



**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
Company¹

Mr John Harris of Nelsons, for the Joint Provisional Liquidators

¹ Nelsons filed a Notice of Acting on behalf of the Joint Official Liquidators in place of McGrath Tonner on 17 January 2024 following the winding-up of the Company on 16 January 2024.

Date of decision:	16 January 2024
Reasons circulated:	26 January 2024
Reasons delivered:	31 January 2024

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Creditor's petition for winding-up-insolvency-need for an investigation-relevance of appeal against judgment debt to creditor's standing-failure of management to cooperate with joint provisional liquidators-whether petition should be adjourned-Companies Act (2023 Revision), sections 92, 104

REASONS FOR WINDING-UP ORDER

Background

1. The Petition herein was presented on or about 4 December 2023 by the Petitioner in the capacity of a creditor or contingent creditor. The Petitioner sought to wind-up the Company on the grounds of (1) insolvency and/or (on the just and equitable ground) based on (2) the need for an investigation into its affairs and/or (3) loss of substratum. The Petitioner also filed a Summons for the appointment of Ms Karen Scott and Mr Russell Homer of Chris Johnson Associates Ltd as Joint Provisional Liquidators of the Company ("JPLs").
2. On 13 December 2023 I granted an Order appointing the JPLs with full powers, but additionally directed that the JPLs should seek to form a preliminary view by the return date of the Petition on the Company's solvency, the risk of asset dissipation or managerial misconduct which would warrant an investigation into its affairs. In my Reasons for Decision dated 18 December 2023, I explained both the reasons for appointing the JPLs and requesting them to provide an interim report.
3. As for the grounds for the JPLs' appointment, I summarised the position as follows:

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“19...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...

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.”

4. As for the grounds for directing the JPLs to provide an interim or preliminary report to the Court in advance of the hearing of the Petition on 16 January 2024, I stated:

“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.” [Emphasis added]

5. It is essentially standard judicial fare to be required to make a series of adverse findings against a party without allowing one’s objectivity to be clouded by an overly cynical view of a litigant which demonstrates complete disdain for the processes of the Court. Such litigants fall within the parameters of the “*all manner of people*” whom the judicial oath requires the Judge to “*do right to*”. Accordingly, justice appeared to me to require that the Company’s management be given a reasonable opportunity to demonstrate to independent officers of the Court (whose stock-in-trade is making hard-headed professional commercial judgments) that the concerns which prompted their appointment were misconceived. As I observed early in the hearing, I have never known the

respondent to a winding-up petition to fail so spectacularly to seize the opportunity offered to it by the Court to extricate itself from the peril of a winding-up order.

6. On 16 January 2024, I granted the Winding-Up Order sought by the Petitioner and appointed the JPLs as Joint Official Liquidators (“JOLs”). These are the reasons for that decision.

Prima facie case for winding-up

7. It was an essential jurisdictional basis for appointing the JPLs on 13 December 2023, that I be satisfied that there was a *prima facie* case for granting a winding-up order. The relevant findings recorded in my 18 December 2023 Reasons for Decision were the following:

“Prima facie case hurdle

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

(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 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.”

8. I have always thought of a *prima facie* case as signifying a case which is sufficient to justify the grant of the relief sought unless the apparent merits of the case are undermined or discretionary factors weigh against the granting of relief. In *Re Position Mobile Ltd. SECZ*, FSD 79/2022 (DDJ), Judgment dated 31 October 2023 (unreported), David Doyle J (at paragraph 133 (10)) opined as follows:

“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...”

9. Those observations were supported by reference to authority. Accordingly, having found that the Petitioner had established a *prima facie* case for winding-up when appointing the JPLs at an interlocutory stage, it was for the Company to undermine the Petitioner’s case on the merits of the grounds relied upon at the hearing of the Petition.

The Company’s evidence and submissions

10. The Company primarily relied on the Second Affidavit of Erin Winczura (its Chief Executive Officer-“CEO”) and the following significant averments therein:
- (a) as a result of evidence which was given in the Nevada Proceedings between PFS and the Petitioner, the Company believed it could adduce evidence on appeal to show that, *inter alia*, the Petitioner was not misled about the connection between PFS and the

Company, the Petitioner was dishonest in its dealings with the Company and the Company could not for legal reasons have returned the Petitioner's shares;

- (b) the Petitioner's standing was wholly dependent upon the Liability Judgment, which was subject to an appeal in relation to which time had not yet started to run;
- (c) the debts relied upon were not presently due or were subject to appeal so that the Petitioner could not contend they were not *bona fide* disputed;
- (d) in these circumstances the Petitioner could not establish that the Company was unable to pay its debts as they fall due;
- (e) the Petitioner's standing to petition on the just and equitable ground could be challenged following the Company's proposed appeal;
- (f) the Petitioner was protected from any risk of dissipation of assets pending appeal by its existing injunctive relief in FSD 227 of 2018 (the "the Writ Action");
- (g) accordingly, the case for a winding-up on the just and equitable ground was not made out;
- (h) there should be a Case Management Stay pending the determination of the Company's appeal which would determine whether or not the Petitioner had standing to seek a winding-up order.

11. These averments combined factual and legal points. In essence, it was averred as a matter of fact that Ms Winczura and the Company proposed to appeal and believed the Liability Judgment would be set aside. As a matter of law, this contingency was said to have deprived the Petitioner of standing to seek a winding-up order. The Company's entire opposition to the Petition was based on the premise that a successful appeal against the Liability Judgment was a realistic possibility. It was somewhat surprising, therefore, for Mr Tonner KC to contend that it was premature for the Court to be conducting any detailed analysis of the merits of the relevant appeal.

12. However, the Petitioner’s counsel had relied heavily on the provisions of section 19 (3) of the Court of Appeal Act (2023 Revision) in suggesting that it was unrealistic to think that the Company would be able to comply with the requirement to satisfy the security requirements for obtaining a stay. Mr Tonner KC submitted that in practice the Court of Appeal did not generally require payment into Court under the following provision:

“(3) No stay of execution or other proceedings shall be granted upon any judgment appealed against save upon payment by the appellant into the Grand Court of the whole sum, if any, found due upon such judgment and the amount of any costs awarded to the other party or parties to the action, or upon good cause shown to the Court or to the Grand Court.” [Emphasis added]

13. Clearly the payment in requirement is not an inflexible requirement for a stay and any Court, taking into account the right of access to justice, would not apply a security provision such as section 19(3) in an inflexible manner. I was unwilling to assume that the Company would be unable for financial reasons to obtain a stay pending appeal, assuming it was able to formulate and file an appeal with realistic prospects of success.
14. The Company’s counsel, in addressing the law, was unable to point to any authority undermining the Petitioner’s case that it was well settled that even a pending appeal did not deprive the petitioning creditor of standing to obtain a winding-up order. Mr Tonner KC argued that the Court should be cautious about relying on the just and equitable ground invoked by a creditor, without positively disputing that the requisite standing existed.
15. The substantive position the Company ultimately adopted was to seek an adjournment of the Petition to allow the Company to promptly file its appeal and stay application.

The issues

16. In light of the Company’s position, the issues which required determination were:

- (a) whether and, if so, to what extent, a pending or prospective appeal affected the Petitioner's standing as a creditor;
- (b) whether (in light of the way in which issue (a) was determined) the Court should adjourn the Petition to facilitate an appeal and an application for a stay pending appeal;
- (c) whether, irrespective of the view the Court took of the Petitioner's standing as a creditor, the alternative just and equitable ground was sufficiently made out to justify a winding-up order in any event.

The JPLs' Preliminary Report and the JPLs' position on an adjournment

17. The JPLs' Preliminary Report was dated 9 January 2024 and contained a number of preliminary conclusions which were relevant to the issues the Court had to decide. Mention is only made here of those portions of it which were referenced in Open Court. In summary:

- (a) the Company's only known local bank accounts were closed in 2020 and 2021;
- (b) the Company has no identifiable local employees;
- (c) the Company's 2023 client list records two individuals and two companies (PFS and the Petitioner);
- (d) the JOLs would need to seek recognition in Canada with a view to pursuing assets of the Company believed to be there;
- (e) due to the CEO's failure to attend three scheduled meetings, the JPLs had issued a Summons seeking an order with a penal notice attached compelling her to meet with them.

18. The Preliminary Report concluded with the following two paragraphs to which I referred during the hearing:

"The JPLs consider there is a clear case of managerial misconduct as explained throughout this Report.

To conclude: the Company's insolvency and the risk of asset dissipation and managerial misconduct warrants further investigation into its affairs."

19. Mr Harris for the JPLs expressed concern about the negative possible impact of an adjournment on the JPLs' ability to obtain recognition and preserve assets abroad. I readily agreed that official liquidators would be far better equipped to pursue asset recovery steps abroad.
20. The JPLs' Preliminary Report, together with their counsel's submissions, provided clear support for the following conclusions:
 - (a) the Company had ceased any identifiable local business operations and had no employees or assets within the Cayman Islands;
 - (b) the Company was very likely insolvent in that it had known debts but no identifiable liquid assets;
 - (c) there was a clear need to investigate the affairs of the Company to prevent any further mismanagement in relation to a regulated financial service provider ("FSP");
 - (d) there was a risk of asset dissipation and prejudice to creditors if the appointment of official liquidators to pursue overseas asset recoveries was delayed.

Legal findings: the Petitioner's standing and the relevance of a potential appeal

21. Ms Pearson demonstrated by reference to clear authority that the existence or likelihood of an appeal against the judgment which forms the basis of a petition debt is no impediment to the right to obtain a winding-up order. Reference to the two local authorities cited in argument will suffice. In *Re Swiss Oil Corporation* [1988-89 CILR 319] at page 330, Collett CJ (as he then was) opined as follows:

"In In re Amalgamated Properties of Rhodesia (1913), Ltd. (1), it was held that the mere existence of an appeal to the local Court of Appeal against the judgment on which a winding-up petition is founded is no reason why the company should not be ordered to be wound up. In In re Douglas Griggs Engr. Ltd. (6), Pennycuick, J. applied that decision to a case where

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litigation was still pending at first instance in regard to a claim which the respondent company was maintaining in other local proceedings against the petitioning creditor for an amount larger than the debt which that creditor relied on in the winding up against the company. It was held that the prima facie right of the petitioning creditor to a winding-up order was not displaced...”

22. In *Re China Hospitals Inc* [2018 (2) CILR 335] where an appeal was pending in relation to an arbitration award upon which the petition debt was based, I held:

“32 In re Amalgamated Properties of Rhodesia (1913) Ltd. (1) was referred to by the petitioner’s counsel as clearly demonstrating that a judgment creditor is entitled to wind up the judgment debtor even if an appeal has been filed. However, the English Court of Appeal was minded to give the company in that case, which had offered to provide security for the debt pending appeal, the opportunity to secure the debt and pursue the appeal.

33 The petitioner’s counsel handed up in the course of the hearing a supplementary authority which resolved this threshold question beyond doubt. In Revenue & Customs Commrs. v. Rochdale Drinks Distrib. Ltd. (7), per Rimer, L.J. (Lewison, L.J. and Pill, L.J. concurring) opined as follows ([2011] EWCA Civ 1116, at para. 85):

‘The fact, however, that the assessment raised by HMRC was one that could be the subject of an appeal by RDD (and it has now launched an appeal, although it had not done so at the time of the hearing before the judge) does not mean that the assessment could not found the basis for a petition for the winding up of RDD. Put another way, it was not open to RDD to challenge and defeat the petition merely on the basis that it had a statutory right of appeal against the assessment before another forum. The existence of a right of appeal says nothing as to whether any appeal will have merit; and it was open to HMRC, as they did, to present their petition against RDD on the basis that their claimed debt, or at least a material part of it, was not capable of serious dispute and so could properly found the basis for a winding up order.’ [Emphasis added.]’ ...

*37 As far as the test for deciding whether or not a dispute is substantial is concerned, the petitioner rightly submitted (without any or any credible challenge) that the burden lay on the companies to establish the substance of the dispute they raised. This is also the position contended for by French (para. 7.451, at 524–525), despite some inconsistency in the authorities. More persuasively still, this is the position acknowledged by the English Court of Appeal in *Revenue & Customs Commrs. v. Rochdale Drinks Distrib. Ltd.* (7) where Rimer, L.J. held ([2011] EWCA Civ 1116, at para. 86)” [Emphasis added]*

23. I was accordingly satisfied, that the foreshadowed appeal against the Liability Judgment had no impact on the Petitioner’s standing. Further, the burden rested on the Company to demonstrate that its appeal prospects were so strong that justice required staying the winding-up proceedings pending the outcome of the appeal.

Findings: the impact of a potential appeal on whether or not a winding-up order should be granted on the insolvency ground

24. As a matter of law, it was not open to the Company to challenge the Petitioner’s standing as undisputedly a contingent creditor in respect of a judgment debt which would become due (if it was not already due) in the very near future. That the Company was insolvent on a cash-flow basis could be inferred from its conduct in the Writ Action combined with the findings recorded in the JPLs’ Preliminary Report. It was also legally permissible to infer insolvency having regard to the Company’s inability to pay debts which would soon be immediately payable. As Martin JA held in a frequently cited passage in the leading judgment in *Re Weaving Macro Fixed Income Fund Limited (in liquidation)* [2016 (2) 514] (Morrison JA and Field JA concurring):

“40 In my view, the cash flow test in the Cayman Islands is not confined to consideration of debts that are immediately due and payable. It permits consideration also of debts that will become due in the reasonably near future.”

25. In these circumstances it was not for the Petitioner to justify the need for a winding-up order. It was for the Company to demonstrate why the usual order should not be made. As Margaret Ramsay-Hale J (as she then was) held in *Re Evergreen Holdings Limited*, FSD 349/2021 (MRHJ):

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“55. It is well-settled that if a creditor with standing to make an application wants to have the company wound up, and if the Court is satisfied that the company is unable to pay its debts, a winding up order will follow, unless there are some special reasons why it should not. In Re Lummus Agricultural Services Ltd. [2001] 1 BCLC 137 at 141 which was cited by the learned Chief Justice in Sun Cheong, the Court said:

‘It is sometimes said that in such a case, a petitioning creditor is entitled to a winding-up order ‘ex debito justitiae’. I therefore start with the assumption that such an order should be made in this case, and the burden of argument rests on [the respondent company] to show me why it should not’.”

26. It was understandable that the Company had postponed formally filing an appeal against the Liability Judgment until the Quantum Hearing was concluded. Nonetheless, since it was contended that an appeal against a Judgment delivered some four months ago was fundamental to the case for an adjournment, it was unimpressive that only a hazy picture was presented of what the grounds of appeal would be. Ms Pearson validly observed that the presently identified grounds all appeared to entail challenging factual findings. In addition, it is far from clear how easy it will be to meet the test for admitting fresh evidence on appeal with a view to:
- (a) impugning the credibility of Mr Sin’s evidence given in the Writ Action based on allegedly inconsistent evidence which emerged in the Nevada Proceedings; and/or
 - (b) advancing a new case under Nevada law which appears at first blush to be one which could with reasonable diligence have been advanced in the Writ Action.
27. It is perhaps also understandable that the appeal-based arguments should have been advanced without any sense of conviction. The Petitioner’s status as a creditor did not depend solely on its status as a Judgment Creditor in respect of all the claims it succeeded on in the Liability Judgment. Reliance was also placed on interlocutory costs Orders made in relation to various hearings which culminated in the Debarring Order being made. The Company failed to obtain leave to appeal from the Court of Appeal to challenge the findings which formed the basis of that Order. On any realistic

view of the position, the Petitioner was clearly an undisputed contingent creditor to a more than trifling extent.

28. In short, not only did the Company fail to demonstrate that the Judgment debt upon which the Petition was based was *bona fide* disputed on substantial grounds. No clear or convincing case for an adjournment was made out. I accordingly was satisfied that that it was appropriate to make the Winding-Up Order on the grounds that the Company was unable to pay its debts as they fall due.

Findings: the alternative just and equitable grounds for winding-up

29. Despite the apparent absence of more than two recent first instance decisions from myself and one other Judge of this Court in support of this jurisdiction², I considered it to be clear that the need for an investigation can support a just and equitable winding-up on a creditor's petition. I indicated in the course of argument that my own preliminary researches confirmed that this was not a heretical view. That a creditor can obtain a winding-up on the just and equitable ground flows logically from the structure of the statutory winding-up scheme, derived from the Companies Act 1948 (UK). Standing is conferred on creditors by section 94 (1) of the Companies Act (2023 Revision); the winding-up grounds are set out in section 92 in terms which do not explicitly limit who can invoke any of the grounds:

“92. A company may be wound up by the Court if—

(a) the company has passed a special resolution requiring the company to be wound up by the Court;

(b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(c) the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up;

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

² *Re Atom Holdings*, FSD 54 /2022 (IKJ), Judgment dated 18 May 2023(unreported) at paragraph 46; *Re Aubit International*, FSD 271/2023 (DDJ), Judgment dated 19 October 2023 (unreported) at paragraph 32.

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

30. It is arguably implicit that only the company itself or a contributory would have standing to petition in reliance upon grounds (a) to (c). Because the insolvency ground is defined by reference to the inability to “pay debts”, it also seems arguable that this ground can only (ordinarily at least) be invoked by a creditor or the company (when required to have regard to the interest of its creditors). But the just and equitable ground, expressed in flexible, open-ended terms, seems particularly apposite to be relied upon by any person with standing to present a petition under section 94 (1). My own researches after the hearing have identified further persuasive support for the conclusion I reached at the end of the hearing. Sections 92 (d) and (e) of the Companies Act are expressed in the same terms as section 122 (f) and (g) of the Insolvency Act 1986 (UK). Section 124 (1) of the UK Act is substantially similar to our own section 94 (1). In light of these similarities of statutory language, I consider the following *obiter dicta* of Patten LJ in *Re Fulham Football Club (1987) Ltd* [2011] EWCA Civ 855 as highly persuasive authority as to the position under Cayman Islands law:

“53. *A winding-up order in insolvency proceedings brings into effect a statutory regime which Lord Hoffmann described in Cambridge Gas v Navigator Holdings [2007] 1 AC 508 at [14] in these terms:*

‘The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. That mechanism may vary in its details. For example, in personal bankruptcy in England, the assets of the bankrupt are vested in a trustee for realisation and distribution to creditors. So the mechanism operates by divesting the bankrupt of his property. In corporate insolvency, on the other hand, the insolvent company continues to be owner of its property but holds it in trust for the creditors in accordance with the provisions of the Insolvency Act 1986: see Ayerst v C & K (Construction) Ltd [1976] AC 167. In the case of personal bankruptcy, the bankrupt may afterwards be discharged from liability for his pre-bankruptcy debts. In the case of corporate insolvency, there is no provision for discharge. The

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company remains liable but when all its assets have been distributed, there is nothing more against which the liability can be enforced: see Wight v Eckhardt Marine GmbH [2004] 1 AC 147, 155–156. At that point, the company is usually dissolved.’

54. The power of the court to wind up on the just and equitable ground is also contained in s.122 of the IA 1986 but, in relation to a contributory's petition, the conditions for its exercise are very different. As a general rule, the shareholder seeking the winding-up order must be able to establish that the company is solvent and that there will be a surplus remaining for distribution after the payment of the company's debts and the costs and expenses of the liquidation: see Re Rica Gold Washing Co Ltd [1879] 11 Ch D 36.

55. A shareholder will not therefore be permitted to petition under s.122 (1) (g) for the winding-up of an insolvent company and, in the case of a solvent company, the court's power will only be exercised in his favour with a view to dividing the net assets of the company where no other means can be found of resolving the dispute between shareholders in relation to their rights and interests as members...” [Emphasis]

31. The emphasised wording clearly supports the proposition that both creditors and contributories may deploy the just and equitable winding-up ground, admittedly without elaborating upon (in a case concerning a contributory’s petition) precisely how a creditor would do so. The need for an investigation can be invoked by a contributory seeking to discover what happened to its investment with a view to making a potential recovery. By analogy, the need for an investigation ought (in appropriate cases) to be capable of being relied upon by a creditor seeking to understand why its debt has not been paid and with a view to making a potential recovery. The cases where it may be appropriate to wind-up on just and equitable grounds on a creditor’s petition may be rare (it will usually be easier to establish insolvency), but this does not in my judgment undermine the logic of concluding that the relevant jurisdiction exists. Indeed, a recent decision of this Court vividly illustrates and vindicates this view.
32. The practical benefits of an investigation into the affairs of an insolvent company in the context of a creditor’s petition was lucidly articulated by Justice David Doyle in *Re Aubit International*, FSD 271/2023 (DDJ), Judgment dated 19 October 2023 (unreported). This was a case to which the

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Petitioner's counsel referred. It is true that the following findings were reached in the context of an application to appoint provisional liquidators. But in my judgment they applied with equal force as the foundation for a substantive winding-up order:

“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. The need for an investigation ground was particularly clear in the present case because I initially relied upon the Petitioner's evidence in support of this ground in deciding to appoint the JPLs. By the time of the hearing of the Petition, the JPLs themselves had independently confirmed that there was a need for such an investigation. There was, therefore, not only an absence of any legally valid basis for challenging the Petitioner's standing to seek a winding-up order as a creditor. There was no credible factual basis for doubting the Company's insolvency, in light of the JPLs' Preliminary Report and the Company's conduct in the Writ Action. The viability of the alternative just and equitable winding-up ground only realistically arose in the context of evaluating:

- (a) the pros and cons of adjourning the proceedings to enable the Company to pursue an appeal against the Liability Judgment; and

(b) the alternative option of making an immediate winding-up order.

34. In these circumstances, having regard to the JPLs' Preliminary Report, the fact that there was a strong case for a just and equitable winding-up based on the need for an investigation which would potentially benefit other creditors as well had the forensic effect of completely sinking the Company's adjournment 'ship'. The alternative ground provided a freestanding basis for winding-up even if the Liability Judgment was either (1) ignored, or (2) presumed to be liable to be set aside. It undercut the central premise of the Company's adjournment application; the proposition that if it was allowed to pursue its appeal it would be established that no justification for winding-up the Company truly existed. I did not find it necessary to consider the far more nuanced question of how the loss of substratum ground, well understood in the context of contributories' petitions, potentially applied in the context of a creditor's petition. The further alternative point was not meaningfully explored in argument in any event.

Conclusion

35. For the above reasons, on 16 January 2024, I granted the Winding-Up Order sought by the Petitioners and appointed the JPLs as JOLs of the Company.

36. It flowed from that decision that the power to determine whether or not to pursue any appeal against the Liability Judgment vested in the JOLs. I expressed some discomfiture during the hearing about the fact that in practical terms, this might mean that no appeal would be pursued. However, on reflection, that discomfiture failed to take into account two fundamental safeguards for the former Management's articulation or perceptions of the Company's legal and commercial rights in relation to the underlying dispute in the Writ Action:

(a) even if the JOLs do not pursue an appeal, any material contingencies attaching to the Liability Judgment can be taken into account through the proof of debt process, which is designed to resolve (where possible) disputes about the validity and/or quantum of creditors' claims in a more cost-effective way than ordinary litigation; and

(b) the making of the Winding-Up Order did not extinguish the authority of the Company's former management to instruct counsel to appeal against the Order.



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