IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 271 OF 2023 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF AUBIT INTERNATIONAL (IN OFFICIAL LIQUIDATION)

Before:	The Hon. Justice David Doyle
Appearances:	Peter Tyers-Smith and Sebastian Gollins of Kobre & Kim (Cayman) for the joint official liquidators of Aubit International (In Official Liquidation) Bhavesh Patel and Bryan Little of Travers Thorp Alberga for Freeway Operations Inc (In Liquidation)
Heard:	16 May 2024
Ex Tempore Judgment delivered:	16 May 2024
Draft Transcript of Ex Tempore Judgment circulated:	29 May 2024
Transcript approved:	3 June 2024

Company law – Section 110 and Schedule 3 of the Companies Act (2023 Revision) – determination of sanction application in respect of legal proceedings, a litigation funding agreement, a remuneration agreement and approval of fees – costs – indemnity or standard basis

JUDGMENT

Introduction

1. I confirm that I have considered the hearing bundle in respect of a summons dated 4 April 2024 (the "Application") filed by David Griffin and Andrew Morrison of FTI Consulting as joint official liquidators (the "JOLs") of Aubit International (in official liquidation) ("Aubit") seeking the court's sanction in respect of (1) proposed legal proceedings to assist in identifying the whereabouts of the Company's assets and taking steps to recover them (2) a litigation funding agreement and (3) a remuneration agreement and approval of the JOLs' fees incurred from 16 October 2023 to and including 31 January 2024.

2. The Application is supported by a majority of the Company's liquidation committee ("LC").

3. Freeway Operations Inc (In Liquidation) ("Freeway") initially opposed the Application but recently that opposition has evaporated.

Submissions

4. I have considered the helpful and well-focused skeleton argument of the JOLs dated 10 May 2024. Although I wish to discourage inappropriate litigation by letter/email I have also considered the letter dated 9 May 2024 and the email dated Friday 10 May 2024, 4:39pm, from Travers Thorp Alberga on behalf of Freeway. If parties have arguments which they want to properly put before the court they should file concise skeleton arguments in accordance with the Financial Services Division Guide or any relevant court orders or directions and by way of oral submissions at the hearing. Busy courts should not be inappropriately bombarded by irregular email traffic.

5. I also record that I have considered the oral submissions of Peter Tyers-Smith of Kobre & Kim (Cayman) for the JOLs and the oral submissions of Bhavesh Patel of Travers Thorp Alberga for Freeway.

Relevant law

6. I have considered the relevant law, including the authorities referred to in the helpful skeleton argument of the JOLs dated 10 May 2024, which forms part of the court record.

Evidence

7. I have considered the evidence and I note that a majority of the LC have approved the funding proposal, the remuneration agreement and the fees claimed.

Orders

8. I am content to make the following orders:

(1) The JOLs are permitted to pursue such court-based discovery and information-gathering proceedings with a view to commencing asset recovery proceedings in such jurisdictions as may be advised by their attorneys and counsel to have a reasonable prospect of success.

(2) The JOLs' decision to enter into the litigation funding agreement in the terms exhibited at Exhibit DMG-5/23-55 is sanctioned.

(3) The JOLs' remuneration agreement in the form presented to the Company's LC and the remuneration for the period from 16 October 2023 to and including 31 January 2024 in the amount of US$650,444 be approved and shall be paid out of the assets of the Company.

(4) The recitals need to refer to the date and also need to delete the words in square brackets about the court determining the matter without the need for an oral hearing, as there has been an oral hearing.

Costs

9. This morning the main focus has been on what costs order the court should make.

10. The JOLs seek indemnity costs against Freeway in respect of the Application.

11. I have noted all that has been written and said in respect of costs on behalf of the JOLs and on behalf of Freeway.

12. Mr Tyers-Smith refers to Order 24 rule 9(4) of the Companies Winding Up Rules (2023 Consolidation), which provides:

> "In the case of a sanction application which is made or opposed by a creditor or contributory the general rule is that - (a) that the creditor's or contributory's costs of successfully making or opposing the application should be paid out of the assets of the company, such costs to be taxed on an indemnity basis if not agreed with the official liquidator; and (b) no order for costs should be made against a creditor or contributory whose application or opposition is unsuccessful, unless the Court is satisfied that that creditor's or contributory's position was wholly unreasonable or that creditor or contributory is guilty of having misled the Court or otherwise acting improperly in connection with the application."

13. Order 24 rule 9(5) provides:

> "The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional circumstances and special reasons which justify making some other order or not order for costs."

14. I have also considered Mr Tyers-Smith's points in respect of the fiduciary position of Freeway and Freeway's opposition being based on proprietary claims which were not dependent on sealed evidence.

15. Mr Patel in effect says that Freeway's conduct would not justify this court in granting indemnity costs against Freeway.

16. I also note that by email of 10 May 2024 Freeway resisted indemnity costs and added the "more appropriate order is for costs on the standard basis".

17. I accept that absent the involvement of Freeway the JOLs would still have incurred costs in respect of the Application.

18. Freeway must, as I think its attorneys realistically recognise, however pay for the additional costs incurred by the JOLs in dealing with Freeway's opposition which was indicated in an email dated 9 April 2024 and was only belatedly removed on 9 May 2024.

19. The order I make therefore is that Freeway should pay the costs of the JOLs in dealing with Freeway's initial opposition to the Application.

20. The issue now arises as to whether those costs should be taxed on the indemnity basis or the standard basis in default of agreement.

21. I note what could be an interesting interaction between the relevant law on the principles in respect of indemnity costs and the relevant law on the principles in respect of the position under Order 24, rule 9(4)(b) of the Companies Winding Up Rules. I have not been addressed in any great detail in respect of that. Suffice to say, the court still retains a wide discretion in respect of costs and the basis upon which those costs should be ordered.

22. Frankly, I am unimpressed by Freeway's reason for the late abandonment of its opposition to the Application, in effect that it discontinued its opposition because its application to unseal certain plainly confidential and sensitive evidence was unsuccessful and it therefore lacked what it says was "critical information". If it felt it had insufficient evidence to support its opposition it should not have presented its opposition to the court in the first place. If Freeway had genuine concerns that the dismissal of its unsealing application was somehow wrong, unfair or unjust it should have sought to appeal the order dismissing its unsealing application and sought a stay of the sanction hearing in the meantime. It wisely did not do so. The late abandonment of its opposition on shaky grounds is, although worthy of criticism, insufficient to justify costs on an indemnity basis against it. To its credit, although late in the day, Freeway did finally abandon its opposition to the Application.

23. The courts, attorneys and other officers of the court in the Cayman Islands are busy and time wasting should be discouraged (if need be by adverse costs orders) but there is not quite enough in this case to justify indemnity costs despite the court's disappointment that a lot of time has been wasted by Freeway.

24. Although it leaves a lot to be desired and it has caused additional costs to be incurred, I am not persuaded that Freeway's conduct was such as to justify an order of costs on the indemnity basis against it. The costs order against it therefore should be on the standard basis. I am satisfied, in the particular circumstances of this case, for the reasons I have given, that it is appropriate to make an order for costs against Freeway. That order should be that the costs are taxed on the standard basis, in default of agreement.

25. In respect of the other costs incurred by the JOLs regarding the Application those costs should be paid out of the assets of the Company.

26. That is my judgment in respect of the Application.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT