



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**Cause No. FSD 364 of 2023(IKJ)**

**IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)**

**AND IN THE MATTER OF CANTERBURY SECURITIES, LTD.**

**IN CHAMBERS**

**Before:** The Hon. Justice Kawaley

**Appearances:**

Ms Katie Pearson and Ms Alexia Adda, Claritas Legal Limited, for the  
Petitioner

Mr Ben Tonner KC and Ms Sally Bowler of McGrath Tonner, for the  
Company

**Date of decision:** 13 December 2023

**Reasons delivered:** 18 December 2023

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## INDEX

*Application to appoint joint provisional liquidators-four hurdles test-insolvency-need to prevent dissipation of assets or misconduct by directors- whether appointment “necessary” need to prevent dissipation of assets and mismanagement or misconduct-Companies Act (2023 Revision), sections 92, 104*

## REASONS FOR DECISION

### Introductory

1. On 4 December 2023, the Court sealed the Petition presented by the Petitioner in the capacity of a creditor or contingent creditor to wind-up the Company on the grounds of insolvency and/or on the just and equitable ground based on the need for an investigation into its affairs. On the same date the Court sealed the Petitioner’s Summons for the appointment of Ms Karen Scott and Mr Russell Homer of Chris Johnson Associates Ltd as Joint Provisional Liquidators of the Company. The summons was issued returnable for the 13 December 2023, the second day of the “Quantum Hearing” in FSD 227/2018 between the same parties (the “Writ Action”). The Judgment on liability in the Writ Action was delivered on 17 August 2023 (“Liability Judgment”) and the Plaintiff’s claims for *inter alia*, breach of fiduciary duty and breach of contract and unjust enrichment succeeded.
2. For the reasons set out in an Ex Tempore Judgment delivered on the morning of 13 December 2023 following the conclusion of the Quantum Hearing, I granted an Order which, *inter alia*, required the Company to pay the Petitioner US\$1,974,057.44. I reserved judgment on the Petitioner’s application for an order for the payment of US\$25, 875,605.84, to enable Mr Tonner KC a further opportunity to make out a case (not supported by the somewhat not easily digestible authorities before the Court) that the damages for breach of contract showed be assessed in some lesser amount.
3. Before the Petitioner’s counsel moved the Summons for the appointment of the JPLs, The Company’s counsel applied for an adjournment on two grounds: (a) the need for more time to respond to the application, although it was accepted that the requisite notice under the Rules had

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been given, and (b) on the grounds that fresh evidence had emerged in proceedings in Nevada against the Petitioner which could potentially provide grounds for setting aside the Liability Judgment on the grounds of fraud. I refused the adjournment applications on the principal grounds that:

(a) the Company was in no position to seek indulgences from the Court. The present application was only occurring because of its own misconduct in the Writ Action, which included disposing of an asset to defeat a freezing order, and its being subjected to a Debarring Order (which was still in effect) for failing to comply with various Court Orders;

(b) to the extent that the fresh evidence was potentially relevant in providing grounds for refusing to appoint the JPLs, the Court could proceed to hear the application on the assumption that the Company had at least a prospect of setting aside the Liability Judgment.

4. Having heard argument, on the afternoon of 13 December 2023 I granted an Order appointing the JPLs with full powers, but specifically directing that the JPLs should seek to form a preliminary view by the return date of the Petition on the Company's solvency and the risk of asset dissipation or other managerial misconduct which would warrant an investigation into its affairs.
5. These are the reasons for that decision.

### **Governing legal principles**

6. Section 92 of the Companies Act (2023 Revision) (the "Act") empowers the Court to wind-up a company on, *inter alia*, the following grounds:

*“(d) the company is unable to pay its debts; or*

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

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7. Section 104 of the Companies Act (2023 Revision) provides in salient part as follows:

***“Appointment and powers of provisional liquidator***

*104. (1) Subject to this section and any rules made under section 155, the Court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally.*

*(2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company or, subject to subsection (6), the Authority, on the grounds that —*

*(a) there is a prima facie case for making a winding up order; and*

*(b) the appointment of a provisional liquidator is necessary in order to —*

*(i) prevent the dissipation or misuse of the company’s assets;*

*(ii) prevent the oppression of minority shareholders; or*

*(iii) prevent mismanagement or misconduct on the part of the company’s directors.”[Emphasis added]*

8. In *Re ICG I*, FSD 192 of 2021 (DDJ), Judgment dated 4 August 2021 (unreported), David Doyle J extracted from section 104 of the Act “four hurdles” to be overcome by an applicant seeking to appoint provisional liquidators. He opined (at paragraph 17):

*“(3) It can immediately be seen from the plain wording of these provisions that an applicant seeking the appointment of a provisional liquidator pending the determination of a winding up petition has four main hurdles to jump:*

*(a) The applicant must satisfy the court that a winding up petition has been duly presented and a winding up order has not yet been made (the ‘presentation of a winding up petition hurdle’);*

*(b) The applicant must satisfy the court that the applicant has standing to make the application i.e. the applicant is a creditor, contributory or the Authority (the ‘standing hurdle’);*

(c) *The applicant must satisfy the court that there is [a] prima facie case making a winding up order (the ‘prima facie case hurdle’); and*

(d) *The applicant must satisfy the court that the appointment of the provisional liquidator is necessary in order to prevent the dissipation or misuse of the company’s assets; and/or the oppression of minority shareholders; and/or mismanagement or misconduct on the part of the company’s directors (the ‘necessity hurdle’)....”*

9. Mr Tonner KC appeared to accept that the only hurdle which was subject to serious challenge by his client in the present case was the “necessity” hurdle. The Petition and standing requirements were clearly met. Ms Pearson placed before the Court another decision of Justice Doyle in which he gave helpful guidance as to both the *prima facie* case requirement and the evidential approach to the necessity hurdle: *Re Position Mobile Ltd. SECZ*, FSD 79/2022 (DDJ), Judgment dated 31 October 2023 (unreported). As for the third hurdle, he stated (at paragraph 133):

*“(10) In considering whether a prima facie case for a winding up has been made out the English authorities (including Rochdale Drinks) may offer helpful guidance. It is not necessary to demonstrate that a winding-up order will be granted. That would be setting the bar too high at the interlocutory stage. A prima facie case for making a winding up order is established if the allegations made in the petition for the appointment of JPLs are supported by evidence and have not been disproved, with any conflicts of evidence to be resolved at the substantive hearing of the winding up petition (Bona Film, Asia Strategic). The applicant has to satisfy the court that the applicant is likely to obtain a winding up order on the hearing of the winding up petition (Asia Strategic, Grand State referring to Rochdale Drinks, ICGI, Al Najah Education.”*

10. As regards the evidential approach to the fourth hurdle, Doyle J further opined (at paragraph 133) as follows:

*“(11) The burden is on the applicant to prove that the appointment of JPLs is ‘necessary’ in order to prevent (i) the dissipation or misuse of the company’s assets or (ii) the oppression of minority shareholders; or (iii) mismanagement or misconduct on the part of*

*the company's directors. The prima facie evidential test does not apply to the necessity hurdle. The burden is not on the respondent to disprove the applicant's allegations on the necessity hurdle but a respondent would normally be expected to provide detailed evidence in response rather than mere generalised denials. The court must consider all the evidence before it and taking a flexible risk assessment approach must reach a conclusion as to whether the applicant has satisfied the court that the necessity hurdle has been jumped. The court, in considering the necessity hurdle, is considering whether the risk which is sought to be prevented is sufficiently serious to justify the appointment of JPLs. The court carefully considers the risks and any necessary preventative measures and reaches a conclusion on the evidence presented to it as to whether the applicant has jumped the necessity hurdle.*[Emphasis added]

## **Findings**

### **Petition hurdle**

11. There was no suggestion that the Petition had not been duly presented.

### **Standing hurdle**

12. There was no credible basis for doubting that the Petitioner was a substantial contingent creditor of the Company based on the Liability Judgment and the award made following the Quantum Hearing. The Petitioner was on 13 December 2023 entitled to be paid in excess of US\$ 1.9 million for breach of fiduciary duty, with a further US\$ 31 million sum being subject to the findings in Nevada proceedings brought against the Petitioner by PFS Management ("PFS"). The Petitioner also claims damages in excess of US\$25 million, which I have yet to assess.

### **Prima facie case hurdle**

13. The Petition was based in many material respects on matters which were either uncontentious or not easily controvertible:

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- (a) the Petitioner's standing as a substantial judgment creditor of the Company;
- (b) the Petitioner's conduct in the Writ Action was relied upon to support the need for winding-up on the grounds of insolvency or on the just and equitable ground based on the need for an investigation into mismanagement.

