EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCM2016/0011

IN THE MATTER OF A PETITION FOR THE WINDING UP OF HARLEQUIN RESORTS (ST. LUCIA) LTD.

AND IN THE MATTER OF SECTION 385, 386 and 387 OF THE COMPANIES ACT CAP 13.01 OF THE REVISED LAWS OF SAINT LUCIA, 2013

BETWEEN:

CREDITORS OF HARLEQUIN RESORTS (ST. LUCIA) LTD.
Represented by (1) JUDITH ANDERSON, (2) ANTHONY CLEMENTS and (3) LESLEY CLEMENTS

Petitioners

and

HARLEQUIN RESORTS (ST. LUCIA LTD.

Respondent

Appearances:

Ms Renee St Rose for the Petitioners and the Financial Services Compensation Scheme Limited of the United Kingdom as interested creditor
Mr Deale Lee for the Respondent
Mr Garth Patterson QC with Mr Mark Maragh for the Trustee in Bankruptcy of Harlequin Property (SVG) Limited as interested creditor
Mrs Natalie Augustin for Appeltjie Properties Limited as interested creditor

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2017: June 12
June 30

Petition for compulsory winding up - subsequent members voluntary winding up – declaration of solvency - balance sheet insolvent - exercise of court's discretion – appointment of liquidator

The petitioners in this action are a representative group for 85 creditors of Harlequin Resorts (St Lucia) Limited (the respondent), all of whom reside in the United Kingdom (UK). They have issued a written demand for return of deposits and stage payments made for purchase of villas in the respondent's off-plan luxury hotel and resort development known as the Marquis Estate Project in Saint Lucia. To date that demand remains unsatisfied. The petition filed on 16th April, 2016 alleges that the respondent is unable to pay its debts and it is just and equitable that the company be wound up pursuant to section 385 (c) and (e) of the Companies Act[1] (the Act).

The respondent opposed the petition stating that (1) it is solvent; (2) there is a dispute as to whether the claims under the contracts with the petitioners are now due; (3) in keeping with the terms of the contracts that issue should be referred to arbitration; and (4) the petitioners are not legitimate creditors because they may have submitted claims and received compensation from the Financial Services Compensation Scheme Limited (FSCS) in the UK and have not clarified this in the petition.

Other parties have appeared as interested creditors, to support the petition. On the eve of the hearing the respondent resolved to commence a member's voluntary winding up, claiming that it would be in a position to pay all its debts within 12 months of commencement of the wind up. A declaration of solvency was sworn and filed along with the requisite statement of assets and liabilities and a liquidator appointed.

The petitioners and interested creditors view this action as an effort to abort the petition and ask that a compulsory order be made to bring the liquidation under the court's supervision and to have their choice of liquidator appointed in place of the respondent's appointee.

Held: This court finds that the circumstances of the case necessitates a compulsory order and appoints Brian Glasgow and Craig Waterman of KPMG as joint liquidators.

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** The respondent[2] was incorporated in Saint Lucia in 2007, as the corporate vehicle for construction of an off-plan hotel and resort development at Marquis Estate in Saint Lucia. It is a wholly owned subsidiary of Harlequin Hotels and Resorts Limited (HHRL), a company incorporated in the Cayman Islands. David Ames (Mr Ames) is the sole director of the respondent, as well as a number of affiliated companies incorporated in several Caribbean countries, the UK and other countries around the world. These companies are involved in construction, marketing and sale of similar developments. I refer to them collectively as the Harlequin Group.

[1] CAP 13.01 of the Revised Edition of the Laws of Saint Lucia
[2] Company No. 2007/C469

[2] In 2008 and 2009 the petitioners entered into contracts with the respondent for acquisition of luxury villas in the Marquis Estate Project, with a completion date of December 31, 2013. Deposits and in some cases stage payments were paid by the petitioners to Harlequin Management Services (South East) Limited (HMSSE), an affiliate company incorporated in the UK, which served as the sales and marketing arm of the Harlequin Group. That company is currently in liquidation. It is almost four years past the completion date of the Marquis Estate Project and except for the acquisition of lands at Marquis, the project has not commenced. On 10th July, 2015 the petitioners' solicitors[3] in the UK issued a written demand to the respondent for return of payments totaling £2,440,350.00. The demand was hand delivered to the respondent's registered office in Saint Lucia on 13th July, 2015. The respondent has failed to pay the sums demanded.

[3] Soon after the petition was filed Appeltjie Properties Ltd and C.O. Williams Construction (St Lucia) Limited filed notices of intention to appear as interested creditors, to support the petition.

[4] The petitioners, respondent and interested creditors commenced settlement discussions and requested that the hearing be adjourned to arrive at a consent order. A draft order was presented to the court on 3rd April, 2017. On that day Mr Garth Patterson QC appeared on an application[4] filed by the Trustee in Bankruptcy for Harlequin Property (SVG) Limited (HSVG), seeking leave to intervene as an interested party. That company was incorporated in St Vincent and is part of the Harlequin Group.

[5] The application was premised on an inter-company debt owed by the respondent to HSVG, for deposits paid by investors under contracts erroneously entered into with HSVG, for sale of villas in the Marquis Estate Project owned by the respondent. The purchasers under these erroneous contracts have presented their claims in the HSVG bankruptcy estate, seeking a share in the distribution of the proceeds from that estate. HSVG claims that this represents a significant dilution of the funds available to creditors who contracted

[3] Regulatory Legal Solicitors now Waterside Legal LLP
[4] Filed on 31st March, 2017

with it for purchase of villas in its Buccament Bay Project in St. Vincent and must be reimbursed by the respondent.

[6] In addition it is alleged that significant sums collected by HSVG were diverted to the Marquis Estate Project and on that basis HSVG considers itself a creditor of the respondent. Brian Glasgow (Mr Glasgow) as trustee in bankruptcy and FSCS as a creditor of HSVG and Inspector on HSVG's Inspector's Committee provided comprehensive affidavits and exhibits in support of HSVG's application. The FSCS operates out of the UK and manages a statutory fund of last resort, utilized for compensating customers of financial services firms in the event of failed financial transactions. Upon payment of compensation FSCS takes an assignment of the investor's rights to claim against the firm or a third party.

[7] HSVG also opposed the consent order on the ground that it would give rise to a fraudulent preference among creditors, as no provision had been made for a vast number of existing creditors who are known to the respondent. The consent order was subsequently withdrawn.

[8] On 29th May, 2017 HSVG's application was fully ventilated, with the respondent disputing a debt of £7.7 million claimed by HSVG and alleging that the sum of £24.7 million is due from HSVG. In addition the respondent says that it has assumed responsibility for the erroneous contracts, by way of a Deed of Assignment[5] between HSVG and itself. I observe that the deed was signed solely by Mr Ames as signatory for both HSVG and the respondent. HSVG contends that for various reasons the deed is invalid. The respondent also says that HSVG has had the benefit of these deposits and has the tangible asset at Buccament Bay to support this.

[9] It is not the role of the court, on such application, to seek to resolve disputed debt in relation to interested creditors. Proof of such claims fall within the purview of a liquidator and should not to be confused with the status of a petitioner who is required to demonstrate that standing as a creditor is not in question, in order to approach the court.

[5] Dated 1st March, 2012 and signed by David Ames on behalf of both entities

[10] An application by an interested creditor for leave to be added out of time is usually granted as a matter of course, provided the applicant does not seek an order for payment of costs for appearing. It is also understood that creditors appearing are not generally expected to take on a prominent role in the hearing of the petition and are not required to file or take copies of evidence, unless directed by the Court to do so[6]. In my view a prima facie case sufficed for this application.

[11] The application was granted and HSVG added as an interested creditor, on the premise that it would be required to prove its claim like all other interested creditors, once liquidation commences.

[12] The court was then apprised of a letter dated 26th May, 2017 to the Registrar of the High Court, for the purpose of these proceedings, which informed that the respondent had initiated a members voluntary winding up. The resolution was dated 25th May, 2017 and filed at the Registry of Companies on 26th May 2017. Jeffrey Coyne (Mr Coyne) of Cap Estate, Saint Lucia was appointed liquidator. The court was given sight of the following documents:- (1) minutes of a meeting of the board of directors of the respondent held on 25th May, 2017; (2) declaration of solvency sworn by Mr Ames stating that he had made a full enquiry of the affairs of the respondent and formed the opinion that the respondent will be able to pay its debts in full within the next 12 months; and (3) a statement of assets and liabilities as at 19th May, 2017. The petitioners requested a short adjournment to consider and provide a position on the voluntary wind up.

[13] At this juncture I considered it imperative that no steps should be taken in the voluntary liquidation, in relation to the assets of the respondent, until the petition is finally disposed and so ordered.

[14] At the hearing on 12th June the FSCS furnished a second affidavit requesting that it be added as an interested creditor, to support of the petition, having incurred debts totaling £20.1 million in payment of compensation to a large number of investors in the Marquis

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[6] Atkin's Court Forms, Volume 9 (1) (2) (3) – Procedural Tables -Table 6 – Step 38 & 40

Estate Project. FSCS stands in their shoes by subrogation. It was deposed that assessment of claims are ongoing and the respondent's indebtedness to FSCS is likely to increase. Mr Ames in his first affidavit[7] had earlier alluded to the FSCS's involvement in payment of compensation to investors in the project. The application was granted.

[15] The petitioners remain adamant that they are not among those compensated by FSCS[8] and FSCS has said that the majority of their claims relate to other investors of the respondent. The petitioners have not attended the proceedings as they reside in the UK.

[16] Mr Ames has been absent from these proceedings and the court informed that he is unable to travel to the jurisdiction to attend the hearing.

THE ISSUES

[17] The filing of a members voluntary winding up on the eve of the petition hearing delineates two issues for the court's consideration:-

(i) Whether good reasons exist to warrant the court's intervention by issuing a compulsory liquidation order; and
(ii) If such order is made, should a new liquidator be appointed.

ANALYSIS

Should the court issue a compulsory order

[18] It is common ground that commencement of the voluntary winding up by the respondent does not affect or impede the jurisdiction of the court to deal with the petition filed earlier in time[9].

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[7] Para 8-9 of Affidavit of David Ames filed on 26th August, 2016
[8] See Affidavit of Gareth fatchett filed on 25th May, 2017
[9] Sections 392 and 463 of the Act

[19] Judicial authorities illustrate that it is not unusual to have voluntary liquidation initiated after a petition is filed and before an order is made. In such cases the court may allow the voluntary process to continue or make a compulsory order if it becomes necessary to have the liquidation supervised by the court[10] or because it would be more beneficial to the majority of creditors.

[20] The cases suggest that a petitioning creditor does not automatically become entitled to a compulsory order as of right. In deciding on the most appropriate course the court will consider several factors, including:- (1) reasons given for not interfering with the voluntary process; (2) the wishes of creditors for the court's intervention; (3) whether such order would be prejudicial to any creditor and (4) whether it is necessary to appoint a different liquidator[11]. The final outcome will typically be driven by the realities of the case.

[21] Generally the court will not frown on a voluntary wind up if the end result is speed, cost savings and it achieves the remedy that all creditors seek. The process must however be fair and premised on a credible declaration of solvency and statement of affairs which satisfies the court that a company will in all certainty be in a position to pay all its debts voluntarily, within a period not exceeding 12 months[12].

[22] Equally the court will adopt a different stance if it is satisfied that:- (1) a voluntary wind up has been instigated for the purpose of excluding creditors; (2) it is premised on false or incorrect information; (3) it will cause substantial prejudice to the rights of creditors or other interested parties, and (4) it may obstruct full and independent investigations into the affairs of the company. This list is not exhaustive but such factors are generally considered as good reason for making a compulsory order. In these instances considerable weight will be given to the views of the majority of creditors, to protect them from fraud or unfairness and the court will usually seek to avoid leaving them in a vulnerable position or with legitimate reason for grievance[13].

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[10] Egon Romay Associates Limited v Leading Guides International Limited [1997] Lexis Citation 4124.
[11] Re Surplus Properties (Hudderfields) Ltd. [1984] BCLC 89
[12] Section 440 of the Act
[13] Re Zinotty Properties Ltd - [1984] 3 All ER 754

[23] On this point Ms St Rose on behalf of the petitioners and FSCS contend that by initiating a voluntary wind up the respondent is merely seeking to take control of the liquidation process to the exclusion of the petitioners and interested creditors and to preclude appointment of their choice of liquidators.

[24] She submits that in a voluntarily winding up sub-section 440(1) of the Act requires a statutory declaration of solvency by a director of the company which must be accompanied by a statement of assets and liabilities at the latest practicable date before the declaration is made. The supporting statement must show that a company is solvent at the time that the declaration is made. Mr Ames as sole director of the respondent gave a sworn declaration stating that he had caused a full enquiry of the affairs of the respondent to be undertaken and formed the opinion that the company would be able to pay all its debts within the next 12 months. The declaration is accompanied by a statement of assets and liabilities as at 19th May, 2017 which shows a deficit of -$6,253.98. She argues that this signals a contravention of section 440 as the statement shows that the respondent is insolvent.

[25] She goes on to outline the features of the statement which makes it unacceptable for the intended purpose. I summarize them as follows:- (1) the statement shows the assets as land valued at £7.1 million, evidence of which is already before the court but that value is questionable; (2) work in progress in the sum of £46.9 million is reflected as assets with no evidence of what comprises this figure, when in reality the land is in an undeveloped state and the Marquis Estate Project has not commenced; (3) despite the time which has elapsed since filing the statement Mr Ames has not provided further information from which the court can verify what constitutes "work in progress"; (4) current assets reflect an intercompany debt of £24.5 million which Mr Ames now says is owed to the respondent by HSVG, without any explanation or verifiable information to substantiate this; (5) in actuality HSVG is bankrupt with liabilities far exceeding its assets, which casts serious doubt on the ability to collect these sums if it is in fact owed; (6) liabilities of £78.6 million is disclosed with no explanation of the composition; (7) at a glance liabilities do not appear to include the claim of £7.5 million by HSVG or the FSCS claim which currently stands at £20.1 million and likely to increase; (8) from this it can be deduced that liabilities have been

grossly understated and will likely increase, giving a clear indication that the respondent is hopelessly insolvent; (9) there is no indication of the source of funding to cover expenses of the liquidator appointed by the respondent; and (10) there is no mention of current or future income to show how the respondent intends to pay all its creditors in full within 12 months.

[26] For these reasons Ms St Rose invited the court to disregard Mr Ames declaration as either mistaken or intending to mislead and issue a compulsory order on the basis that the statement of affairs confirm the respondent's state of insolvency.

[27] Mr Patterson QC on behalf of HSVG submits that:- (1) the purported member's voluntary winding up was ineffective, given that the declaration of solvency was supported by a statement of affairs which confirmed insolvency; (2) the scheme of the Act contemplates that it is incompetent to make a declaration of solvency for the purposes of a members winding up when the company is insolvent, because the underlying principle is that a company must be in the position to wind up voluntarily; and (3) having filed the resolution and declaration based on a statement of insolvency the issue of winding up is a foregone conclusion. The respondent is woefully insolvent and what remains for the court consideration is whether to make a compulsory order appointing the creditors choice of liquidator.

[28] Mrs Augustin on behalf of Appeltjie Properties Limited submits that section 440 of the Act requires that a declaration of solvency taken on oath must be truthful and have merit. It should not contain inaccurate or misleading information. It is an offence for a director to make a declaration without having reasonable grounds for the opinion that the company will be able to pay its debts in full within the period specified in the declaration[14]. Mr Ames declaration should be treated as incredible and disregarded based on the statement of affairs which confirms insolvency.

[29] Mr Lee made brief submissions on behalf of the respondent, agreeing that the situation was beyond whether the company should be wound up. Its creditors have filed a petition

[14] Subsection 440 (3) of the Act

and the respondent itself has filed a resolution for voluntary wind up. Mr Ames in his third affidavit[15] has conceded that the court has jurisdiction to make a compulsory order once sufficient reason exists to do so. He accepted that in the circumstances it would be just and equitable to wind up the respondent.

[30] I have given due consideration to the submissions of Counsels and the relevant provisions of the Act. I agree that the respondent must be wound up but whether the process should continue voluntarily or compulsorily is a matter which I must briefly consider.

[31] Section 386 (2) of the Act provides that a company is deemed unable to pay its debts if it is shown to the satisfaction of the court that the value of the company's assets is less than the value of its liabilities, taking into account its contingent and prospective liabilities. The respondent has provided a statement of affairs which confirm that liabilities exceed assets. The evidence is that substantial liabilities have not been accounted for and the deficit position is expected to deteriorate significantly. This settles that the respondent is balance sheet insolvent. In the absence of cash flow or revenue projections or reasonable explanations for the information provided in the statement I must conclude that the respondent will not be in a position to voluntarily pay its debts in full within 12 months. I agree that section 440 of the Act could not have intended a statement confirming insolvency as acceptable support for a declaration of solvency.

[32] Mr Ames in his first affidavit explained that the respondent was the victim of a fraud perpetrated by the developers of the Marquis Estate Project, in circumstances which were beyond his control. In support he exhibits a judgment obtained in the High Court of Ireland (the **O'Halloran Case[16]**) in July 2013, in which damages in the sum of US$1.9 million and €120,000.00 was awarded to the plaintiffs HSVG and HHRL. What is notable is that the respondent was not a party to this claim and is not entitled to the sums awarded in the claim.

[15] See para 10 of Affidavit of David Ames filed on 9th June. 2017
[16] [2013] IEHC 362

[33] He also exhibits documents relating to a second claim against the accounting firm of the Harlequin Group, in the English Courts, seeking compensation of US$70.0 million (the **Wilkins Kennedy Case**[17]), which he says would restore monies to the Harlequin Group for the purpose of carrying projects to completion. Judgment was delivered in December 2016[18]. The original award of damages was discounted by 50% on account of "*Harlequin's*" contributory negligence, resulting in damages of US$11.6 million (£7.443 million) awarded to HSVG. That sum has been ordered to be paid into court for safeguard, until such time as the position of the investors and the insolvency of HSVG become clearer[19]. Again I note that the respondent was not a party to this claim and not in any way entitled to the sums awarded.

[34] Presently three companies of the Harlequin Group namely HMSSE, HSVG and the respondent are in liquidation. It is alleged that Mr Ames is involved in personal bankruptcy proceedings in the UK and other companies in the Harlequin Group are earmarked for imminent insolvency proceedings.

[35] The respondent's financial standing is in fact far worse that the statement of affairs and Mr Ames declaration have purported to show. I accept that these documents can have no credibility as justification of the voluntary liquidation initiated by the respondent.

[36] I am satisfied that the case is most appropriate for compulsory liquidation and would so order.

Who should be appointed as liquidator

[37] When the petition was filed David Holukoff and Marcus Wide of GrantThornton were recommended as joint liquidators. Ms St Rose on behalf of the petitioners drew attention to the 4th affidavit of Gareth Fatchette[20] which states that the petitioners have reassessed

[17] [2016] EWHC 3233 (TCC) Queen's Bench Division, Technology and Construction
[18] See Exhibit MM3 of Affidavit of Martin Meredith filed on 24th May, 2017
[19] Harlequin Property (SVG) Ltd and another v Wilkins Kennedy (a Firm) [2016] EWHC 3233 (TCC)
[20] Filed on 25th May, 2017

their options and recommend Brian Glasgow and Craig Waterman of the firm of KPMG for appointment. They believe that Mr Glasgow's prior involvement in the HSVG insolvency will reduce the time required to grasp the affairs of the respondent, speed up the liquidation and reduce the cost of that process. They consider this to be the most commercially sensible option.

[38] The petitioners also submit on this point that (1) the Act clearly states that a wind up order operates in favour of all creditors[21]; (2) it is not the capability or independence of Mr Coyne which in question, it is simply that when a company is insolvent the choice of liquidator rests with the creditors and not the respondent; (3) the petitioners and the interested creditors are in agreement on the appointment of Messers Glasgow and Waterman; (4) a liquidator is required by law to be impartial and to observe all the fiduciary obligations which attach to this office; and (5) there is no evidence before the court that Messers Glasgow and Waterman would not adhere to their full obligations as joint liquidators.

[39] Ms St Rose further submits that section 546 of the Companies Act provides that companies owned and controlled by the same persons are affiliates. In Mr Ames first affidavit he speaks of the Harlequin Group of companies, a parent company HHRL and monetary awards in the **O'Halloran** and **Wilkins Kennedy** claims, which would benefit HSVG, the respondent and the rest of the Harlequin Group. By his own admission monies belonging to the respondent were used in relation to contractors and accountants of the group. He owned and controlled the companies and indiscriminately moved funds within the group. His very suggestion that the respondent would benefit from claims to which it is not a party is a clear admission of his disregard for the separate corporate personality of the companies. For these reasons the most sensible, cost effective, orderly and efficient approach for dealing with the respondent's winding up is to appoint the same office holder already in place for HSVG.

[40] The petitioners accept that the possibility of intercompany debts may exist and this will have to be examined by the liquidators; but they contend that the mere appearance of

[21] Section 395 of the Act

conflict as suggested by Mr Ames does not warrant the appointment of a separate liquidator, because a liquidator is an officer of the court and not of the respective company.

[41] In support of these submissions Ms St Rose relied on several judicial authorities and first highlighted the Australian case of **Australian Securities and Investment Commission v Bikurra Investments Pty Ltd[22].** In that case the court concluded that it was not unusual or a conflict to appoint the same liquidator with respect to a group of companies, considering what has to be achieved. Even where questions of conflict of interest may arise economy and efficiencies will be strong considerations for a common liquidator, who may then approach the court for appointment of a special liquidator if serious conflict develops. Concerning this matter Beach J said:

> *"The mere existence of a possible conflict does not necessarily warrant different insolvency practitioners being appointed as liquidators…….**It is common for the same insolvency practitioners to be appointed to a group of related companies. As officers of the Court, such liquidators frequently consider issues of potential conflict and address then in a variety of practical ways including by applying to the Court for direction or in serious cases for the appointment of a special purpose liquidator.** In the present case it would be inefficient for different liquidators to be appointed….." (Emphasis added)*

[42] In **Re Nuhan Ltd[23]** the question arose as to who should be appointed liquidator in the context of petitions for the winding up of three different companies which were all plainly insolvent, were engaged in international activities and were all related. The Supreme Court of New South Wales ruled that the decision should be made in light of all the circumstances bearing in mind the interest of the parties concerned in the winding up. In that case Needham J said:-

> *"I think that in the first instance I should appoint one liquidator only. My reason for this conclusion is that, as I have said, much investigation needs to be done. **It is I***

[22] [2016] FCA 371 at para 114 to 118
[23] (1980) 5 ACLR 69

think preferable in the interest of economy that only one liquidator be appointed initially. The liquidator appointed is an officer of the court, in the sense that he is under the control of the court, and he will be aware that should the stage be reached that conflict cannot fairly be resolved without the appointment of another liquidator he should approach the court to be relieved of one of the offices*. I envisage from the evidence presently available that that stage could well be reached……..." (Emphasis added)*

[43] **Doffman & Isaacs v Wood & Hellard**[24] was also cited and dealt with an application for removal of liquidators where a party who was not a creditor sought to have the liquidators removed from office for conflict of interest. The relevant dicta in the context of the instant case is that:-

"*The primary purpose of the bankruptcy process is the orderly payment of creditors and* ***the principal interest in the insolvency process is that of the creditors****. Thus where there is no likelihood of a surplus* ***a bankrupt has no interest in the estate and it is in principle wrong to allow him to dictate conduct of the bankruptcy against the wishes of the creditors……."*** *(Emphasis added)*

[44] The words of Lord Millet in **Deloitte & Touche AG v Johnson**[25] in circumstances where it was alleged that liquidators had a conflict of interest with their duty to the company and its creditors are also instructive. He said:-

*" The only persons who could have a legitimate interest of their own in having the respondents removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors……..and the creditors have taken no steps to remove them……****If such a conflict exists, it is for the creditors alone to decide what if anything to do about it……..****"(Emphasis added)*

[24] [2011] EWCH 2008 (ch) at paras 14 to 16 & 20 to 22
[25] [1999] BCC 992

[45] In concluding Mr St Rose conveyed that the joint liquidators have been chosen by the petitioners and interested creditors, with no opposition among them. The only opposition is from the respondent who wishes the court to retain its liquidator. She urged that due regard be given to the evasive actions of respondent and the principles arising from the authorities because it is the interest of the petitioners and creditors which must be considered and protected at this time by appointing their choice of liquidators.

[46] Mr Lee contends that the respondent believes there is a clear conflict of interest by acting on behalf of a creditor proving in the liquidation of the respondent and also serving as liquidator of the respondent. He refers to the first affidavit of Mr Glasgow[26] which outlined his interest in HSVG and how he came to be associated with that company. In particular he Mr Glasgow speaks of contracts between purchasers and HSVG, as well as deposits and stage payments received by or on behalf of the Harlequin Group. He further speaks of contracts between 196 purchasers and HSVG for purchase of units in the Marquis Estate Project which is owned by the respondent. He deposed that these purchasers have submitted claims against the estate of HSVG. There is a concern that these claims will reduce the estate available for the genuine HSVG purchasers and because of this it was necessary to be added as an interested creditor of the respondent.

[47] It is the respondent belief that the petitioners and creditors assertions are premised on the idea of a single group of companies and a unified interest of the creditors involved. Despite the fact that all the companies are owned by Mr Ames there is no direct relationship between them. They are not subsidiaries of each other and there is no parent company that ultimately owns the groups. If they are treated as one group with a commonality of interest among the various creditors there a distinct possibility that the estate of the respondent will be used unduly for the benefit of HSVG. Mr Glasgow's interest is primarily to secure and safeguard the interests of the HSVG creditors and that is an obvious conflict of interest.

[26] Filed 31st March, 2017

[48] Mr Lee referred to the second affidavit of Mr Glasgow[27] in which he deposed that of the monies received by HMSSE on behalf of HSVG totaling £25.0 million, £15.3 million was paid by investors desirous of purchasing villas in Marquis Estate. This sum was subsequently reduced to an agreed sum of £7.7 million. Mr Glasgow stated that against this background any distribution from the estate of HSVG without recovery from the respondent will be severely impacted. The respondent says this can only be interpreted to mean that the aim is to ensure that as much money as possible is secured for the creditors of HSVG.

[49] He submits further that Mr Coyne as liquidator in the voluntary liquidation has filed an affidavit[28] stating his credentials and indicating that he has had no prior connection with the respondent. He notes that the objection to Mr Coyne has nothing to do with his professional capability or independence but only concerns whether the respondent should have a voice in the appointment of a liquidator. There is no evidence to suggest that he is unsuitable or unable to fully dispense the duties of liquidator. The ability to apply to the court for directions and to ensure that the liquidation is conducted in a fair manner which serves the interest of all stakeholders applies equally to Mr Coyne as to any other liquidator. In addition his complete independence from the process is worthy of note. He asserts that much has been said of the economy and efficiency to be gained if the respondent's winding up is undertaken by the liquidator already in place in other jurisdictions, but there is no evidence before the court of the likely cost to be incurred by a common liquidator and the extent of the efficiencies to be achieved.

[50] Mr Lee says that the conflict is patent and rather than going through the process of addressing it when it becomes more obvious, it is more advisable to adopt the strategy demonstrated by the respondent from the outset, by ensuring that an independent liquidator is appointed to safeguard the interest of all creditors. At this stage the list of creditors is not closed and as the liquidation advances there is a strong likelihood that

[27] Filed on 20th April, 2017
[28] On 9th June, 2017

more creditors will come forward, who would not had the opportunity to have a voice in these proceedings. Complete independence must be secured to protect their interest.

[51] Mr Patterson QC on behalf of HSVG highlighted two issues for the court's consideration. The first is that when a company is insolvent as is the case here, the respondent has no say in the choice of liquidator. It is the creditors who stand to benefit from the winding up that are entitled to nominate a liquidator. He contends that the position is reinforced by the authorities cited by the petitioners and scheme of the Act. In a member's voluntary liquidation the company appoints a liquidator of its choice but in a creditor's voluntary liquidation it is the wishes of the creditors that must prevail. Sub-section 449 (i) of the Act speaks to this issue when it says that in a creditor's voluntary wind up *……..”if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors the person, if any, nominated by the company shall be liquidator”*. Although the section pertains to voluntary wind up, the scheme of the Act is such that once a company is insolvent it has no say in the appointment of liquidators.

