Court decision stood, the impact on the practice of “passporting” would have been to stop requests unless the requesting court could fulfil the pre-requisite of proceedings being afoot that could thus be assisted. This might have posed some difficulty for the Jersey court, given the disadvantages of a number of the local procedures. Although this might have been palliated by the opening of whichever of the local procedures was deemed the least disadvantageous, even the opening and staying of those proceedings would have resulted undoubtedly in some impact on the debtor’s estate pending the successful application for an administration order via a letter of request. Such proceedings might also have attracted the view that they were insufficient for the purposes of granting meaningful assistance under s 426.

\textbf{The road often travelled: following the Tambrook example}

22 It was fortunate that service was resumed, as a few more cases have trod the same path in the intervening years, again driven by the lack of a local procedure and the comparative effectiveness of administration at achieving the outcomes desired by the stakeholders.

\begin{itemize}
\item \textsuperscript{52} \textit{Ibid}, at paras 42–43.
\item \textsuperscript{53} \textit{Ibid}, at para 44.
\item \textsuperscript{54} \textit{Ibid}, at para 45.
\item \textsuperscript{55} \textit{Ibid}, at para 46.
\end{itemize}
These cases include *Re Alard*,\(^{56}\) *Re Northern Invs*,\(^{57}\) *Siena*,\(^{58}\) and two cases arising out of the same fact matrix: *Re Orb I*\(^{59}\) and *Re Orb III*.\(^{60}\)

**Re Alard**

23 In the first of the post-\textit{Tambrook} sequence of cases, reporting reasons for an order given some days previously, the court noted that the facts featured a number of similarities to previous applications, in that the company, though incorporated in Jersey, had its assets (bank accounts excepted) in England and Wales, in which jurisdiction security had also been given and where its unsecured creditors were located.\(^{61}\) In particular, defaults in servicing the loan agreement occurring in 2013 had given rise to a formal demand in May 2015 that allowed for the appointment of a receiver under the debenture that had been executed in favour of the bank.\(^{62}\) The company, on whom notice of proceedings had been served, had acknowledged the owing of sums (though not yet quantified) and confirmed that it had no substantial assets in Jersey, all of its investments in property being situated in England and Wales.\(^{63}\)

24 In relation to the avenues that could be pursued, explanation was given that the option of a receivership was discounted by the bank for the reason that the procedure did not protect the bank from the ability of other creditors to take action in respect of their common debtor. Furthermore, the company’s existence would not be brought to an end as the result of a receivership, as further action would need to be taken, whether by the directors or through some other procedure being invoked, as a result of which the entity could be dissolved.\(^{64}\)

25 The option for administration, comforted by counsel’s opinion,\(^{65}\) appeared more effective for a variety of reasons. Given the insolvency of the company, its prospects were limited. However, its assets in England and Wales, consisting of a portfolio of properties, tenanted

\(^{56}\) *Re Alard Invs Ltd* [2015] JRC 137.

\(^{57}\) *Re Northern Invs (Wrexham) Ltd* [2015] JRC 207; 2015 (2) JLR N [12].

\(^{58}\) *Siena SARL v Glengall Bridge Holdings Ltd* [2015] JRC 260; 2015 (2) JLR N [17].

\(^{59}\) *Re Orb arl* [2016] JRC 171 (“*Re Orb I*”).

\(^{60}\) *Re Désastres of Gail Cochrane and Orb arl* [2017] JRC 025 (“*Re Orb III*”).

\(^{61}\) *Re Alard*, at paras 1–2.


\(^{64}\) *Ibid*, at para 7.

\(^{65}\) *Ibid*, at para 2.
for the most part, needed to be actively managed to preserve their value. Other properties in which the company had a beneficial interest would also need to be carefully realised, while the process of realising value also needed to be protected from possible action by other creditors. Bringing the company to an end would also be possible through this process and the administrator reporting the end of proceedings to the relevant authorities in Jersey.66

26 Dealing, in the alternative, with any Jersey options available, the court observed that advice had been given that désastre was not appropriate, given the “sudden death” nature of the procedure which would result in activity ceasing and making it difficult to continue the active management of the debtor’s asset portfolio. In addition, the Viscount would be put to the trouble and cost of making an application for recognition of the désastre in England and Wales and would incur further costs, though eventually borne by the estate, of appointing local agents for realisation purposes.67 Referring to remise de biens, the court recited the view emitted in Re Control Centre that the reference to héritages in the law referred uniquely to Jersey property, thus precluding the use of foreign property to satisfy the requirement.68