14. The primary facts were accordingly matters of record in the Writ Action of which judicial notice could be taken. The only obvious basis for controverting the Petition entailed an evaluation of matters of record as opposed to controverting disputed primary facts. The misconduct case pleaded concisely was elaborated upon in the Petitioner's Skeleton, and most pertinently invited the Court to draw the following inferential conclusions from the largely incontrovertible facts:

*"5. Further, the behaviour post-trial of CSL, acting through its founder, CEO, director and, to the best of FDL's belief, sole owner, Ms Erin Winczura, leads to serious concerns that CSL is likely to dissipate assets and/or is being mismanaged by Ms Winczura. CSL has failed to comply with, or otherwise sought to evade the stringency of, a series of Court orders in the Proceedings leading the Court to find that it is 'satisfied that the Defendant [CSL] is the sort of litigant which is not embarrassed to engage in blatant acts of asset dissipation in circumstances which constitute a serious abuse of the processes of this Court.'" (see Sin 1 at para. 39)...*

*23. The fact that CSL is in flagrant breach of a Court order to pay cash to its attorneys leads to the irresistible conclusion that it is insolvent. CSL is likely to be wound up on the insolvency ground and a good prima facie case is established. FDL is unaware of any assets in CSL's name belonging beneficially to CSL. FDL is aware that, prior to 6 December 2018, CSL appears to have had c. US\$1.9 million held in CSL's account with a Canadian financial institution ("Hampton"), but CSL's evidence appears to be that this was other clients' funds (discussed further below at paragraph 29) and in any event is likely insufficient to satisfy the Judgment debt.*

*24. The only conceivable alternative to CSL being insolvent is that, acting through Ms Winczura, it chooses not to comply with orders of the Court. If that is true, CSL is being seriously mismanaged and it is appropriate to wind CSL up to enable a proper*

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*investigation to be carried out into Ms Winczura's (mis)management of the Company."*

[Emphasis added]

15. These were powerful arguments which made it straightforward to conclude that the *prima facie* case hurdle had been met by the Petition. Insolvency could be inferred not from a failure to pay the judgment debt (which only fell due on the day the present application was heard). Instead I inferred insolvency from the Company's failure to keep the proceeds of the YRIV share sales as security for the judgment debt and its subsequent failure to comply with the Order directing it to provide cash security in the Writ Action. More straightforward was the case on the need for an investigation, the right of a creditor to seek a winding-up on the just and equitable ground. Ms Pearson pointed out that this alternative ground for a creditor to seek a winding-up order had been recently confirmed by this Court in *Re Atom Holdings*, FSD 54 /2022 (IKJ), Judgment dated 18 May 2023 (unreported) at paragraph 46.

#### **The necessity hurdle**

16. The necessity hurdle in this case required the Applicant to demonstrate that it was necessary to appoint joint provisional liquidators to prevent either (1) a dissipation or misuse of the Company's assets or (2) mismanagement or misconduct on the part of the Company's directors. In approaching this pivotal evaluative exercise, I inevitably drew on my experience of adjudicating similar applications over the last 20 years. I determined that the need for the appointment was very clearly made out. It was not entirely hyperbole when I observed in the course of argument that the Defendant's conduct in the Writ Action appeared to have been designed to create a situation where no reasonable court, properly directing itself, could refuse to appoint provisional liquidators over the Company.
17. Although I felt obliged to appoint the JPLs on clear legal and factual grounds, I took no pleasure in making such a draconian order in respect of a local regulated financial services provider ("FSP"). I have generally viewed commercial judges and FSPs as sharing a common mission of promoting the regulatory reputation of the jurisdiction, the judges for public purposes and the FSPs for private purposes. Based on that tacit assumption, FSPs are sometimes the recipients of a certain margin of appreciation when discretionary judgments are made as to the need for coercive orders, based on the assumption that they as local, regulated entities have a vested interest in adhering to higher
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standards of probity than might realistically be expected from other litigants, especially human actors beyond the personal jurisdiction of this Court. It is also tacitly understood, of course, that the integrity of the jurisdiction also requires the Court to adjudicate substantive disputes with all commercial parties fairly.

18. It is my invariable experience that regulated FSPs are normally scrupulously diligent about conducting court and regulatory proceedings appropriately, more so than commercial litigants generally. However, even ordinary civil and commercial litigants, including those accused of serious wrongdoing, are typically astute to avoid even technical non-compliance with court orders with a view to ensuring that no adverse inferences are drawn in respect of their probity. It was ultimately not necessary to understand the Defendant's motivations as its actions provided a clear basis for finding that the JPLs should be appointed to prevent both a dissipation and/or misuse of the Company's assets and to prevent further misconduct on the part of the Company's officers. In the commercial world as a whole it is generally understood that disrespect for the law (which includes the common law, statutory provisions and court orders) on the part of commercial actors is a form of misconduct and this understanding is more acute on the part of regulated entities and professionals who are required to comply with both the general law and applicable regulatory requirements as well.
19. Against this background, the Company's conduct in the Writ Action (which included a blatant act of asset dissipation designed to defeat the relief the Court was actively considering granting) and repeated breaches of Court orders was difficult to comprehend. It implied that the Company was no longer conducting business at all, prompting a "loss of substratum" plea in the Petition the merits of which did need to be considered. It was ultimately not necessary to interrogate or seek to understand the Company's motivations; its overt conduct was all that needed to be assessed.
20. Through its former attorneys' letter dated 17 April 2020, the Company had informally undertaken in the Writ Action that it would keep the proceeds of sale of the Petitioner's YRIV Shares "*secure pending the outcome of this litigation*". This letter was written to reassure the Court that it could safely release the Company from its undertakings given in lieu of an injunction which I discharged because the Petitioner's misconduct in relation to AML/KYC information provided to the Company. Prior to the letter, the Company's then counsel had (as I recall) orally asserted that the Court could trust the Company as it was a regulated entity. Failure to confirm the location of the assets prompted the granting of the "Freezing Order" on 22 May 2023, before trial, and the

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“Information Order” after trial. The Company had filed evidence about the supposed location of the funds and, after failing without good cause over a period of weeks to comply with the Information Order offered to provide a Treasury Bill as alternative security. There were two aspects to the non-compliance:

- (a) the failure to produce historic documentary evidence which it explained was due to the non-existence of records which it appeared ought to have been kept (a matter considered briefly below); and
- (b) the failure to produce a screenshot of the Canadian Escrow account the company had sworn the share sale proceeds were held in. This failure was never satisfactorily explained.

21. While contesting an application to freeze the Treasury Bill, which I granted, the Company sold the Treasury Bill and offered to provide yet another form of illiquid security. I made an Order on 7 September requiring the Company to pay to its attorneys the cash equivalent of the Treasury Bill it had previously dissipated (“Restraining Order”), for Reasons delivered on 14 September 2023. I stated:

*“39... A litigant that has failed to satisfy the Court about the existence of assets it has contended are available to meet their opponent’s proprietary claim is almost by definition a high dissipation risk....”*

*40. In the event, the Defendant elected to add to this sorry picture of dishonourable litigation conduct a blatant act of asset dissipation (effectively in the face of the Court)...”*

22. The Company failed to comply with the Restraining Order prompting me to Order on 25 September 2023, *inter alia*:

*“3. Unless the Defendant has complied with the Restraining Order to the Court’s satisfaction, the Defendant shall be debarred from filing any further Summonses, applications or evidence in these proceedings until further Order.”*

23. I refused leave to appeal against the 7 September 2023 Order, and the Court of Appeal apparently also refused leave to appeal. The temporary stay I granted expired in mid-October, and the Company continues to be in breach of the Information Order and the Restraining Order. It is a matter of record in the Writ Action that the Company simply refuses to comply with any Court

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Orders it considers ought not to have been made. It only respects the law to the extent that it agrees with the outcomes the law delivers.

24. Ms Pearson also pointed out that in justifying its failure to comply with one aspect of the Information Order, the Company had effectively admitted a failure to keep adequate records in breach of section 10 of the Securities Investment Business Law (2020 Revision). There were at least reasonable grounds for believing that this regulatory offence has occurred and, further, that the Company has deliberately misled the Court about the funds it said it held with Canadian Escrow in the Writ Action. In the Liability Judgment I found that the Company misled the Petitioner. It also a matter of record that the Company has been sued for, *inter alia*, misrepresentation by three other plaintiffs: *Black Gold Investments Holding Inc. et al-v- Erin Winczura et al*, FSD 163/2022.
25. The cumulative effect of all of these considerations was the most compelling case imaginable for the appointment of joint provisional liquidators in relation to an FSP to prevent the dissipation or misuse of assets and/or misconduct by the Company's directors. It was compelling because I was not required to assess the need for an appointment based merely on affidavit evidence sworn by a commercial and litigation adversary; I had the benefit of a ringside view of the matters complained of as the presiding Judge in the Writ Action. It is important to add that I had regard to not simply the narrow interests of the Petitioner, but also the wider interests of other actual or prospective clients as well. As I observed in the course of the hearing, it would be damaging to the reputation of this Court and this forum if any other investor suffered harm after this Court failed to remove the Company's existing management despite all the material before the Court.

### **The JPLs' initial report for the hearing of the Petition**

26. It seemed inherently improbable that a company which had no compunction about adopting a cavalier approach to litigation in the face of the Court would have been conducting its private commercial dealings in an entirely proper manner. However, I was concerned to ensure that my interlocutory finding that there was a *prima facie* case for winding-up was capable of being fairly re-evaluated at the hearing of the Petition and was critically assessed. I accordingly directed the JPLs to prepare a preliminary report before that hearing indicating, to the extent possible, their independent views as to the Company's solvency and the need for an investigation into its affairs.

**Conclusion**

27. For the above reasons, on 13 December 2023, I appointed the JPLs in respect of the Company.



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**THE HONOURABLE MR JUSTICE IAN RC KAWALEY  
JUDGE OF THE GRAND COURT**