



**Maplecross Properties Limited**  
Royal Court  
29<sup>th</sup> January 2018

**JUDGMENT**  
**14/2018**

Application by liquidators to place the Company in compulsory liquidation pursuant to sections 405 and/or 406(i) and 412 of The Companies (Guernsey) Law, 2008

**IN THE ROYAL COURT OF GUERNSEY**

**ORDINARY DIVISION**

**IN THE MATTER OF MAPLECROSS PROPERTIES LIMITED (IN LIQUIDATION)**

**and**

**IN THE MATTER OF THE COMPANIES (GUERNSEY) LAW, 2008 (AS AMENDED)**

**Hearing Dates 9 and 23 January 2018**

**Judgment handed down: 29 January 2018**

**Before Sir Richard Collas, Bailiff and Jurats S M Jones, D P L Hodgetts LVO and J G Hooley  
plus N D McCathie on 9 January only**

**Advocate for the Applicant: Advocate M C Newman**

**Introduction**

1. The purpose of this judgment is to set out the reasons for decisions made by the Royal Court on 9 and 23 January following an application (“the Application”) by Carl James Bowles and Martyn Mahé the joint liquidators of Maplecross Properties Limited (In Liquidation) (respectively “the Liquidators” and “the Company”) to place the Company in compulsory liquidation pursuant to sections 405 and/or 406(i) and 412 of The Companies (Guernsey) Law, 2008 as amended (“the Companies Law”). The Application raised a number of legal issues, some of which may not have been addressed previously in any written judgment of the Royal Court.
2. Evidence was presented in two affidavits sworn by one of the Liquidators, Carl Bowles, dated respectively 4 January and 18 January 2018. There was a Skeleton Argument by Advocate Newman dated 4 January and a Supplementary Skeleton Argument from him dated 18 January. The Application was presented *ex parte*. Advocate Newman who did not call any oral evidence made submissions to the Court on each of the two dates of the hearing.

3. The Company was registered in Guernsey on 8 September 2006. Prior to 19 July 2010 the Company's shares were beneficially owned by Beeson Property Investments Limited ("BPIL") with the legal title to the shares held by Marlborough Trust Company Limited and Marlborough Nominees Limited (together "Marlborough") both of which are in liquidation; the Liquidators are also liquidators of Marlborough.
4. On 19 July 2010 BPIL entered into a joint venture agreement ("the JV") with Maplecross Holdings Investment Company Limited ("MHICL") following which MHICL held approximately 46% of the shares in the Company with Marlborough holding approximately 54%. Shortly thereafter it appears that BPIL and Marlborough each held 50% of the shares. Later, following the introduction of further funds to meet the administrative expenses of the Company and the issue of further shares to BPIL, its shareholding in the Company increased to approximately 54%.
5. The joint venture was to be for the purpose of developing specific properties as described in the JV:

*"to carry on the business of real estate development and investment including the development and eventual sale of the Witney Place property as an hotel and the potential acquisition of the Thames Water Property and the development and eventual sale of the Thames Water Property together with the Denham Way Property as an outlet mall or other retail development."*

6. The Company has two wholly owned subsidiaries, Maplecross Retail Limited ("MRL") which owns a property at 1 Denham Way, Maple Cross, Rickmansworth, Hertfordshire and Maplecross Hotel Limited ("MHL") which owns a hotel site at Witney Place, Denham Way, Maple Cross, Rickmansworth, Hertfordshire.
7. MHICL is incorporated as a Guernsey company. The directors of MHICL are Marlborough Nominees Limited and Marlborough Secretaries Limited, both of which are being wound up by the Liquidators. The shares in MHICL are held by Marlborough Trust Company Limited on trust for the Libyan Investment Authority ("LIA"). The Liquidators had earlier made an application under section 426 of the Companies Law to the Royal Court (heard by the Deputy Bailiff) seeking directions in relation to the sale of the properties owned by MRL and MHL. The details of that application were not disclosed in this present Application other than that it concerned the potential operation of European Union legislation (as it applies in Guernsey) in relation to international sanctions imposed on, *inter alia*, the LIA. Mr Bowles exhibited to his second affidavit a letter received from the Law Officers of the Crown in Guernsey advising that the Law Officers and the Policy & Resources Committee were satisfied that the proposed transactions are not in breach of the sanctions legislation.
8. The purpose of the Application was explained in paragraph 23 of the First Affidavit of Mr Bowles:

*"Given the structure of the Maplecross group of companies as set out at page 199 of CJB1 and the identity of the shareholders of the Company, (as made clear in the section 426 Application) the Joint Liquidators consider that converting the voluntary liquidation of the Company to a compulsory liquidation will provide an additional*

*layer of protection to ensure the funds are not distributed to the LIA. This is due to the process of a compulsory liquidation which would have a court-appointed Commissioner whose purpose and function will be to examine the accounts of the Company in liquidation. It will also provide the Commissioner with a further avenue to refer any dispute (which may arise) to the Court before any final distribution of assets is made. At present, the Company has no cash or other liquid assets, and is reliant solely on its real property assets at the foot of the structure to make distributions, through the Commissioner process, to its creditors and members.”*

9. The Application was brought on two alternative grounds: first, that the Company was insolvent on a cash flow basis; and second that it is just and equitable to do so. For the reasons explained below, on 9 January, the Court dismissed the first ground on the basis that the insolvency of the Company was not proved and/or under the Court’s discretion as the Jurats were not satisfied that it was necessary or appropriate for the Court to make a winding-up order on the grounds of insolvency. The second ground was then adjourned to enable the filing of further evidence and further submissions in support thereof.

#### **Preliminary Issue – Standing or *Locus***

10. A preliminary issue raised by Advocate Newman was whether the Liquidators, as liquidators of the Company have the standing or *locus standi* to bring an application for the Company to be placed in compulsory liquidation by the Court. It is an issue on which there appears to be no written judgment of the Royal Court although a similar application by the Liquidators was made, and allowed by the Royal Court, in relation to Marlborough Trust Company Limited in their capacity as joint liquidators of that company.
11. Section 405 permits application to be made for an order for the compulsory liquidation of a company notwithstanding that it has previously been placed in liquidation following the passing of a resolution under section 391 of the Companies Law but section 405 is silent and does not say who may make such an application. By contrast, section 116 of the Insolvency Act 1986 specifies that in England and Wales the right to make a similar application is available only to a creditor or contributory of the company. In this jurisdiction, section 408(1) of the Companies Law applies to all applications for liquidation, whether or not the company is already in voluntary liquidation and provides that:

*“An application for the compulsory winding up of a company may be made to the Court by the company, by any director, member or creditor thereof or by any other interested party.”*

12. Advocate Newman submitted first that the Liquidators could make the Application as the “company” and alternatively that they were an “interested party”. Following the passing of the special resolution of the members of the Company placing it in liquidation and appointing the Liquidators, all powers of the directors have ceased (section 395(2) of the Companies Law) and hence the Company acts through the Liquidators. It is sometimes said that the powers of the directors vest in the liquidator. However that is not what is said in the Companies Law. Section 397 entitled “General provisions as to liquidator” provides in subsection (1) that:

*“(1) The liquidator shall –*

(a) realise the company's assets and discharge the company's liabilities, and

(b) having done so, distribute any surplus amongst the members according to their respective entitlements in accordance with section 419."

13. Sub-section (2) makes provision for the exercise of their powers where several liquidators are appointed and is not relevant here. Sub-section (3) states that:

"(3) A liquidator may exercise all powers which may be given to him by the Court."

14. There is no express power given to a liquidator to issue proceedings on behalf of and in the name of the company in liquidation although it is well recognised that a liquidator may do so. Where proceedings are for the purpose of gathering in and realising the assets of the company, the proceedings are ancillary to, and necessarily implicit in, the general power described in section 397(1). The Bailiff decided that the Liquidators had the power to bring the Application on behalf of the Company in the present case. He added that if he were wrong in that regard he was satisfied that the Liquidators could do so as an interested party.

15. Advocate Newman cited paragraphs 79 and 80 of the Royal Court's judgment in In the matter of Synergy Capital Limited (Royal Court, Judgment 28/2012) as to the meaning of "any other interested party" in particular that:

*"The basis of the person's interest in the company will need to be assessed against the touchstone of whether an appropriate degree of connection or association with the company exists so as to warrant the person taking steps to bring about its dissolution."*

16. The Bailiff respectfully agreed. There is no need to limit the categories of persons who may be considered to have an appropriate or sufficient interest. The words used in the section are to be given their ordinary meaning and applied in the circumstances of any particular case. The Bailiff was persuaded that the Liquidators could be considered to be "an interested party" able to bring the Application in the circumstances of the case before the Court.

17. It is also to be noted that sub-section 397(3) enables application to be made to the Court for a liquidator to be given additional powers. If the Bailiff had not accepted that the Liquidators have the power to bring the Application, they could have made a specific application to do so under sub-section 397(3) and, if they had done, the Bailiff would have granted it.

18. In summary, whichever way it is looked at, the Bailiff was satisfied that the Application could proceed in the form in which it was brought by the Liquidators.

### **Preliminary issue – Parties**

19. At the resumed hearing on 23 January, the Bailiff raised with Advocate Newman the issue of whether the contributories to the Company ought to have received notice of the Application and/or ought to be made parties to the Application under Rule 37 of The Royal Court Civil Rules 2007. After taking instructions Advocate Newman confirmed that the contributories

were aware that the Application was to be made and had expressed no views on it, neither in favour nor against it.

20. In other circumstances, it might be appropriate to notify the creditors of such an application. In this case, the creditors will be unaffected because the assets of the Company exceed its liabilities and they will be paid in full in due course. The contributories might have been expected to have a view on whether the liquidation should be converted from a voluntary basis to one ordered by the Court. However, given that the purpose of the Application is to provide additional protection to the Liquidators against any possible demands to distribute LIA's share of the surplus assets to it in breach of sanctions legislation, the Bailiff was persuaded not to order that the contributories "ought" to be made a party.
21. For the reasons we explain below, in the deliberations of the Jurats they were not minded to appoint the Liquidators without receiving confirmation that the contributories would be content for them to be appointed.

### **Insolvency**

22. The first ground relied upon in the Application to place the Company in liquidation was that it failed the first limb of the solvency test set out in section 527 of the Companies Law being unable to pay its debts as they became due ("the Cashflow Test"). The Company satisfied the second limb ("the Balance Sheet Test") because the net value of the properties owned by the two subsidiaries, MRL and MHL, exceeds the liabilities of the Company. Once the properties have been sold and the net proceeds have been paid to their parent, there will be more than enough cash to pay the debts.
23. On 9 January the Court was told that the Liquidators had considered placing the two subsidiaries in compulsory liquidation but on 23 January the Court was advised that they had decided that was not necessary. Instead, they will be taking steps to place MRL and MHL in voluntary liquidation.
24. The evidence of the Company's inability to pay its debts was that there were two creditors, Marlborough Trust Company Limited and Barclays International Limited. The latter was owed £1,959.38 on an overdraft and the total indebtedness was £10,364.28. Both creditors will be paid in full upon receipt of distributions from one or other of the subsidiaries following the sale of their properties. It is not known when that will be but sales should be completed in the next few months. Neither creditor is pressing for payment - the larger creditor by value is represented by the Liquidators who are the liquidators of it. Whilst the debts are both payable on demand, in the absence of any evidence of demand having been made or about to be made, the Jurats were not persuaded on the balance of probabilities that the Company failed the Cashflow Test. Even if they were wrong in that regard, they would not have been minded in the exercise of the Court's discretion to place the Company in liquidation when there appeared to be no need to do so; the creditors will be paid in full in due course.

### **The "just and equitable" ground**

25. Section 406(i) of the Companies Law provides that:

*“A company may be wound up by the Court if -....*

*(i) The Court is of the opinion that it is just and equitable that the company should be wound up.”*

26. The meaning of the phrase “just and equitable” in the context of applications for winding up a company has been considered in a number of local cases, including in Prodefin Trading Limited v Midland Resources Holding Limited and others (Royal Court unreported judgment 7/2017, 14 February 2017) where I said the following at paragraph 61:

*“61. The leading English decisions on the principles that constitute “just and equitable” grounds for winding-up a company, such as Ebrahimi v Westbourne Galleries Limited [1973] 360 have been followed in this jurisdiction, see for example Hubert v Circuit Skips Limited (unreported, Royal Court, 24<sup>th</sup> January, 2001). Such English decisions make clear that the “just and equitable” principles were borrowed from the law of partnership, recognising not only that in many cases there may have been a pre-existing partnership but also that behind many companies, “there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure”, per Lord Wilberforce at page 379C. He went on to say, at 379E: “It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may apply”.”*

27. Advocate Newman submitted that the English authorities may be of assistance in this jurisdiction insofar as they identify a number of categories of circumstances where a just and equitable winding-up may be found but this Court should not be constrained by those categories. He also noted that there is no Guernsey decision saying that the categories should be so constrained. He did however submit that two of the categories recognised in the English decisions are found in the circumstances of the present case, namely ‘deadlock’ and the so-called ‘substratum’ cases that is to say those cases where the purposes for which the company was formed can no longer be achieved or no longer exist.

28. In England and Wales, the Companies Act 2006, Part 30, enables a member of a company to apply for a winding up order on grounds that the affairs of the company are being conducted in a manner that is unfairly prejudicial to some or all of its members. Buckley on the Companies Acts states in a general note in Division 18, section 994, that there were a number of significant differences between section 210 of the 1948 Act and sections 459-461 of the 1985 Act including that “(iii) *it is no longer necessary for the facts to justify the making of a winding-up order on the ‘just and equitable’ ground in order to obtain relief.*”

29. Notwithstanding the law change in England, the ‘just and equitable’ ground was retained by our legislature twenty years later when it enacted the Companies Law of 2008. In the judgment of the Bailiff, the Guernsey courts are free to interpret the meaning of ‘just and equitable’ in the context of Guernsey law and in a modern context, guided by but not constrained by the earlier decisions of the English courts. Bearing in mind that the ‘just and equitable’ concept was borrowed from the law of partnership, it may normally be a member of the company who will apply for a winding-up on a ‘just and equitable’ ground. However, as Lord Wilberforce said, it is wholly undesirable to define the circumstances which may apply.

30. The Bailiff directed the Jurats that there is no legal definition of ‘just and equitable’. The words are to be given their ordinary meaning. Whether there is evidence in support thereof is a factual matter for the Jurats to determine on the civil standard of the balance of probabilities. As a factual matter, it is most appropriate to leave it to the Jurats for their determination and it is one of the advantages of the Guernsey judicial system that the Jurats are present to decide such matters.
31. The evidence of deadlock relied upon by the Liquidators is of deadlock between the contributories. There is of course no deadlock between the directors of the Company as their powers have ceased on the passing of the special resolution of the members placing the Company in voluntary liquidation. Mr Bowles disclosed, in his second affidavit, that MHICL and its parent, LIA, issued proceedings on 18 July 2016 in the High Court of England and Wales against, *inter alia*, BPIL and its parent company claiming damages in the sum of £12.26 million less the value of MHICL’s interest in the Company. In those proceedings, MHICL is alleging that BPIL and its parent unlawfully conspired to induce it to enter into the JV which set out how the Company was to operate. Correspondence seen by the Liquidators indicates that there may be further factual disputes between MHICL and BPIL including in relation to the clause in the JV providing for additional shares to be allocated in exchange for the injection of additional funds from which it is to be inferred that there may be a dispute over the percentage allocation between the contributories of any distributions to members that the Liquidators will be making in due course.
32. One of the advantages of a compulsory liquidation put forward by Advocate Newman was that any distributions will be subject to approval by a Commissioner of the Court whereas if the Company were to remain in voluntary liquidation, the members of the Company retain a degree of control. One of the examples he quoted is the requirement of the Liquidators to present their account of the winding-up at a general meeting of the Company convened for that purpose in accordance with section 400 of the Companies Law. He submitted that where the contributories are in dispute, it could be difficult to secure their agreement.
33. As for the substratum ground, the evidence is of the proposed sales of the properties owned by the Company’s two subsidiaries which were to be developed pursuant to the terms of the JV.
34. In addition to those two grounds, the main basis relied upon by the Liquidators concerned the LIA as one of the ultimate shareholders and the prohibitions placed upon them by the European Council Regulation 2016/44 in force in Guernsey through the Libya (Restrictive Measures) (Guernsey) Ordinance, 2016. In paragraph 13 of his Supplementary Skeleton Argument, Advocate Newman wrote:

*“The primary motivation for moving the Company into compulsory liquidation is that a compulsory liquidation provides greater oversight by the Court into distributions made by liquidators at the end of the liquidation process. It is accepted that a liquidator faced with issues concerning the performance of his functions during the winding up may apply to Court under section 426 of the Companies Law, and indeed there is nothing to suggest that the Joint Liquidators*

*would not do just that. The Court has appointed them both on other matters and is aware they would not do anything in their professional capacities which would give rise to any sort of liability (civil or criminal). No doubt, if the Company remains in voluntary liquidation, when the Joint Liquidators have realised the Company's (considerable) assets they will apply to the Court for directions as to how to distribute them to members given the obvious issue that they have with the LIA as one of the ultimate shareholders and the prohibitions imposed on them..."*

35. As well as the concern that it is the members who control a voluntary liquidation, Advocate Newman raised the need for the public, including those who scrutinise Guernsey as an international finance centre, to have confidence that where sanctions or other similar issues are involved a liquidation, which is a public process, is ultimately under the control or supervision of a competent authority.
36. Further concerns as to the extent of the members' control of the liquidation include the fact that, under section 396 of the Companies Law, they have the power to replace a liquidator who may have died or resigned. All the risks, however far-fetched they might appear, would be avoided if the winding-up were under the control of the Royal Court following a Court Order to place the Company into liquidation.
37. At the hearing on 9 January, Advocate Newman was not in apposition to present full submissions on the 'just and equitable' but he developed the case in Mr Bowles' second affidavit and in the Supplementary Skeleton Argument in the manner we have summarised above.

## **Decision**

38. The Jurats had regard to all the circumstances of the case but did not consider it to be a clear-cut example of a winding-up on just and equitable grounds. The Company could remain in voluntary liquidation with the current Liquidators who could, from time to time, apply to the Court for directions under section 402 of the Companies Law whenever necessary including, for example, before seeking to make any distributions to the members whilst the LIA remains subject to a regime of sanctions.
39. However, there are some highly unusual circumstances including: the dispute between the contributories which is being litigated in the High Court; the further disagreements which may yet be the subject of litigation including the validity of the further allocations of shares; the sanctions affecting the LIA and the need to ensure that the liquidation process is conducted and in due course concluded without breaching the sanctions regime.
40. In such exceptional circumstances and having regard to the fact that the Liquidators are asking for the assistance of the Court to provide them with the extra protection they consider they need, the Jurats were minded to order that the Company be placed in liquidation on the ground that it is just and equitable to do so. Before making an order to that effect, the Jurats wish to be satisfied that the contributories are content with the appointment of Mr Bowles and Mr Mahé as liquidators. The Jurats wish the contributories to have the opportunity to express any concerns they may have, for example, as to potential conflicts with the other, closely connected, companies which are being wound up by the Liquidators and in relation to the fees

estimated to be incurred by the Liquidators in addition to the charges they have already incurred.

41. Consequently, on 23 January, the Court adjourned the application to enable the views of the contributories to be obtained and directed that a further affidavit be lodged exhibiting letters from the contributories with any comments they wish to make. Upon receipt of the affidavit, the Bailiff will advise whether a further hearing is required or whether the Court may proceed by making an order “on the papers”.