



ADVISORY
Industry Information

Royal Court provides helpful guidance to companies that make distributions in contravention of Article 115 of the Companies (Jersey) Law 1991 (as amended)

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The Royal Court has, for the first time, provided helpful guidance as to the need to provide the Court with full explanations in order to help it consider an application to rectify distributions made in contravention of Article 115 of the Companies (Jersey) Law 1991 (as amended) (the **Companies Law**).

The decision in *In the matter of the Representations of The Royal Bank of Scotland International Limited and The Royal Bank of Scotland International (Holdings) Limited* [2017] JRC 120A was borne out of applications made by The Royal Bank of Scotland International Limited (**RBS International**) and The Royal Bank of Scotland International (Holdings) Limited (**RBSI Holdings**), seeking orders under Article 115ZA of the Companies Law that various distributions made by each of those companies be taken as having been made in compliance with the requirements of Article 115 of the Companies Law.

The Law

In recent years, the Companies Law has seen significant amendments, which include amendments to Article 115 that were brought in by the Companies (Amendment No. 9) (Jersey) Law 2008 (the **2008 Amendments**). Article 115 of the Companies Law deals with restrictions on distributions made by a company and makes clear that the Companies Law only restricts or seeks to control distributions which reduce the net assets of the company or which are to be regarded as liabilities in the accounts of the company. The 2008 Amendments introduced, *inter alia*, a new regime governing distributions made by a company such that, pursuant to Article 115(3), where the company is not an open-ended investment company, a distribution may only be made if the directors make a statement of solvency in accordance with Article 115(4) (the **Statement of Solvency**). A Statement of Solvency is required even where the company has distributable reserves and must state that the directors have formed the opinion that:-

- » Immediately following the date of the proposed distribution, the company will be able to discharge its liabilities as they fall due; and
- » Having regard to (i) the prospects of the company and the intentions of the directors with respect to the management of the company's business and (ii) the amount and character of the financial resources that will, in their view, be available to the company, the company will be able to continue to carry on its business and discharge its liabilities as they fall due until the expiry of the period of 12 months immediately following the proposed date of distribution, or until the company is dissolved on the basis of a solvent winding up.

The 2008 Amendments also enabled distributions to be made from both profits and any account save for nominal share capital and any capital redemption reserve fund (prior to the 2008 Amendments, distributions to shareholders could only be made out of profits, the governing principle being the maintenance of capital).

Ability to rectify mistakes made

Article 115ZA of the Companies Law was introduced by means of the Companies Law (Amendment No.11) (Jersey) Law 2014 (the **2014 Amendment**). Article 115ZA enables a company that has made a distribution in breach of Article 115 to apply to the Court seeking an order that the distribution be treated as if it had, in fact, been made in accordance with Article 115. In considering whether or not to make such an order, the Court will consider if:-

- » immediately after the distribution was made, the company was able to discharge its liabilities as they fell due;
- » at the time that the application is made, the company is able to discharge its liabilities as they fall due; and
- » in circumstances where a distribution was made less than 12 months before the date on which the application is determined, the company will be able to carry on business and discharge its liabilities as they fall due within 12 months starting on the date on which the distribution was made.

The Court must also be satisfied that it would not be contrary to the interests of justice to make such orders.



Facts giving rise to the applications by RBS International and RBSI Holdings

Since the amendments to [Article 115](#) in 2008, both RBS International and RBSI Holdings had declared a number of significant interim dividends at board meetings over a seven and a half year period. However, due to an oversight, the changes brought in by the 2008 Amendments had been overlooked, such that on each occasion that a distribution was paid, the directors had failed to sign the mandatory Statement of Solvency, in breach of the Companies Law. RBS International and RBSI Holdings therefore made applications seeking orders under [Article 115ZA](#) of the Companies Law, that all distributions be treated as if they had been made in accordance with [Article 115](#).

The applications of RBS International and RBSI Holdings were first presented to the Royal Court in December 2016; however matters were adjourned as neither company had provided a full explanation as to how the requirement for a Statement of Solvency had been missed by so many over such a long period of time. Matters came back before the Court at the end of April 2017, at which time a second affidavit was provided by the finance director of the two companies, explaining that whilst the RBS Group had in place a process by which changes to applicable laws and regulations in various jurisdictions were identified, the changes in the Companies Law introduced by the 2008 Amendments had been overlooked. It was submitted that notwithstanding the failure to produce a Statement of Solvency prior to each distribution, the directors of each of the companies had considered the solvency of each company at the relevant time. In auditing the companies, the auditors had not specifically looked at compliance with the provisions of the Companies Law, as they had taken the view that there was sufficient evidence that the board had approved the dividends and that financially, the dividends were properly paid.

The Court's decision

The Court accepted, without difficulty, that both companies were able to meet their liabilities (especially given that both companies are still carrying on business long after the distributions had been made). However, the lack of detailed information presented the first time that the applications were brought before the Court as to:-

- a. How the requirement for the Statement of Solvency had been overlooked for such a long period of time; and
- b. The basis upon which the directors expressed their satisfaction as to the current solvency of the two companies,

meant that the Court was not able to satisfy itself that it would be in the interests of justice to make the orders sought; conversely, when armed with full information, the Court felt able to do so.

In giving this judgment, the Court made clear that, under [Article 115ZA](#), it is the Court that needs to be satisfied that a company is able to discharge its liabilities as they fall due; it is not sufficient for the directors simply to state their opinion as to the solvency of the company without explanation as to the basis upon which they have reached that conclusion.

Conclusion

The Court has, on numerous occasions, stated its willingness to assist companies where appropriate and just to do so; however, this case highlights the importance of providing the Court with detailed information in order to assist it with its decision-making process. This case also serves as a useful reminder of the importance of staying up to date with legislative amendments.

Contacts

For further information please speak with your usual contact or:



Damian Evans
Partner
T: +44 (0)1534 700 714
E: damian.evans@walkersglobal.com



Jonathan Heaney
Partner
T: +44 (0) 1534 700 786
E: jonathan.heaney@walkersglobal.com



Marc Seddon
Senior Counsel
T: +44 (0) 1534 700 761
E: marc.seddon@walkersglobal.com



Fritha Ford
Senior Associate
T: +44(0) 1534 700 899
E: fritha.ford@walkersglobal.com



Niall MacDonald
Senior Associate
T: +44 (0) 1534 700 885
E: niall.macdonald@walkersglobal.com



James Turnbull
Associate
T: +44 (0) 1534 700 776
E: james.turnbull@walkersglobal.com

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