27 In deciding that a letter of request constituted the only acceptable route, the court referred to the Tambrook case and the restoration of the availability of administration in England and Wales as a result of the Court of Appeal’s decision in those proceedings, which directly confirmed the authority of the courts to make appropriate orders in response to letters of request.69 In this case, a letter of request was the only appropriate route, given that ordinary jurisdiction could not be satisfied using the COMI test.70 Of the outcomes of administration that were possible, counsel’s view was that the purpose likely to be achieved was that of securing a distribution to one or more secured creditors as a result of the debtor’s property being realised.71

28 Evidencing some concern for the position of the unsecured creditors, only one of whom was located in Jersey, the court was minded to protect their position by the inclusion within the letter of request of a provision requesting preservation of the priority enjoyed by the unsecured creditors that they would have in a désastre and, if this were not possible, for the administration not to go ahead. This, the

68 Ibid, at para 10, referring to Re Control Centre, at paras 15–16.
70 Ibid, at para 11.
court felt, would be sufficient to protect their interests. Agreeing the submissions of counsel, particularly on the appropriateness of administration and that it would be in the best interests of the creditors as a whole and, furthermore, that no party would be adversely affected by the making of an administration order compliant with the terms of the letter of request, the court made the order sought at the request of the bank and of which the company had had full notice.

Re Northern Invs

29 In this case, a company that had been reinstated to the register was made the subject of a letter of request for the opening of administration proceedings in England and Wales. Most of the judgment dealt with the locus standi of the representor, the commercial lender whose advance under a facility to the debtor company had been defaulted upon. As the company had apparently also defaulted in its compliance obligations under the Companies (Jersey) Law 1991, it had been struck off by the Registrar by virtue of art 205 of that law. The application to restore the company, pursuant to art 213 of the same law, was acceded to by the court on the basis that the representor, as a creditor, had sufficient interest to appear in proceedings and that, in default of any other party appearing, despite notice having been given, the court was able to accede to what it considered to be a pragmatic use of the art 213 facility for the purpose of permitting proceedings to be established in another jurisdiction.

30 As for the letter of request component of the representation, the court noted that the sole asset of the company consisted of commercial property in Wales. Thus, the representor sought the issue of the letter of request with a view to the making of an administration order to enable it to recover some of the debt owed it. In motivating the granting of the request, the court simply referred to the authority of Re Control Centre and Re Alard, contenting itself with the observation, comforted by counsel’s opinion, that the company, though a Jersey

---

73 Ibid, at paras 16–17.
74 Re Northern Invs, at para 1.
75 Ibid, at para 2.
77 Ibid, at paras 6–12 and 14–15. The court referred (at para 12) to an unreported Master’s Order of 11 November 2013 (Representation of Al Muthana Inv Co) restoring a company to enable proceedings to be issued elsewhere against the company and other individuals.
78 Ibid, at paras 3 and 5.
entity, had all its assets in England and Wales and, further, that the court in that jurisdiction was likely to accede to the request and grant an order of administration, which would be “more appropriate than other forms of insolvency procedure that could theoretically be invoked in the present circumstances.”

**Siena**

31 At first sight, the basis of the representation trod the usual ground of reciting the interest in opening proceedings in England and Wales on the basis that the Jersey companies the focus of the request have their assets within the jurisdiction of the High Court and that administration would be in the interests of the creditors. The court referred to the jurisprudential history, including *Re Alard, Tambrook* itself and the pre-*Tambrook* Jersey jurisprudence, and confirms the likely availability of the assistance. Nevertheless, the unusual features in *Siena*, according to the court, were a liminal question as to the solvency of the debtor companies and the impact, if any, that should have on the making of the request, given the possibility of a reduction of the value of the estates if subject to insolvency proceedings and a consequent “disproportionate prejudice” to the detriment of the unsecured creditors and shareholders.

32 The facts of the case involved a series of Jersey companies, which, between them were involved in investing and developing property in London. The representor was a special purpose vehicle which had lent moneys to the first respondent, the loan being guaranteed by the remaining respondents. Although the loan, subject to security over the assets, was in the form of mezzanine finance, subordinated to an earlier loan, the recovery sought in the instant proceedings was not opposed by the senior lender, an entity related to the major investor in the SPV, it was acknowledged that the obligations in respect of all lending facilities were in default. However, a critical issue for the respondents was whether, in the absence of meaningful negotiations on achieving a consensual outcome, they should seek to open proceedings in Jersey on the basis of their view that an administration would lead to significant tax liabilities “crystallising” and consequent prejudice to the unsecured creditors and shareholders.

33 The court acknowledged the availability to *Siena* of the remedy of appointing a receiver, deemed unsuitable by reason of the complexity

---

80 *Siena*, at paras 1–2.
of the fact pattern and the fact that the process would not enable overall control of the respondents’ assets and business, but simply the property subject to the security. The preservation of value in the case could only occur through “strong and coordinated management”, a position from which the parties involved do not dissent. That need for active management explains the interest of having an administration, as opposed to a Jersey procedure. This was accepted by the court, in light of the preceding jurisprudence as being in the best interests of all the creditors.

34 Further complicating matters, however, was the presence of parties seeking to intervene in the proceedings to argue that, even if the order were granted, it should be postponed to a future critical date to enable further negotiations to take place. Although resisted by the representor, the court did not feel it could deny the right to intervene to parties in the position of unsecured creditors. Similarly, the court was of the view that it could not exercise its discretion against the admission of parties who were shareholders and who might, according to the court, have interests distinct from the directors, given that in insolvency the focus of their duties had shifted to the creditors. For the court, the arguments over the solvency of the companies involved also underpinned the interest of the shareholders in participating in the process.

35 As for the argument on postponement, it was predicated in essence on securing more time in which to explore further negotiations with a view to a consensual outcome. This position, supported by the respondents and the intervenors, was largely due to concerns over the issue of property values, which went to the solvency of the companies concerned. For the respondents and intervenors, the consolidated balance sheet position showed a net surplus on a valuation commissioned initially by the representor. The court, however, contrasted this with the reported outcomes of negotiations that had taken place with potential purchasers and the likely diminution in value that would occur if a pre-let in relation to part of the property was terminated due to an event of insolvency. This diminution was also used by the respondents and intervenors as grounds for resisting the immediate granting of the order, given that an administration

84 Ibid, at paras 5–6.
would trigger the termination of the pre-let and enhance the risk of tax liabilities crystallising.\textsuperscript{87}

36 Adding to the arguments against, the directors of the respondents averred that they had sufficient funds to continue operations, without risk of wrongful or fraudulent trading liability, until a sufficiently remote date that would enable consensual negotiations to continue. The intervenors also sought to persuade the court to this step, stating that they did not see any urgency for an administration to occur. A postponement would also allow for more time for proposals to be put forward by the respondents and to permit a more careful assessment of the risks of tax liability that would have an impact on the overall outcome.\textsuperscript{88} In response to all the above arguments, the representor simply stated that there were no prospects of a consensual outcome, given the representor had lost confidence in the respondents.\textsuperscript{89}

37 In proceeding to give its decision, the court was mindful that the making of an order is an exercise of its inherent jurisdiction, which should take into account the appropriateness of lending its assistance towards an orderly realisation of the debtor’s assets in the interests of the creditors and that this assistance could take a number of different forms depending on the outcome sought.\textsuperscript{90} The issue of a letter of request could be motivated by concerns over the interests of creditors or of debtors and even if to do so were in the public interest, defined as referring to securing the application of an appropriate procedure to balance the interests involved and to avoid damage to these interests and consequent impact on the reputation of Jersey as a trading jurisdiction.\textsuperscript{91} Thus, the court ought to be mindful of the need to do justice between the parties, particularly in relation to whether the letter of request should be made and whether its making or effect should be postponed.\textsuperscript{92}

38 In that light, the court noted that the arguments for postponement, put forward by the respondents and supported by the intervenors, would have a similar function to a \textit{remise de biens}, particularly its suspensory effect. The court’s understanding, referring to \textit{Re Alard}, was that the procedure would not be available and, even if it were, would be much less flexible than an administration procedure.\textsuperscript{93}

\textsuperscript{87} \textit{Ibid}, at paras 24–31.
\textsuperscript{88} \textit{Ibid}, at paras 32–35.
\textsuperscript{89} \textit{Ibid}, at para 36.
\textsuperscript{90} \textit{Ibid}, at para 21, referring to \textit{Re REO}, at para 16.
\textsuperscript{91} \textit{Ibid}, at para 22, referring to \textit{Re REO}, at para 18.
\textsuperscript{92} \textit{Ibid}, at para 23.
\textsuperscript{93} \textit{Ibid}, at paras 37–38, referring to \textit{Re Alard}, at para 10.
Similarly, both the representor and respondents had the option of désastre, since a number of the pre-conditions would in all likelihood be met. The court was mindful though that, if a more optimistic property valuation could be demonstrated in the short term, then it might refuse the making of an order to avoid the risk of harm and the need to apply for a recall of the désastre, although, on the facts, it doubted this would be the case.\textsuperscript{94}

39 Similarly, the court was doubtful that the assets of the companies could be realised in the short term with values that would make the granting of a letter of request unnecessary. By the same token, the arguments on postponement hinged on whether the time it allowed would be used well to enable a consensual outcome to be satisfactorily negotiated. In addition, for this step to be successful, it would also require some of the unsecured creditors to be paid off to avoid action being taken as some of the intervenors had threatened to do.\textsuperscript{95}

40 One factor, however, that might militate in favour of postponement was the concern the court shared on the negative effect on property values of the termination of the pre-let that, in all likelihood, would be triggered by the making of an administration order. In the end, the court was not prepared to countenance delay on this ground alone, accepting that all insolvency proceedings would have an impact on the value of assets in the estate and that unsecured creditors, by their status and standing in insolvency would always be negatively impacted. Furthermore, on the facts, it was likely that an event of insolvency that would entitle the trigger to be depressed had already occurred, while the unhappy lot of the unsecured creditors might be mitigated a little by the duty of the administrators to conduct proceedings in the interests of creditors as a whole.\textsuperscript{96}

41 Ultimately, the court did not see it as a proper use of its powers to grant an adjournment. For the court, the fact of default was all that was necessary to permit the representor to take out proceedings and to ask for the letter of request to be issued.\textsuperscript{97} Comforted by Counsel’s opinion, the court acceded to the request in reliance on the foregoing jurisprudence subject to a minor amendment to alert the court in England and Wales to the need to consider whether the risk of tax

\textsuperscript{94} \textit{Ibid}, at paras 39–43, incidentally referring to \textit{Re Blue Horizon Holidays} 1997 JLR 124.

\textsuperscript{95} \textit{Ibid}, at paras 44–46.

\textsuperscript{96} \textit{Ibid}, at para 47.

\textsuperscript{97} \textit{Ibid}, at paras 50–51.
liability should be explored as part of the conditions for the granting of an administration order.\(^98\)

**Re Orb I**

42 The case involved an application for the issue of a letter of request in respect of a Jersey company (“Orb”) which was the holding company of a group specialising in property, transport, logistics and investment operations.\(^99\) Following a corporate reorganisation of the group in 2002, its then chief executive, also the husband of the sole director and shareholder, misappropriated funds from another company in which Orb had invested. On discovery of the misappropriation and facing a suit, Orb effected a sale of substantial assets to a third party and to companies and entities he controlled. In turn, the third party transferred those assets to a complex structure in the form of a settlement domiciled in the Isle of Man.\(^100\)

43 The former executive director faced trial on charges relating to the misappropriation in 2006. After his conviction, a confiscation order was made with KPMG being appointed enforcement receivers in respect of the order.\(^101\) Following his release, Orb launched litigation in England and Wales against the third party to whom it had sold its assets, alleging breach of an oral agreement for the share of profits to be made from the investment of those assets. In part, the breach was alleged to have arisen because of the transfer of those assets to the Isle of Man settlement in order to conceal the assets and the profits being made from their use.\(^102\)

44 For the purposes of conducting the litigation, Orb entered into an agreement with its former executive director to share the proceeds of any recovery to the value of the confiscation order. It also entered into a litigation funding arrangement with an entity owned by the executive director’s brother.\(^103\) A further litigation funding arrangement was entered into with the representor secured against Orb’s property and supported by a guarantee given by Orb’s sole director and shareholder. The arrangement would see the repayment of the legal costs funded together with a proportion of the moneys recovered.\(^104\)

---

\(^98\) *Ibid*, at paras 53–54.
\(^99\) *Re Orb I*, at paras 1–2 and 4.
\(^100\) *Ibid*, at paras 5–6.
\(^101\) *Ibid*, at paras 7–8.
\(^103\) *Ibid*, at paras 10–11.
In a related development, proceedings were launched by Orb’s sole director and shareholder against parties involved in the Isle of Man settlement. A deed of settlement compromising the proceedings was entered into by which the parties agreed to procure the transfer of property from the settlement to the sole director and shareholder, but not Orb.\textsuperscript{105} The amount transferred amounted to more than the value of the claim against the third party being brought in England and Wales.\textsuperscript{106} Following this step, the third party who had been involved in originally setting up the trust counterclaimed in the same proceedings that the transfer amounted to a misappropriation by the sole director and shareholder.\textsuperscript{107} The proceedings were eventually compromised by an agreement, to which the representor was a party, that treated the recovery in the Isle of Man as the proceeds of the English litigation.\textsuperscript{108} Two things conspired to upset matters. The first was litigation by the liquidators of the Isle of Man settlement which resulted in a freezing order being obtained against the sole director and shareholder. The second was a criminal investigation launched into the circumstances of the litigation settlement. This notwithstanding, the representor brought proceedings against Orb under the litigation funding agreement in respect of the sums it claimed were owed.\textsuperscript{109} In proceedings, Orb declined to appear, arguing that letters from the enforcement receivers (under the confiscation order previously mentioned) and the investigating authorities in the case of the litigation settlement made the appointment of an administrator, sought by the issue of a letter of request, premature.\textsuperscript{110} In determining the issue of jurisdiction, the court referred to its inherent jurisdiction and to the Jersey jurisprudence.\textsuperscript{111} Noting that the COMI test would ground jurisdiction for the English court, it nonetheless suggested that a creditor might find it difficult to ascertain with any degree of certainty, thus necessitating the production of the letter of request to enable the court in London to have the necessary authority.\textsuperscript{112} In the instant case, the representor did not have the necessary evidence and could not use its right to appoint an

\begin{flushright}
\begin{tabular}{ll}
\textsuperscript{105} & \textit{Ibid}, at paras 14–15. \\
\textsuperscript{106} & \textit{Ibid}, at para 19. \\
\textsuperscript{107} & \textit{Ibid}, at para 16. \\
\textsuperscript{108} & \textit{Ibid}, at paras 21–22. \\
\textsuperscript{109} & \textit{Ibid}, at paras 23–25. \\
\textsuperscript{110} & \textit{Ibid}, at paras 26–28. \\
\textsuperscript{111} & \textit{Ibid}, at paras 29–30. \\
\textsuperscript{112} & \textit{Ibid}, at paras 31–32.
\end{tabular}
\end{flushright}
The court also refers to the same test of its discretion first articulated in Re REO and repeated in Siena. For the court, using s 426 requires the court making the request to be exercising insolvency jurisdiction, which in turn requires cash-flow insolvency to be demonstrated and the applicant’s status as creditor to be beyond doubt, as would also need to be the case were the application in respect of a désastre. After quite lengthy consideration, the court concluded in the affirmative on both issues.

Other factors to be taken into account in deciding whether to issue the letter of request would also include the location of the assets. In this regard, evidence suggested that two particular problems associated with the property that had been identified as potentially subject to the insolvency. First, the ownership status was uncertain, i.e. whether it was owned legally or beneficially by Orb. Secondly, the property was also scattered across a number of jurisdictions. As a result, the substantial connection with England on which the request for an administration order would be premised could be difficult to demonstrate. In such circumstances, any administration procedure would need to gather information, recover assets, intervene in ongoing proceedings as well as bring new proceedings, some of which might need to occur in other jurisdictions.

49 The key question for the court here is whether an administration to permit these tasks to be undertaken would offer any more or less advantage than were the Viscount to do so within a désastre, particularly as it would be likely that the court in London would need to issue a letter of request directed to the court in Jersey to enable the affairs of the group to be properly investigated. This would raise a number of concerns, including some expressed by the Viscount over how an administrator might be supervised while carrying out functions in Jersey, particularly pursuant to powers that would not ordinarily be available in Jersey. Furthermore, the court is doubtful of the utility of an administration as opposed to a désastre, particularly given the difficulty it envisages of seeking recognition of a “passported”

113 Ibid, at paras 33–34.
114 Ibid, para 35, referring to Re REO, at para 18.
116 Ibid, at paras 40–51 and 58.
120 Ibid, at para 66.
insolvency in other jurisdictions.\textsuperscript{121} Taken together with the views of other creditors opposed to its issue, the court ultimately declines to make the order sought, though it recommends consideration by the parties of the merits of initiating désastre proceedings.\textsuperscript{122}

\textit{Re Orb III}

50 The case involved an application by the Viscount, subsequent to the opening of two désastres against Orb and its sole director and shareholder,\textsuperscript{123} seeking the issue of two letters of request, which were granted.\textsuperscript{124} In an admirably short judgment, the court recited a brief history of the litigation and the making of the désastre declarations before court noting the effect of the vesting provision in the law giving the Viscount authority in the désastre proceedings.\textsuperscript{125} Given contradictory statements about the extent of the estates subject to the désastres, the court believed it to be imperative for the Viscount to be able to gather information, intervene in proceedings as well as bring proceedings, if necessary, to ascertain the true extent of the property owned.\textsuperscript{126} In that light, the court did not doubt that it should issue the letters of request to facilitate the recognition of the Viscount’s appointment and to enable her to perform the above tasks.\textsuperscript{127}

\textbf{Summary}

51 In relation to the post-Tambrook jurisprudence, \textit{Re Alard} and \textit{Re Northern Invs} appear to be straightforward applications of the principles established by the sequence of jurisprudence confirmed in Tambrook. Even Siena does not alter the direction of travel, the same considerations involving the benefit for the creditors of having an administration order and the advantages of such a process compared to the outcomes of any locally available procedure. Siena, though, does explore the idea of an anticipatory letter of request, given the postponement sought by the respondents and intervenors. In the end, the court goes with the immediacy of the benefit to creditors, even if there is an arguable impact on the preservation of value of the estate.

52 Collectively, the \textit{Orb} cases raise the issue of the extent to which the “passporting” exercise would produce any better a result than the

\textsuperscript{121} \textit{Ibid}, at paras 67–68.
\textsuperscript{122} \textit{Ibid}, at paras 69–71.
\textsuperscript{123} \textit{Harbour Fund II LP v Orb arl} [2017] JRC 007 (“\textit{Re Orb II}”).
\textsuperscript{124} \textit{Re Orb III}, at paras 1–2.
\textsuperscript{125} \textit{Ibid}, at paras 3–7, referring to art 8, Bankruptcy (Désastre) (Jersey) Law 1990.
\textsuperscript{126} \textit{Ibid}, at paras 8–16.
\textsuperscript{127} \textit{Ibid}, at para 17.
opening of an autochthonous procedure. This could occur in cases where there is a risk of the letter of request being regarded as not likely to have the desired effect, particularly where there may be a doubt as to the connection necessary to ground the opening of administration proceedings. Furthermore, where the fact matrix reveals that there might be a substantial interconnection between the two jurisdictions, it might be difficult to simply relinquish responsibility, especially where a major component of the conduct of proceedings would need to take place in Jersey. In such circumstances, the court would be reluctant to accede to the issue of a letter of request, not least where it is unsure of the reception the request would receive.

53 In the last analysis, the rise of the “passporting” phenomenon since the beginning years of the millennium is well noted. Apart from the temporary hiatus caused by the Tambrook case until it was overturned in the Court of Appeal, the line of jurisprudence can be regarded as sufficiently stable with the principles underpinning its use clearly set out in the case-law. That said, the phenomenon is driven by the way in which Jersey companies and special purpose vehicles are used for tax efficiency reasons as property owning entities, particularly for major development projects in England and Wales. In such circumstances, England and Wales could be regarded as the “natural” home for the insolvencies, the choice of location of incorporation not necessarily being seen as determinative of the outcome.

54 This view can only persist, however, if there is no alternative procedure available in Jersey. For the moment, there is no local version of administration, nor any analogous procedure that could potentially deliver similar outcomes. Until such time as one is enacted, the “passporting” exercise is the only route for such entities to be able to access the types of benefit, including rescue, that are included in the possible outcomes of administration. Overall, given that the number of cases overall is slight, there may be no immediate rush to legislate. However, the necessity of doing so may be justified by reference to the interests involved, which, in these cases, are not negligible.

Paul J. Omar, of Gray’s Inn, Barrister, Former Visiting Professor, Institute of Law, Jersey.