[52] Mr Lee in response agrees that sub-section 449 (1) of the Act says the creditors' nominee prevails in a creditors voluntary winding up but sub-section 449 (2) also allows the company to apply to the Court for an order either directing that its nominee be appointed instead instead of or jointly with the creditors nominee or that some other person be appointed. In any event since the respondent is insolvent there is no need to be concerned with the provisions of voluntary liquidation.

[53] The second feature cited by Mr Patterson is the allegation of fraud. He referred to the first affidavit of Mr Ames in which he Mr Ames suggests that fraud allegations against himself and the companies are trumped up. He exhibits pleadings and a witness statement from the **Wilkins Kennedy Case** to dispel this notion. Colson J delivering the judgment in that case expressed his views quite definitively on the issue of fraud and the relevant extracts are cited in the first affidavit of Martin Meredith of the FSCS[29] and the judgment which is

[29] See para 44 and Exhibit MM3 of Affidavit of Martin Meredith filed on 24th May, 2017

exhibited. The Learned Judge described the Harlequin business model at paragraph 43 of his judgment in these words:-

> *"……It is important not to pull any punches when describing the Harlequin business model. There were elements of it which were similar to what might be called a "Ponzi" scheme, where the money paid in by gullible investors was not spent as they thought it would be, but the scheme grew by word of mouth and those responsible for it became rich, whilst the investors ended up with nothing……."*

[54] With this feature the authorities call for is a single independent liquidator for the group, not only because it is convenient or more efficient but also because that liquidator has a specific task to perform in sorting out what has transpired within the group of companies.

[55] He submits further that although the corporate vehicles were in place Mr Ames by his conduct completely disregarded the principle of separate corporate personality. Monies were collected and used in an adhoc manner without reference to who was the payer and to which company it belonged. Therefore Mr Ames contention that the respondent is not part of a group and stands on its own is refuted by his own evidence. The companies have combined their resources in a manner that is inextricable, they have entered into contracts in relation to properties not owned by the contracting entity and that is not a simple matter to unwind. The liquidation exercise will require a sort of lifting of the corporate veil akin to the commonly used expression "*fraud unravels all*" for complete and thorough investigation.

[56] He considered it is an absurdity for the respondent to suggest that having collected £96.0 million from investors of the Marquis Estate Project and having done nothing in relation to that project, a liquidator should be appointed without the involvement of the many creditors. He urged the court to adopt a holistic rather than piece meal approach to the liquidation of the respondent.

[57] Mrs Augustin on behalf of Appeltjie Properties Limited conveyed that upon reflection this creditor is convinced of the efficacy of appointing the joint liquidators recommended by the petitioners.

[58] I accept that a winding up order operates in favour of all creditors. On a petition and compulsory order a liquidator is normally recommended by the petitioning creditor(s). It is not expected that a respondent in a petition will have any involvement in the selection of a liquidator. The court will generally appoint the recommended liquidator.

[59] At paragraph 34 of Mr Glasgow's first affidavit he said:- *"I consider that the affairs of Harlequin SVG and Harlequin SLU are so inextricable intertwined that it would promote the objective of the orderly, fair and equitable distribution of the assets of Harlequin SVG and Harlequin SLU among purchasers, creditors and other stakeholders if Craig Waterman and myself, both of KPMG, are appointed as joint liquidators of Harlequin SLU".* The petitioners and interested creditors have without reservation expressed the same sentiments. I am satisfied on the evidence that the respondent is insolvent and it is very unlikely that there will be any surplus from the liquidation. The principles emanating from the cases illustrate that it is the petitioners and interested creditors who must be given the protection and assurance that investigations will be independent, all-encompassing and unimpeded. In that regards it is their wishes which must prevail on the issue of choice of liquidators.

[60] I note the basis of the objection to Mr Coyne as liquidator and the fact that the petitioners and interested creditors are unanimous in their selection of the joint liquidators. I accept on the authorities cited that the same liquidator can be appointed for related companies even where dealings between them may give rise to conflict of interest. I do not think the existence of a Harlequin Group and the extent of intra-company dealings and commingling of funds among the group can be denied.

[61] In **Re Maxwell Communications Corporation plc**[30] and **Parmalat Capital Finance Limited**[31] Lord Hoffman settled the practice when he said :-

[30] [1992] BCC372
[31] [2009] 1 BCLC 274 at 279 para 12 -13

"……..it is by no means uncommon in the case of insolvency of a substantial group of companies for cross-claims and conflicts of interest to arise within the group. That does not usually deflect the court from appointing a single firm of insolvency practitioners in the first instance to deal with the whole insolvency as a group, leaving the question of potential conflict of interest to be dealt with if and when it arises."

[62] He went on to say:-

"……it is very much a matter of discretion…….. the attitude of the court has been that any conflicts of interest can be dealt with by the court (on the application of the liquidators) when they arise."

[63] I observe that it is only Mr Glasgow who is appointed as trustee for HSVG and I do not believe that the independence of the joint liquidators will be compromised by his trusteeship position. In the **Doffman** case the court opined that in such cases the appointment of another partner in the same firm to act jointly with the common liquidator can been seen as a solution to a conflict of interest. In that regard the petitioners and interested creditors have recommended Mr Waterman from the same firm.

[64] It must be remembered that in compulsory liquidation the liquidators are supervised and controlled by the court. They are required to present periodic reports for scrutiny and directions as required from the court. These reports must provide detailed information on the findings of liquidators in relation to proven debts and their quantum. Ranking of debts and final payments must ultimately be approved by the court. The reports are circulated to stakeholders and the Act provides avenues for addressing grievances which may arise in the course of the liquidation[32].

[65] I expect that if a serious conflict is presented it will be brought to the attention of the court for specific directions. Equally I expect that established standards and best practice

[32] See sections 406(3) and 407 (5) of the Act

guidelines for insolvency practitioners will provide the necessary platform for the joint liquidators to navigate the concerns expressed by the respondent.

[66] I do not agree that appointment of a common liquidator offends the principle of separate corporate personality in the circumstances of this case, primarily because the overriding purpose for doing so is to put in place a process for avoiding the expense and duplication of different liquidators investigating the same transactions. As I see it, there is extensive investigation and reconciling of intricate information that needs to be done, which will best be achieved by adopting a cohesive approach. In my view the benefits and synergies to be derived from an integrated arrangement far outweigh that the dis-jointed process of having a separate liquidator.

[67] I am not persuaded by the respondent's arguments on this issue and find greater merit in the positions advanced by the petitioners and interested creditors. I conclude that it is correct in the circumstances, to appoint Messers Glasgow and Waterman as joint liquidators and would so order.

Costs

[68] Mr Patterson QC requested that costs be awarded to HSVG on the application for leave to be added out of time.

[69] I have considered this matter and do not agree that cost should be awarded. As already stated at paragraph 7 above it is not customary that costs be awarded to interested creditors on such application or for appearing at the hearing. I do not consider HSVG to be in a position which is different to any of the other interested creditors, simply because an application had to be made out of time or that HSVG is perhaps privy to more information than the others. All interested creditors are still required to prove their respective claims in the liquidation. HSVG will have to bear the costs of its application and appearance.

CONCLUSION

[70] For all of the reasons given above I order as follows:-

1. The respondent company Harlequin Resorts (St. Lucia) Ltd., Company No. 2001/C469 be and is hereby wound up pursuant to Section 385 (c) and (e) of the Companies Act.

2. Mr Brian Glasgow and Mr. Craig Lawrence Waterman of KPMG are appointed Joint Liquidators of the company with immediate effective.

3. Costs in the sum of $7,000.00 is awarded to the Petitioners to be paid out of the liquidation estate.

5. Any act required or authorized to be done under this Order or by the Act may be done by one or both of the persons appointed.

6. The Joint Liquidators in discharging their obligations shall be empowered to carry out the following functions:-

(a) Bring or defend any action or other legal proceeding in the name and on behalf of the company;

(b) Carry on the business of the respondent, so far as may be necessary, for the beneficial winding-up thereof;

(c) Appoint an attorney-at-law or other agents to assist them in the performance of their duties;

(d) Pay any classes of creditors in full if the assets of the company remaining in his hands will suffice to pay in full the debts and liabilities of the company which rank for payment before, or equally with, the debts or claims of the first mentioned creditors;

(e) Make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(f) Compromise any calls and liabilities to calls, debts and liabilities capable or resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or winding-up of company, on such terms as are agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof;

(g) Sell the real and personal property and things in action of the company by public auction or private contract on such terms and conditions as determined in their discretion, with power to

transfer free and clear of all encumbrances, the whole thereof to any person or to sell the same in parcels;

(h) Do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company's seal;

(i) Prove, rank and claim in the bankruptcy, insolvency, or sequestration of any contributory, for any balance against his or her estate, and receive dividends in the bankruptcy, insolvency, or sequestration in respect of that balance as a separate debt due from the bankrupt and insolvent, and rateably with the other separate creditors;

(j) Draw accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted made or endorsed by or on behalf of the company in the course of its business;

(k) Appoint an agent to do any business which the Joint Liquidators are unable to do themselves; and

(l) Do all such other things as may be necessary for winding-up affairs of the company and distributing its assets.

7. The Liquidators may apply to the Court for directions in relation to any matter arising on the winding up.

8. The Liquidators shall comply with all the applicable provisions of the Act and in particular sections 404, 407, 408, 409 and 410 and any other applicable statute.

9. The Liquidators shall present an initial report to the Court within **seventy five (75) days** of the date of this order and the matter is adjourned to **September 25, 2017** in chambers.

10. A copy of this order shall be lodged with the Registrar of Companies.

Cadie St Rose-Albertini
High Court Judge

By the Court

Registrar