IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 121 OF 2018 (IKJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND

IN THE MATTER OF HARLEQUIN HOTELS AND RESORTS LIMITED

IN OPEN COURT

Appearances:

Mr Jeremy Snead and Ms Heather Froude of Appleby, on behalf of the Petitioner

Ms Kate McClymont of Broadhurst LLC on behalf of the Company

Before: **The Hon. Justice Kawaley**

Heard: **11 September 2018**

Date of Decision: **11 September 2018**

Reasons Circulated: **17 September 2018**

Reasons Delivered: **21 September 2018**

HEADNOTE

Winding-up petition-order sought on insolvency or just and equitable grounds- last-ditch oral application by company for adjournment in order to oppose petition on grounds that debt disputed on substantial grounds-exercise of discretion to wind-up-exercise of discretion to refuse adjournment application

REASONS FOR WINDING UP ORDER

Background

1. On July 3, 2018, Brian Glasgow in his capacity as the Bankruptcy Trustee of the estate of Harlequin Property (SVG) Limited ("HPSVG") presented a Petition to wind-up the Company on the grounds of insolvency and alternatively on the just and equitable ground.

2. The Petition (issued with a notice of hearing for September 11, 2018 at 9.30 am) was served on July 5, 2018. The prescribed time for the Company to file evidence in opposition to the Petition was within 14 days of the date of service. The Petition and its appointed hearing date and time were advertised in '*The Times*' and the '*Cayman Compass*' on August 23 and August 24, 2018, respectively. Prior to the hearing, the Company took no formal steps to signify to the Court or the Petitioner that it had instructed counsel to appear at the hearing of the Petition.

3. The Petition was in part based on a Statutory Demand, so that the Company had been put on notice that a winding-up petition might be presented before the Petition was actually presented and served. The Statutory Demand was served by Appleby on the Company's registered office on April 3, 2018. On April 13, 2018, the Company's (and Harlequin Group) principal Mr David Ames responded directly to Appleby by email disputing the debt and setting out legal objections to the presentation of a petition based on a disputed debt. Nelson & Co. confirmed on April 23, 2018 that it had recently been instructed by the Company which "vigorously" denied liability for the sum claimed. Appleby responded on 1 May 2018 rejecting the contention that the Company was entitled to unilaterally revise intercompany accounts to extinguish the debt and indicating that it stood by its right to present a petition. After considering further materials forwarded by Mr Ames himself via email in mid-May (including material from English solicitors), Appleby on June 28, 2018 notified Mr Ames and Nelson & Co that:

> "*...We have instructions to issue a petition for winding up of HHR without further notice.*"

4. On September 11, 2018, the Petition was formally listed for hearing in Court No. 6. For internal administrative reasons, the present matter was reassigned to Court No.4. The Petitioner's legal team, the only attorneys of record, were duly apprised of this

courtroom reallocation. After a brief and seemingly unopposed hearing at the end of which the Order sought was granted, I was returning to my Chambers when Mr Snead chased after my Marshall and myself to advise that counsel had belatedly appeared for the Company. I returned to Court and proceeded to hear the application on behalf of the Company, Ms McClymont having explained that she had attended Court No.6 at the appointed time and only belatedly learned that the present matter was in fact being heard in Court No. 4.

5. The application advanced on behalf of the Company by counsel on her feet was simply this. An adjournment was sought to afford the Company an opportunity to properly instruct counsel and file evidence in support of its case that the debt upon which the Petition was based was a disputed one. In the exercise of my discretion I refused the application for an adjournment and confirmed the Order I had initially made. The Order provided that, *inter alia*:

   (a) the Company should be wound-up; and that

   (b) Kris Beighton and Jeffrey Stower of KPMG should be appointed as Joint Official Liquidators ("JOLs") of the Company.

6. I now give reasons for this decision.

Insolvency ground for winding-up- is the debt disputed in good faith on substantial grounds?

7. The Petitioner's primary submission was that the Company is deemed to be insolvent under the provisions of section 93(a) of the Companies Law. He invited the Court to conclude that although the Company has alleged in correspondence that the debt is disputed on substantial grounds, no substantial dispute has in fact been raised. In short the Company, through Mr Ames has:

   (a) admitted that inter-company accounts disclose a debt owing to the Petitioner; and

   (b) asserted a right to net-off this debt against various other inter-company debts without providing a credible legal or factual basis for this less than straightforward exercise.

8. This submission assumed, as the position appeared to be on the eve of the hearing, that the Company had elected not to oppose the Petition. After all, the Companies Winding Up Rules 2018 ("CWR") Order 3 rule 9 provides as follows:

> "***Evidence in Opposition to Petition (O. 3, r. 9)***
>
> *9. (1) If the company intends to oppose the petition, its affidavit in opposition must be filed and served upon the petitioner within 14 days from the date upon which the petition was served upon the company.*
>
> *(2) The petitioner may serve a notice, at least 3 days prior to the hearing date, requiring that any deponent attend the hearing for cross-examination.*"

9. The CWR are designed to ensure that a petitioner is afforded an opportunity to have the petition heard on its merits at the first hearing. It is within the broad ambit of the CWR for a Company to seek an adjournment having filed evidence in opposition to a petition. The petitioner and the Court can, to a preliminary extent at least, based on a review of that evidence assess the merits of the Company's opposition and the merits of its request for an adjournment.

10. In the present case the Company filed no evidence in support of the assertion made in correspondence that the Petition debt was disputed on substantial grounds. On their face the assertions made in correspondence by the Company disputing the debt lack conviction. The force of the assertions is further diminished by the fact that no deponent was willing to swear to the substance of the dispute in a timely manner. On its face the argument appeared to be not that the Petition debt did not exist, but rather that (on a Group accounting basis, not on the basis of setting off mutual debts), the Company is not ultimately a debtor.

11. In my judgment the Court was entitled to conclude that the Petition was in substance unopposed and that the Company was deemed to be insolvent because it failed to pay the sum claimed in the Statutory Demand. Raising an implausible dispute in correspondence alone was insufficient in the context of the present case to raise even an arguable case for striking-out or dismissing a winding-up petition on the grounds that the petition debt is disputed.

Locus standi to petition-exercise of discretion to wind-up without resolving the issue of whether or not the Petition debt is undisputed

12. Even if I had concluded that the matters raised in correspondence by the Company had some merit on their face, the Petitioner advanced an alternative legal basis for side-stepping the disputed debt "defence". It is well recognised under Cayman Islands law that where a petition debt is disputed on substantial grounds, the Court retains the discretion to decline to dismiss or strike-out the petition. The Court does not have to either resolve the dispute itself or direct that the dispute be resolved in more appropriate separate proceedings. The Court need only determine whether the petitioner has established a *prima facie* case that it is a creditor in order to make a winding-up order. The Petitioner's counsel placed two important authorities before the Court each of which explicitly supported these principles: *In the Matter of Parmalat Capital Finance Limited* [2006 CILR 171]; *In the Matter of GFN Corporation Limited* [2009 CILR 135].

13. In *Parmalat*, Henderson J was "*not prepared to dismiss this petition on the basis of an alleged dispute on substantial grounds advanced for the first time more than two years after the filing of the petition and supported solely by assertions made in US proceedings*" (paragraph 24). Smellie CJ in *GFN* explained the governing legal principles as follows:

> "*23. In the first place...the question of locus standi to petition is, indeed, a threshold issue going to the jurisdiction of the court to hear a petition. As such ...what is required is a prima facie showing, or alternatively, as Lord Denning stated in Re Claybridge Shipping Co. S.A.*[1]*, a good arguable case in that regard. A conclusive finding as to the existence of the indebtedness can only ever be made in the context of the winding up itself, after the books and records of the company will have been examined by the liquidator and a decision taken to accept or reject the proof of debt.*
>
> *24. Secondly, and again as demonstrated in Re Claybridge Shipping Co. S.A. (per Oliver, L.J.), it must always be open to the court as a matter of discretion to say that, in exceptional circumstances, the rule against petitions based on disputed debts should not be followed because to do so would result in injustice or unjustifiable inconvenience or hardship to a petitioner....*
>
> *25. This principle should now be regarded as settled in Cayman law. In allied Leasing & Fin. Corp v. Banco Economico S.A.*[2]*, the Court allowed a petition to wind up, despite the existence of a dispute over the indebtedness on which it was based....*

[1] [1997] 1 BCLC 572.
[2] [2000] 1 CILR 118].

26. Finally, and most conclusively on this point, as Lord Brightman said, on behalf of the Privy Council, in Brinds Ltd. v. Offshore Oil N.L. (2 BCC at 98,921-98,222): "

> *'It is a matter of discretion for the judge whether a winding-up order should be made on a disputed debt, and it is also a matter of discretion whether he decides the substantive question of debt or no debt'..."*

14. If I had felt bound to find that there was a substantial dispute about the existence of the Petition debt, I would have found in the alternative that the Petitioner had established a good arguable case that he was a creditor in any event. Accordingly, the Petition was not liable to be dismissed solely on the grounds that the debt upon which it was based was a disputed one. Although the Petitioner did not assert that the Company's insolvency could be inferred otherwise than by reference to non-payment of the Statutory Demand, it was submitted that there were alternatively just and equitable grounds for making a winding-up order.

Just and equitable grounds for winding-up

15. The case for a just and equitable winding-up was advanced on clear and compelling grounds. The Harlequin Group had apparently been:

> "*...used as a vehicle to perpetrate a very significant scam...Deposits totalling £450 million were accepted from thousands of investors and those investors have suffered very significant losses. As a result, a number of companies within the Harlequin Group have entered into insolvency/bankruptcy...The appointment of official liquidators will permit the affairs of the Company and its involvement in the Harlequin Group to be investigated and the interests of the investors in the Harlequin Group to be pursued...*" ('Skeleton Argument On Behalf of the Petitioner', paragraphs 17, 29).

16. These assertions were supported by the Petitioner's unchallenged evidence in support of the Petition, with counsel very carefully pointing out that charges laid against Mr Ames by the Serious Fraud Office in England last year should obviously not be taken as proved. Reliance was placed in general terms on the views expressed by the English High Court at an earlier stage of judicial scrutiny of the affairs of the Harlequin Group. In *Harlequin Property (SVG) Limited and another-v- Wilkins Kennedy (a Firm)*[2016] EWHC 3188 (TCC), Coulson J set the scene at the beginning of a comprehensive judgment in the following way:

"4. This case does not lack startling features. The following will suffice as examples. There is an ongoing Serious Fraud Office ("SFO") investigation into Harlequin, and putting the words 'Harlequin Property' into any search engine or social media immediately brings down a shower of invective and complaint by their erstwhile investors. There have been significant findings of fraud and dishonesty against Mr O'Halloran, in connection with the construction of the resort, made by the High Court in Dublin. There have been defamation proceedings, resolved by an apology and a payment of money to Mr and Mrs Ames, as a result of a website which published lies about and threats against Harlequin, and which was discovered to be the work of Mr Jeremy Newman, a senior employee of WK, who provided services to Harlequin at the same time as being ICE's chief financial advisor.

5. If those examples were not enough, there are at least four significant features of this case which, in my experience, are unique, and which lie behind much of what went so disastrously wrong with this development.

6. First, the construction works at the resort were funded by deposits made by Harlequin investors who wanted to purchase cabanas (a small bungalow with one or more bedrooms) or apartments, either at this resort, or other resorts planned by Harlequin round the world. But the deposits were not ring-fenced, so there was no link between an investor's 30% deposit for a property at one of the Harlequin resorts, and the destination of that money. The money might go to any other of the numerous Harlequin developments, or might be used for entirely different purposes altogether, such as the generous commissions paid to Harlequin's sales agents, the large sums paid to the Ames family as directors of the web of related Harlequin companies, or separate enterprises altogether, such as the Harlequin travel agency, and the sponsoring of Port Vale FC.

7. Secondly, despite the limited land purchased by Harlequin at Buccament Bay, and the very obvious physical restraints of the site as a whole, there was no limit to the number of deposits which were taken for the proposed resort there, with the result that there was a huge imbalance between the properties for which a 30% deposit was paid to Harlequin, and the number of properties that had been (or were realistically going to be) built at the Buccament Bay resort. This discrepancy was exacerbated by the fact that, of all the numerous Harlequin projects in the Caribbean and elsewhere, it was/is only the Buccament Bay resort that has ever been built. So, although more than 1,900 deposits were taken for Buccament Bay, and 8,200 overall for all Harlequin developments worldwide, only 195 units have been built at Buccament Bay and none anywhere else. Of those completed units, only about 16-20 are now owned and occupied by the 1,900 investors: the other buildings are used as hotel rooms, with Harlequin, not the investors, receiving the sums paid by the holiday-makers who stay at Buccament Bay. These two elements of the Harlequin business model might be said to bear the hallmarks of a serious and significant scam.

8. The third remarkable feature of this case arises out of the development itself. Harlequin paid ICE, its contractor, around \$52 million. They did so, not only without any sort of written contract, but without any detailed agreement as to the scope of the works to be carried out, the monitoring of those works, or their

valuation. Although fixed weekly payments were agreed in significant sums, these payments were not in any way tied to interim claims for payment made by ICE, let alone an independent valuation process operated on behalf of Harlequin SVG. ICE received the agreed amount every week, regardless of what, if any, work they had carried out. In the Dublin litigation (***Harlequin Property (SVG) Limited and Harlequin Hotels and Resorts Limited v Padraig O'Halloran and Donal O'Halloran*** *[2013] IEHC 362), McGovern J described this situation as "extraordinary". That is, if anything, an under-statement. In my view, for a project of this size, the fact that there were no financial controls whatsoever beggars all belief.*"

17. In their written submissions, Mr Snead and Ms Froude also relied on the same two authorities referred to in connection with the disputed debt principle above. *In the Matter of Parmalat Capital Finance Limited* [2006 CILR 171] was a case where the company itself was "*hopelessly insolvent*". But Henderson J nevertheless stated a principle which in my judgment applies with equal force to a member of a corporate Group which includes hopelessly insolvent members:

> "*18. PCFL is hopelessly insolvent. The circumstances surrounding its downfall need continuing investigation, and that is a free standing ground for making a winding up order…*" [Emphasis added]

18. *In the Matter of GFN Corporation Limited* [2009 CILR 135] provides more direct support for the proposition that facilitating the investigation of the collective affairs of an insolvent group constitutes grounds for a just and equitable winding-up. In that case, this Court proceeded on the basis that the petitioner's insolvency was enough to make it just and equitable to wind-up the respondent without being satisfied that the respondent itself was insolvent. Smellie CJ crucially held:

> "*37. In the wider context of the allegations in this petition, the authorities have also clearly established that the court has jurisdiction, in the exercise of its statutory discretion, (given here by ss. 94 and 100 of the Companies Law) to wind up a company on the basis that an investigation into its affairs is necessary and justified. In the present circumstances, the court can use its discretion, more especially because an investigation into GFN's affairs relating to the petitioner is justified.*" [Emphasis added]

19. In the present case, the verified Petition presented by the trustee of an insolvent member of the Harlequin Group averred as follows:

"26.4 Further and in the alternative, HHR is part of a group which has perpetrated a scam which has caused very significant losses for investors and creditors; and

26.5 Allowing Mr Ames and HHR to continue to hide behind the remaining structures of the Harlequin Group risks further losses for investors and creditors."

20. Mr Glasgow in his supporting and verifying Affidavit also pertinently deposed as follows:

"46. Based on KPMG's investigations and as apparent from the findings of the courts of England, SVG and St Lucia, I have formed the view that HHR has operated as an intrinsic part of an enterprise that has defrauded a significant number of investors. HHR has been party to transactions which need to be investigated and received money which needs to be accounted for."

21. Coulson J, commenting on the commencement of insolvency proceedings in Saint Vincent and the Grenadines in relation to the present Petitioner (in *Harlequin Property (SVG) Limited and another-v- Wilkins Kennedy (a Firm)* [2016] EWHC 3188 (TCC) at paragraph 887) stated: "*It makes me even more certain that this court needs to take all legitimate steps it can to ensure the protection of the investors.*" This same factual and legal policy imperative made it clear to me that it was just and equitable that the Company be wound-up.

The application to adjourn the Petition

22. Serious applications to adjourn a winding-up petition on the grounds that the debt is disputed[3] are usually advanced in one of the following ways:

(a) the petition comes on for hearing while a summons filed by the respondent to strike-out or stay the petition on abuse of process grounds is still pending before the Court. It is agreed that the petition must be adjourned;

[3] A more flexible approach is of course adopted where the petitioner, the company or other creditors seek an adjournment with a view to exploring or undertaking a restructuring.

(b) by the date of the hearing of the petition, the respondent has filed an affidavit disputing the debt and explaining why the petition should be dismissed or stayed. The Court is asked to decide whether or not to fix a special appointment to determine whether or not the petition should be heard on its merits;

(c) on the hearing of the petition the respondent has filed no evidence in opposition to the petition, but as a result of out of court negotiations it is agreed that the petition should be adjourned; and/or

(d) on the hearing of the petition the respondent has filed no substantive evidence in opposition to the petition, but has filed an affidavit seeking an adjournment and setting out extenuating circumstances for its failure to comply with the obligation to file its evidence in opposition within 14 days of service of the petition. Such evidence would at least foreshadow or outline a defence to the petition. The Court is then tasked with assessing the merits of the case for an adjournment by reference to sworn evidence

23. This well-worn practice does not just flow from the fact that CWR Order 3 rule 9 requires affidavits by respondent companies opposing the petition to be filed in advance of the hearing. That statutory procedural requirement itself derives from the substantive legal principle that a petitioner who makes out a *prima facie* case for winding-up is *prima facie* entitled to an order. It is for the respondent company to persuade the Court that an order ought not to be made.

24. The Petitioner's counsel expressly relied upon this important principle, placing the decision in *In the Matter of HSH Cayman I GP Limited et al* [2010(1) CILR 157] before the Court. Jones J in that case opined:

> "*11. The applicable legal principles are well established and not in dispute between the parties. On the basis of the admitted facts, the petitioner has a prima facie right to expect the court to make winding-up orders. The court's power is a discretionary one, but the petitioner can expect the court to exercise its discretion in favour of making an immediate winding-up order unless it is satisfied that there is some exceptional circumstance or special reason which justifies the adoption of a different course.*"

25. In the present case I was satisfied that the Petitioner had established a *prima facie* case for a winding-up order in his capacity as a creditor on the grounds of insolvency and/or on the even more compelling just and equitable ground. The burden lay on the

Company to establish special reasons why the winding-up order sought should not immediately be made, bearing in mind that it had filed no evidence in opposition to the Petition either within the required time or at all.

26. The Company instructed counsel to make an oral application for an adjournment unsupported by a shred of evidence, based on a plea for an opportunity to take legal advice and file evidence in opposition to the Petition. This was the most insubstantial and unconvincing way imaginable of advancing an application to adjourn the Petition in all the circumstances of the present case. The Company was served with a Statutory Demand on April 3, 2018 and the Company has been in touch with lawyers and has threatened to vigorously contest any petition which was presented several months ago. In the course of the hearing I likened Ms McClymont's brave last-ditch battle to defend the Company to 'Custer's last stand'. The adjournment application was plainly hopeless and could only be refused.

Summary

27. For the above reasons, on September 11, 2018 I ordered that the Company should be wound-up and refused the Company's application to adjourn the Petition.

HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT