IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD NO. 271 OF 2023 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF AUBIT INTERNATIONAL

Before:	The Hon. Justice David Doyle
Appearances:	Ms Sarah Dobbyn and Mr Cameron Thomson of Sinclair Attorneys for the Company
	Mr Tom Lowe KC instructed by Mr Erik Bodden and Ms Alecia Johns of Conyers for the Petitioners
	Mr Bryan Little of Travers Thorp Alberga for Freeway Operations Inc.
	Mr Mark A Russell and Mr Rupert Wheeler of KSG Law for various unsecured creditors
	Mr John Harris of Nelsons Attorneys-at-Law for White Knight Funding Ltd
Heard:	16 October 2023
Ex Tempore Judgement Delivered:	16 October 2023
Draft Transcript of Judgment Circulated:	17 October 2023

Date Transcript of Judgment approved: 19 October 2023

HEADNOTE

Determination of winding-up petition-standing of contingent creditors-rule of practice in respect of disputed debts-no abuse of process in this case – no justification for a sealing order-winding-up order granted on grounds of inability to pay debts and just and equitable as there was a need for an urgent full independent investigation into the affairs of the Company and its management

EX TEMPORE JUDGMENT

Introduction

1. I shall now deliver an ex-tempore judgment in respect of this matter. In view of the long day of legal argument on various and numerous legal issues we have all had (with some counsel in remote locations) and in view of the lateness of the hour I shall try and keep this judgment relatively brief, but I hope to come to determinations on all the relevant issues before the Court and provide brief reasons for the same. It is best I do that now as I have a number of other pressing commitments in my docket for the rest of this month and November.

2. This case and AuBit International (the "Company") have something of an unsatisfactory history.

The failed application of the Company to appoint ROs

3. The Company, only last month, applied for restructuring officers ("ROs") to be appointed. At the hearing on 6 September 2023, as is clear from my judgment delivered on 4 October 2023, the Company submitted that it was unable to pay its debts. Indeed, the directors did not seem to be on top of the financial position of the Company. The Company said it was unable to pay its debts because Ardu Prime Investment Services SA ("Ardu Prime"), a company in Greece, had and would not release US$60.4 million apparently held in the Company's accounts in Greece. The Company said it was "insolvent within the meaning of section 93 of the Act". I dismissed the petition to

appoint ROs as statutory ground 91B(1)(b) had not been satisfied. There was no credible evidence of a rational restructuring proposal with reasonable prospects of success.

4. At the hearing on 6 September 2023 Sarah Dobbyn, the Company's attorney then and now, submitted that the binary options were a winding-up order or a restructuring. At paragraph 59 of the petition the Company requested that a power be conferred on the proposed ROs to take all steps necessary to investigate the causes of any and all losses on the Company's brokerage accounts at Ardu Prime and to investigate generally the business dealings, finances and affairs of the Company and to analyse all documentation and data recovered as part of such investigation and with powers to take all such proceedings as the ROs consider necessary.

The failed application to appoint JPLs

5. By summons dated 11 September 2023 entities described as LedgerScore Pte Ltd ("LedgerScore"), LS Litigation Holdings LLC ("LSLH") and Earn Guild Pte Ltd ("Earn Guild") (together "Conyers' Clients") applied for the appointment of joint provisional liquidators. That summons was heard on 26 September 2023 and with the hearing of the winding-up petition only then a few weeks away, I dismissed it as I was not satisfied that the necessity hurdle had been jumped. I ordered Conyers' Clients to pay the Company's costs to be taxed on the standard basis if not agreed.

The winding-up petition

6. I now turn to the winding-up petition dated 11 September 2023. I shall refer to Conyers' Clients as the Petitioners and at paragraph 16 of the petition they state that they "are all creditors or contingent creditors of the Company."

7. At para 2 of the petition the Petitioners say they are creditors of the Company and seek the winding up of the Company pursuant to section 92 (d) and (e) on the following grounds:

(a) the Company is unable to pay its debts; and

(b) it is just and equitable that the Company should be wound up on the basis that there is a need for an independent investigation into the affairs of the Company.

8. The Petitioners say that they are retail investors who utilised an online cryptocurrency trading platform operated by "Freeway" who invested in Freeway's Supercharger programme ("Superchargers"). The Petitioners add that Freeway abruptly halted withdrawals on its platform in October 2022 due to unspecified "trading losses". The Petitioners say that the result is that over 5,000 entities holding Superchargers (understood to have collectively invested over US$ 160 million) have had no access to deposits in their Freeway accounts for almost a year.

9. LedgerScore and LSLH in proceedings filed against the Company (and many other defendants) in the District of Wyoming (the "US proceedings") claim compensatory damages of at least US$ 3,205,276.96 and punitive damages of no less than US$ 7.75 million. Various causes of action are pleaded including a request for equitable relief and relief in respect of various alleged torts including negligence, negligent misrepresentation and civil conspiracy.

10. LSLH says it is an assignee of US$ 50,000 of LedgerScore's claim against the Company. LedgerScore is stated to be a 99% shareholder of LSLH.

11. Earn Guild says it deposited a total of US$ 2,987,196.06 into a crypto wallet believed to belong to the Company in order to invest in Superchargers. It is not a party to the US proceedings but says it has a number of potential causes of action against the Company including misappropriation of assets, breach of trust, dishonest assistance, fraudulent misrepresentation, and knowing receipt.

12. The Petitioners in their petition say that the Company is unable to pay its debts and that there is an urgent need for an independent investigation into the affairs of the Company as a whole and in particular:

    (1) alleged misrepresentations regarding the protection of investors' funds;
    (2) alleged misrepresentations to investors regarding Grant Thornton's role as auditor. I should, in fairness, add I think it is common ground that Grant Thornton never conducted an audit and based on the evidence presently before the Court I make no criticisms against them in respect of the unsatisfactory financial position of the Company;
    (3) the Company's dealings with Ardu Prime (the Company itself says "[t]here is evidence of fraud on the part of" Ardu Prime);
    (4) the statements to investors regarding the reason for the halt in withdrawals;

(5) the Company's own admission as to the need for an independent investigation; and

(6) the Company's belated assertion that it is receiving funding on certain conditions.

13. The Petitioners in their skeleton argument dated 10 October 2023 also raise as grounds for an investigation (1) the Company's failure to maintain audited accounts and adequate records necessary to determine its financial position and (2) potential regulatory breaches under the Securities Investment Business Act (2020 Revision) or the Virtual Asset (Service Providers) Act (2022 Revision). The Company in its 28-page skeleton argument dated 10 October 2023 spends some 9 pages seeking to refute these regulatory breach allegations. The Petitioners did not seek leave to amend the petition to include these fresh allegations but the Company has nevertheless responded to them in some considerable detail so has plainly not been unduly disadvantaged by them not appearing in the petition.

14. The Petitioners seek the appointment of David Griffin and Andrew Morrison of FTI Consulting (Cayman) Limited ("FTI") as Joint Official Liquidators ("JOLs"). FTI is well known in the Cayman Islands and regularly provides insolvency officers. The Company would prefer EY (Cayman) Ltd as it thinks that FTI have no presence in Greece and FTI would face a conflict in dealing with the US proceedings.

Recent developments in respect of the existence and standing of the Petitioners

15. On 10 October 2023 the Company provided its written submissions in opposition to the winding-up petition. It said that (1) LedgerScore is "a phantom company which has never existed"; (2) LSLH is "the assignee of a claim from a company which has never existed" and (3) Earn Guild is "a company which has been struck off the register in Singapore and dissolved". In such circumstances the Company sought an order striking out the petition with costs on an indemnity basis ("a wasted costs order against the Petitioners or in default the Petitioners' attorneys, Conyers Dill & Pearman LLP") and "an amendment of the adverse costs order made by the Court on 26 September 2023 against the Petitioners since two of them have no corporate existence and the assignee party has no assets."

16. In prompt reply the Petitioners filed submissions and evidence on 11 October 2023. It is stated that LedgerScore's full and proper corporate name is "LedgerScore International Pte Ltd" and the pleadings in the US proceedings has been duly amended and leave is sought to amend the petition

before this Court to insert the word "International" so that the correct name of the company is specified and also to refer to the equivalent amendment in the US proceedings. It is added that Earn Guild has now been restored in Singapore with retroactive effect.

17. I note GCR Order 20 rule 5 and CWR Order 1 rule 5 and the other authorities referred to by counsel. I have also considered the submissions in favour of amendment and those against.

18. The use of the wrong name and the striking off are most unsatisfactory developments but I have considered the explanations and the prompt remedial action that has been taken. I also note that the Company, in a somewhat desperate attempt to avoid the Court considering the winding-up petition on its merits, seeks to portray the unfortunate although highly negligent mistakes of two of the Petitioners in a somewhat sinister or at least improper bad faith light. Perhaps to remove the spotlight from its unsatisfactory financial position and on the tactical basis that the best form of defence is attack, the Company seeks to turn the spotlight towards the Petitioners and attempts to highlight what it terms suspicious activity on the part of the Petitioners and submits that the Court should decline to allow its process to be abused by the Petitioners.

19. In this case, having considered the evidence and submissions I am satisfied that this is something of an unnecessary storm in a teacup and that a genuine mistake (albeit a highly negligent one) has been made as to the correct name of LedgerScore and that there was no intention to mislead. This is a simple and straightforward case of misnomer. Nothing more sinister than that despite the great fuss the Company has, for naked tactical reasons, made about the recent unsatisfactory developments.

20. I am content to exercise this Court's discretion by permitting leave to amend LedgerScore's name to the correct name that is now specified and also to make the other minor amendments in the petition to reflect the amended name in the US proceedings. I note that Earn Guild has now been restored with retrospective effect.

21. I do not strike out the petition on the grounds put forward by the Company in respect of these latest developments regarding two of the Petitioners. I am minded however to make an order for costs in respect of the summons to amend against the amended LedgerScore entity and against Earn Guild on the indemnity basis in favour of the Company. The conduct in creating this problem and distraction of the correct name of one petitioner and the striking off and the restoration of another

appears to be negligent to a high degree and what should be outside the reasonable norm. It *prima facie* justifies disapproval by the imposition of indemnity costs. I am not, however, presently persuaded that it is appropriate to make a wasted costs order against Conyers and in fairness Ms Dobbyn wisely did not press that in her robust oral submissions and I was referred to no authorities or evidence that would justify such an order.

22. I am however content to vary my costs order made on 26 September 2023 to refer to the correct LedgerScore entity and Mr Lowe, on behalf of the Petitioners, sensibly did not oppose that.

23. Counsel should let me have draft orders dealing with these judicial determinations before 3 p.m. tomorrow whilst it is still fresh in my mind and before I move on to other pressing matters.

24. I now turn to the winding-up petition and the various issues which presently require judicial determination. Before I do that, I record that I have considered all the relevant evidence and submissions put before the Court by the attorneys on behalf of the Petitioners, the Company, White Knight Funding Ltd ("White Knight"), Freeway Operations Inc ("Freeway") and what I shall describe as the Schedule A unsecured creditors. I am most grateful to all counsel for their considerable assistance to the Court.

Standing

25. I am satisfied that at least the first and second petitioners have standing as contingent creditors. Ms Dobbyn submitted in effect that the Petitioners' claims were against Freeway rather than the Company and then Freeway has a claim against the Company. As she puts it, you cannot have two people claiming the same debt. Mr Lowe says that the claims of the Petitioners are for, amongst other relief, damages for misrepresentations by the Company. The Petitioners' claims are not for restitution or for the breach of contract. The contingent debts of the first two petitioners are the subject of the US proceedings. The third petitioner Earn Guild has a potential damages claim against the Company, although I accept it has not commenced legal proceedings in respect of such claim and there are arguments about its lack of existence at the time the winding-up petition was presented, but they do not have to be determined today. It is clear that at least the first and second petitioners have standing.

26. I also accept that in the context of insolvency a contingent claim may include a claim for unliquidated damages for a tort (see for a recent example *Re Atom Holdings* (FSD 54 of 2023 (IKJ) unreported judgment, 18 May 2023)) and the other authorities referred to therein. As I say, Mr Lowe submits that the Petitioners' claims in this case are against the Company and others for misrepresentation by the Company and others and they are claims in tort.

27. The facts of the case presently before the Court are miles away from the relevant facts and circumstances of *Shinsun Holdings* (FSD 192 of 2022 (DDJ) unreported judgment, 21 April 2023). At paragraph 143 of *Shinsun Holdings,* I stated that the evidence before me in that case established no obligation whether existing or otherwise upon the company to the petitioner whether in contract, tort, equity or otherwise. I held in such circumstances the petitioner was not a contingent creditor. There is no conflict between *Atom* and *Shinsun*, as suggested by the Company. The evidence before me today reveals that the Petitioners have claims in tort and equity. There is sufficient evidence to support the standing of at least the first two petitioners as contingent creditors of the Company.

Inability to pay debts

28. On the evidence before the Court, even discounting the contingent liabilities, the Company is presently unable to pay its debts. That was the position last month and it remains the position this month.

29. I have considered *Parmalat* [2008] UKPC 23 at paragraph 9, *GFN* 2009 CILR 650 (CICA) and the other authorities referred to and the rule of practice in respect of disputed debts. Mr Russell took me to some of the Australian cases to stress that the *Parmalat/GFN* disputed debt rule of practice applies to contingent debts. For my part, I stress that a rule of practice should not be elevated to a rule of law. What the Court is concerned about is protecting the winding-up procedure from abuse. I am not persuaded that the fact that the contingent debts are disputed by the Company means that I should not make a winding-up order in the circumstances of this case. The first two petitioners have at the very least arguable *prima facie* claims against the Company. It is not an abuse to permit them to proceed with their winding-up petition on the grounds they rely upon.

30. I note the Company's recent prior admission of inability to pay debts and the involvement of White Knight post the failed RO petition (recently incorporated for the purposes of responding to the winding-up petition and with no significant assets). I note also the Freeway deferral deed but neither

of these matters lead me to the conclusion that the Company is able to pay its debts. Although Mr Harris for White Knight attempts to fend off criticism as to the terms of the loan agreement (which has now somewhat belatedly been produced), he does not suggest that White Knight has immediate access to US $ 15 million. Only last month, the Company was stressing and relying on its inability to pay its debts and it is now in October taking the position that it is able to pay its debts because of White Knight and the Freeway deferral. I find such a position as unattractive as it is unpersuasive. I am of the opinion based on all the evidence before the Court that the Company is still unable to pay its debts and it is totally unrealistic to try and suggest otherwise. In reaching this conclusion I wish to make it plain that I have not relied on the disputed contingent debts.

Reflective loss issue

31. I should add that I was not impressed with the Company leaving it to its undated Supplemental Written Submissions filed late on Friday to raise the reflective loss principle over some 3 pages. If the Company felt that there was something in that point it should have raised it in its written submissions dated 10 October 2023 and provided the Petitioners adequate time to consider it rather than to include it as an afterthought. As it happens, Mr Lowe on behalf of the Petitioners was able to deal with it in his oral submissions today. Mr Lowe submitted that the reflective loss arguments put forward by the Company were in effect incomprehensible. He submitted that his clients claim as creditors and not as shareholders and therefore the reflective loss principle does not impact upon them. He added that his clients are not claiming through LedgerScore Estonia. Ms Dobbyn wisely did not wish to spend much time on her reflective loss arguments in her oral submissions but stressed that you cannot have two people claiming the same debt. Suffice to say the Company's belated misplaced reliance on the reflective loss principle does not persuade me not to make a winding-up order.

Just and equitable - need for full investigation

32. Moreover, it is just and equitable to appoint JOLs so that an independent and thorough investigation can be undertaken into the financial mess the Company is presently in and has been in for a year now and to determine the causes of the Company's financial downfall and who are responsible for it and to make sure that they are held to account. The Company has failed to maintain any proper reliable accounts (audited or otherwise) that accurately sets out its financial position. There has been a real absence of proper accounting. There needs to be an independent investigation into the

Company's use of the significant funds that passed through its hands and into the affairs of the Company, its dealings with Ardu Prime and in particular the financial position of the Company. In the RO proceedings the Company wisely and openly accepted, indeed expressly advocated through its petition, evidence and submissions, that there should be an independent investigation into the Company's losses and "to investigate generally the business, dealings, finances, and affairs of the Company, and to analyse all documentation and data recovered as part of such investigation" (paragraph 59 of the RO petition). In the context of the winding-up petition, I agree.

33. Sadie Hutton in her second affidavit sworn on 10 October 2023 refers to what she describes as a Crypto Fraud Intelligence Report produced on 10 October 2023 with the name of its author redacted but no reason for the redaction being advanced. She says the report concluded that "[t]here is a high likelihood that there has been fraud" to which she adds "by Ardu Prime". The report appears to be from CIRO Group Limited. Under the heading "Scope" it is stated that the report aims "to provide a sample review of alleged fraudulent activities involving cryptocurrency transactions related to Aubit International." The report refers to funds transferred from "Aubit" to "ARDU". The timeline is stated as "2012 to 2022". I think the reference to 2012 is a mistake and should read 2021. It is stated "[t]here's a strong suspicion of fraudulent activities, and immediate action is advised for the potential recovery of assets…immediate legal actions such as a freezing injunction would be prudent next steps." It is unfortunate that the Company did not commission such report some considerable time ago and take immediate action. Moreover, I note that to date no independent report has been commissioned to investigate and report on the conduct of the Company's management. The Crypto Fraud Intelligence Report says, "[l]osses were building throughout the year, reaching up to $ 20.7 million by the end of August 2021." The Report says it has reached certain "unbiased conclusions", the first being "[t]here is a high likelihood of fraudulent activity" and the second being "[i]mmediate action is necessary to mitigate further risks in the form of a full investigation". Again I agree. Ms Dobbyn also accepts that "there are still questions that need answers" but she adds that those answers can be obtained from avenues other than as she puts it "destroying the Company" contrary to the wishes of creditors.

34. An internal investigation led or commissioned by management would not suffice and neither would legal or regulatory investigations and proceedings alone. There needs to be an urgent and full independent investigation by JOLs, officers of this Court, into this failed Cayman company and its management. There is no other adequate way of dealing with the present unsatisfactory situation.

35. There is a weight of first-instance authority as outlined in *Seahawk China Dynamic Fund* (FSD 23 of 2022 (DDJ), unreported judgment 9 August 2022) at paragraphs 63-80 to the effect that the need for an investigation can be a free-standing basis for a winding-up order. *Asia Private Credit Fund* 2020 (1) CILR 134 provides some appellate support, albeit by way of a footnote (footnote 9) and perhaps without the benefit of full argument. In the circumstances of this case, however, I am satisfied that it is appropriate to make a winding- up order on two grounds namely, the inability to pay debts ground and the just and equitable ground.

Petition not an abuse

36. I reject the arguments on abuse. The petition is far from an abuse. The purpose of the Petitioners is for an independent investigation to be carried out into how significant funds were apparently lost and how the loss can be recovered. I am not satisfied that the petition is brought to fish around for evidence in support of the US proceedings or to exert improper commercial duress on the Company and its board. There is nothing in the evidence to persuade me that the Petitioners are motivated by improper or collateral or other abusive purpose concerns. This case is a very different case to *Mann v Goldstein* [1968] 1 WLR 1091, relied on by the Company. The Petitioners do have a legitimate interest in the outcome of a winding up. I am not persuaded that the Petition should be struck out on grounds of abuse.

37. I have considered the Company's arguments relying on *Camulos Partners* 2010 1 CILR 303 but I am not satisfied that the Petitioners have an alternative remedy or that an investigation other than by independent JOLs would be sufficient. The Petitioners in this case are not unreasonably failing to pursue an alternative remedy. There is no abuse of process in this case.

38. Moreover, the evidence does not establish that the Petitioners have "unclean hands" or that there is some other reason why they are not entitled to a just and equitable winding up.

No adjournment

39. I should add, for the sake of completeness, that I am satisfied that this is not one of those cases where the Court should allow a short adjournment to give the Company "breathing space" to regularise its financial position and finalise a rescue package. The difficulties date back to last year.

The Company has had plenty of time to get its financial house in order. There are no good reasons for an adjournment.

Creditors

40. I have noted the views of the internal and external creditors as to whether a winding-up order should be made and if so who the JOLs should be. I have considered the second affidavit of Peter Neilson on behalf of Freeway and the results of what he describes as the "Freeway Supercharger Holder Survey" with almost a thousand responses, 12.41% in favour of liquidation and 56.21% (with a value stated to be approximately US$ 43.8 million) in favour of restructuring. It is interesting that he accepts the views of Supercharger holders as relevant. I note also the Petitioners' position that the petition is supported by over 45 investors whose investments total over US$20 million. Mr Little for Freeway refers to DOF-1 pages 3-4 and says that those creditors were led with reasons to support a winding up being specified for them. I have also noted the views of those creditors in opposition, some of whom seem connected to management. Leaving aside the Petitioners' lack of acceptance of Freeway as a creditor, it is difficult to accept Freeway as an independent party with no axe to grind. It is easy to see why Freeway may not want the Company's activities to be put under intense objective scrutiny. I do take its views and the views of all other creditors into account. However, the evidence put before the Court shows that the affairs of the Company and its management cry out for a thorough independent investigation, and I have had little hesitation in reaching the conclusion that it is just and equitable to make a winding-up order to enable that to happen forthwith.

Identity of JOLs

41. Turning now to the identity of the JOLs, David Griffin and Andrew Morrison of FTI are sufficiently independent and competent and I am content to appoint them as JOLs. Insofar as they need to engage assistance on the ground in Greece and also jurisdictions where the directors and any other members of management of the Company are located, they can no doubt make the necessary arrangements. FTI will deal with the US proceedings, as officers of this Court, as they seek fit and if need be with the guidance of this Court. There is no conflict in that respect.

No sealing order

42. I should add, again for the sake of completeness, that I am not minded to grant a sealing order, briefly touched upon at paragraph 36 of the Company's skeleton argument dated 10 October 2023 although not pressed before me today. I note the unconvincing evidence filed in respect of the proposed sealing order. There is no persuasive evidence before me that the Petitioners have misused any material put before the Court in these proceedings. The need for open justice and transparency in respect of the serious issues raised in this case to my mind trumps any confidentiality or abuse concerns (see my judgment in *Silicon Valley* FSD 163 of 2023 (DDJ), unreported judgment 29 June 2023). One can well see why the Company and its management are somewhat embarrassed by these proceedings, but that embarrassment does not justify taking the exceptional step of closing the Court file. Secrecy in this case will only assist any potential wrongdoers and is not in the interests of justice.

43. I can well see why the Company and its management do not want some of the issues ventilated in these proceedings to see the light of day as such reflect badly upon them but that is insufficient to justify closing the Court file and keeping such issues secret.

44. Those entitled to access the Court file should be permitted access for proper use without further obstacles being placed before them. The rules must be read subject to the fundamental common law principle of open justice (see *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38). In any event the cat is already largely out of the bag. These proceedings with references to the evidence and submissions have rightly taken place in open court and my judgments in the RO proceedings and in these winding-up proceedings are judgments that are and should be available to the public. I am minded to dismiss the sealing application with costs against the Company.

Terms of winding-up order

45. In respect of the terms of the winding-up order I was concerned to see at paragraph 7 of the prayer of the petition a request for blanket authorisation of JOLs' powers as follows:

> "The JOLs be authorised to exercise any of the powers conferred on them by section 110(2) of the Companies Act and Parts I and II of the Third Schedule of the Companies Act without the further sanction or intervention of the Court".

46. I have lost count of the number of times I have had to remind attorneys both in Court and in my judgments (which appear online) that a request for such blanket authorisation is not appropriate - see *UCF Fund* 2011 (1) CILR 305.

47. Fortunately, the draft order which was handed in this morning has focused only on the powers reasonably presently required in this case. I am content to make an order substantially in terms of that draft and to include the powers which are specifically included in that draft. If other powers are required in due course the JOLs can make any necessary and appropriate applications. I am content to make an order substantially in terms of the draft. An updated amended draft order should be provided no later than 3pm tomorrow.

48. I am grateful to the attorneys and their respective teams for their assistance to the Court.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT