



**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: Mr Jonathan Harris of Nelsons on behalf of the Joint Official Liquidators (“JOLs”)

Mr Ben Tonner KC of McGrath Tonner for Ms Erin Winczura (a former director of the Company)¹

Heard: 12 April 2024

Date of Decision: 12 April 2024

Draft Reasons circulated: 23 April 2024

Reasons delivered: 24 April 2024

INDEX

Application for sanction of decision not to pursue an appeal against judgment which formed the basis of the petition upon which the company was wound-up-illiquid estate-appeal sought only by company’s former manager-procedure for sanction application in absence of liquidation committee-governing legal principles-Companies Act (2023 Revision) section 110, Schedule 3 Part I-Companies Winding Up Rules (2023 Consolidation) Order 11

¹ On 23 April 2024, the Court was notified that McGrath Tonner had ceased to act. Their comments were accordingly not sought on the draft of this Judgment.
240424- In the matter of Canterbury Securities, Ltd- FSD 364 of 2023 (IKJ)- Reasons for Decision

REASONS FOR DECISION

Introductory

1. The Company was wound-up by Order of this Court dated 16 January 2024 (the “WU Order”). On that date the JOLs, who had earlier been appointed as joint provisional liquidators (“JPLs”), were permanently appointed. The Petition dated 1 December 2023 was presented by Fortunate Drift Limited (“FDL”) as an actual and/or contingent creditor, based primarily on the Judgment dated 17 August 2023 delivered in favour of FDL against the Company in FSD 227/2018 (IKJ) (the “Action” and the “Liability Judgment” respectively). The WU Order was based secondarily on the Ex Tempore Judgment dated 13 December 2023 delivered in the Action (the “Quantum Judgment”). I received further submissions on 5 January 2024 in relation to the measure of damages for breach of contract for the temporary derivation of shares, but was unable to deliver judgment until 31 January 2024 (the “Measure of Damages Ruling”). That Ruling awarded FDL only 50% of the damages it sought for breach of contract.
2. In short, the Company elected not to immediately file an appeal against the Liability Judgment and to seek a stay pending appeal. A stay would have potentially immunized it from a winding-up attack. This was presumably because it was unwilling to post the security which would inevitably have been required by the Court in respect of the substantial costs of the Action. Instead, the Company elected to await the delivery of the Quantum Judgment, and further agreed with FDL that time for appealing the Liability Judgment would not start to run until judgment was delivered in pending Nevada proceedings between FDL and an affiliate of the Company.
3. As a result of the filing of the Petition, with the JPLs being appointed on 13 December 2023 and the WU Order being made on 16 January 2023, the Company’s management lost the ability to exercise its right of appeal against the Liability Judgment. No appeal was filed against the WU Order itself. It was thus left to the JOLs to decide, having regard to the best interests of the Company’s creditors, whether an appeal should be filed against Liability Judgment.
4. By a Summons dated 11 March 2024, the JOLs sought the following substantive relief:

“1. A direction as to whether the JOLs should cause the Company to appeal against any ruling or order made in cause number FSD 227 of 2018.

2. Sanction pursuant to section 110 of the Companies Act and/or Order 11 of the Companies Winding-up Rules in respect of any action proposed to be taken by the JOLs pursuant to paragraph 1 above.”

240424- In the matter of Canterbury Securities, Ltd- FSD 364 of 2023 (IKJ)- Reasons for Decision

5. The Summons was heard on 12 April 2024. At the end of the hearing, I made an Order in the following substantive terms:

“1. The Joint Official Liquidators’ decision not to cause the Company to issue any appeal in Cause Number FSD 227 of 2018 is hereby sanctioned pursuant to section 110 of the Companies Act and Order 11 of the Companies Winding Up Rules.”

6. These are the reasons for that decision.

The statutory framework

7. Section 110 of the Companies Act (2023 Revision) provides as follows:

“110. (1) It is the function of an official liquidator —

(a) to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and

(b) to report to the company’s creditors and contributories upon the affairs of the company and the manner in which it has been wound up.

(2) The official liquidator may —

(a) with the sanction of the Court, exercise any of the powers specified in Part I of Schedule 3; and

(b) with or without that sanction, exercise any of the general powers specified in Part II of Schedule 3.

(3) The exercise by the liquidator of the powers conferred by this section is subject to the control of the Court, and subject to subsection (5), any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of such powers (hereinafter referred to as a ‘sanction application’)...”

8. Section 110 (1) states the fundamental principle that in a winding-up official liquidators’ primary duties are to creditors because contributories are only entitled to share in any surplus following a solvent winding-up. Section 110 (2) identifies, by reference to Schedule 3, what powers the liquidators can exercise without the Court’s sanction and which powers may only be exercised with the Court’s sanction. Section 110 (3) articulates a principle which is fundamental to the character of liquidation proceedings supervised by this Court. Namely, that the exercise of official liquidators’ powers are subject to the general supervision of the Court. This subsection additionally enables

240424- In the matter of Canterbury Securities, Ltd- FSD 364 of 2023 (IKJ)- Reasons for Decision

creditors or contributories to apply to the Court in relation to the “*exercise or proposed exercise of such powers*”.

9. Schedule 3 Part I sets out the powers which require Court sanction in the following terms:

“1. Power to bring or defend any action or other legal proceeding in the name and on behalf of the company.

2. Power to carry on the business of the company so far as may be necessary for its beneficial winding up.

3. Power to dispose of any property of the company to a person who is or was related to the company.

4. Power to pay any class of creditors in full.

5. Power to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable.

6. Power to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company.

7. Power to deal with all questions in any way relating to or affecting the assets or the winding up of the company, to take any security for the discharge of any such call, debt, liability or claim and to give a complete discharge in respect of it.

8. The power to sell any of the company’s property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels.

9. The power to raise or borrow money and grant securities therefor over the property of the company.

10. The power to engage staff (whether or not as employees of the company) to assist that person in the performance of that person’s functions.

11. The power to engage attorneys and other professionally qualified persons to assist that person in the performance of that person’s functions.” [Emphasis added]

10. Paragraph 7 of Part I is the only potential paragraph within which the JOLs’ application for sanction of a decision to refrain from exercising their power to commence proceedings under paragraph 1 obviously potentially falls.

11. Part II of the Third Schedule lists the following additional powers that do not require the Court's sanction:

"1. The power to take possession of, collect and get in the property of the company and for that purpose to take all such proceedings as that person considers necessary.

2. The power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company seal.

3. The power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against that person's estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent and rateably with the other separate creditors.

4. The power to draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with the respect of the company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business.

5. The power to promote a scheme of arrangement pursuant to section 86.

6. The power to convene meetings of creditors and contributories.

7. The power to do all other things incidental to the exercise of that person's powers."
[Emphasis added]

12. Paragraph 7 of Part II of the Schedule contains the only general power which potentially applies to the JOLs' relevant decision. Deciding not to commence proceedings in the name of the Company appears potentially to be incidental to the exercise of the power to commence proceedings, but there is no express power to decide not to commence proceedings.
13. Experience suggests that official liquidators do not seek the Court's sanction for every decision they take not to commence proceedings. A golden thread which runs through liquidation law is the requirement for official liquidators to act with commercial efficiency with a view to maximizing the returns to stakeholders. It is accordingly only decisions which have commercial significance and/or where their decision might be subject to criticism by relevant stakeholders which are treated as raising a question "*in any way relating to or affecting the assets or the winding up of the company*" within paragraph 7 of Part 1 of Schedule 3. To avoid a multiplicity of sanction applications, winding-up orders typically provide a pre-emptive sanction for the exercise of essential powers.

14. Section 110 of the Act is supplemented by Companies Winding Up Rules (2023 Consolidation) (“CWR”) Order 11, which provides in salient part as follows:

“Introduction (O.11, r.1)

1. (1) Any application to Court made by —

(a) the official liquidator for a order sanctioning the official liquidator’s exercise or proposed exercise of any power conferred upon the official liquidator by Part I of the Third Schedule of the Law or otherwise; or

(b) a creditor or contributory for an order directing the official liquidator to exercise or refrain from exercising any of the official liquidator’s powers in a particular way, is referred to in these Rules as a ‘sanction application’.

(2) Sanction applications shall be made by summons in CWR Form No 16.

2. Service of Sanction Applications (O.11, r.2)

2. (1) Every sanction application made by the official liquidator shall be served on —

(a) each member of the liquidation committee; or

(b) counsel to the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and

(c) such other creditors or contributories as the Court may direct.

(2) Every sanction application made by the liquidation committee shall be served on —

(a) the official liquidator; and

(b) such creditors or contributories as the Court may direct.

(3) Every sanction application made by a creditor or contributory (other than the liquidation committee) shall be served on —

(a) the official liquidator; and

(b) each member of the liquidation committee; or

(c) counsel to the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and

(d) such other creditors or contributories as the Court may direct.

(4) A sanction application shall not be heard on less than 4 clear days’ notice.

(5) The Court may direct that the hearing of a sanction application be advertised.”
[Emphasis added]

15. In the present case there was no liquidation committee, so the Court was required to consider whether the sanction application ought to be served on any creditors.

Legal principles informing the approach of the Court to sanction applications derived from case law

16. Mr Harris placed various helpful authorities before the Court. Firstly, as to the nature of the sanction jurisdiction in relation to powers under Part 1 of Schedule 3 to the Act which could not be exercised by the JOLs without Court approval, *Re Greenhaven Motors Ltd* [1999] 1 BCLC 635, Chadwick LJ held (at page 642i-643a):

“It is because the decision whether or not to sanction the exercise of the power is a decision which is not entrusted to the liquidator that it is wrong in principle for the court to approach its task on the basis that the liquidator’s wish to exercise the power should prevail unless it is satisfied that the liquidator is not acting bona fide or that he is acting in a way in which no reasonable liquidator should act.”

17. However, the sanction jurisdiction is more nuanced than the quoted statement read in isolation from the judgment as a whole and subsequent case law would suggest. The approach to sanction applications in this jurisdiction was laid down by Smellie CJ (as he then was) in *Re DD Growth Premium 2X Fund* [2013 [2] CILR 361 where he held:

“30 The legal principles applying to the exercise of sanction of a liquidators’ powers are well known:

*(a) The decision whether to sanction the exercise of a power falling within Part I of the Third Schedule to the Law is a decision for the court (see *Re Greenhaven Motors Ltd. (7)* ([1999] 1 BCLC at 642)). The decisions of the liquidators to enter into the FAA and the Appleby CFA fall within the exercise of such powers.*

*(b) In exercising its discretion as to sanction, the court must consider all the relevant evidence (see *In re Universal & Surety Co. Ltd. (11)* (1992–93 CILR at 152)).*

*(c) The court must consider whether the proposed transaction is in the commercial best interests of the company, reflected prima facie by the commercial judgment of the liquidator (see *Re Edenote Ltd. (No. 2)* (6)).*

*(d) The court should give the liquidators’ views considerable weight unless the evidence reveals substantial reasons for not doing so (*Re Edenote Ltd. (No. 2)* ([1997] 2 BCLC at 92)).*

*(e) The liquidator is usually in the best position to take an informed and objective view (see *Re Greenhaven Motors Ltd. ([1999] 1 BCLC at 643)*).*

240424- In the matter of Canterbury Securities, Ltd- FSD 364 of 2023 (IKJ)- Reasons for Decision

(f) Unless the court is satisfied that, if the Fund is not permitted to enter the compromise in question, there will be better terms or some other deal on offer, the choice is between the proposed deal and no deal at all (see Re Greenhaven Motors Ltd. ([1999] 1 BCLC at 643)). [Emphasis added]

18. The starting assumption, even though the decision is ultimately for the Court, is that the liquidator's judgment as to where the best interests of the relevant stakeholders lie will suffice to grant the sanction.
19. The present application did not involve any delicate balancing of competing considerations nor any careful evaluation of complicated evidence; it centrally turned on more fundamental principles governing whose interests the JOLs were required to take into account in the context of an insolvent liquidation. It is clear from sect 110 of the Act that the relevant interests are those of the creditors. As Telford Georges JA observed in *Johnson and Dinan-v- Deloitte and Touche A.G.* [1997 CILR 120] at 157, a liquidator “owes no duty to debtors or potential debtors”.
20. Finally, as Smellie CJ observed in *Caribbean Islands Development Limited-v- First Caribbean International Bank* [2014 (2) CILR 220]:

“30 In the first place, it is well understood that liquidators are not obliged to institute proceedings unless there are enough assets available to cover the costs of that litigation. See, for instance, Bailey & Groves, Corporate Insolvency Law and Practice, 3rd ed., at para. 15.33 (2007) where the obvious advice is given that ‘in any event, when the liquidator is undertaking litigation, he would be wise to first obtain an indemnity in respect of the costs of litigation and he is not obliged to litigate unless there are enough assets available to cover the cost of that litigation.’

31 Moreover, if the creditors wish the liquidators to pursue the litigation where the estate is impecunious, they should be expected to fund the proceedings themselves or provide an indemnity: McPherson’s Law of Company Liquidation, 3rd ed., at paras. 9–074 – 9–075 (2013), citing the observations of Morritt, L.J. in Re Exchange Travel (Holdings) Ltd. (No. 3) (3) ([1997] 2 BCLC at 595), adverting to the fact that indemnities from creditors for these purposes is a commonplace. This principle was recently re-affirmed by this court in Ahmad Hamad Algosaibi & Bros. Co. v. Saad Invs. Co. Ltd. (1) (November 15th, 2013, unreported, at paras. 68–94).

21. The latter principles had somewhat muted significance in the present case. Because the JOLs were being pressed to pursue proposed proceedings by a potential debtor rather than by members of the legitimately interested creditor stakeholder class.

Findings: merits of application

22. The evidence adduced by the JOLs, which was not challenged by counsel for Ms Winczura, showed that:
- (a) since the WU Order, Ms Winczura alone had urged the JOLs to appeal the Liability Judgment;
 - (b) the only grounds of appeal identified were the grounds set out in evidence filed in opposition to the Petition. None of those grounds were considered to be arguable;
 - (c) the Company was illiquid, and no funding proposal had been advanced which would make an appeal beneficial to the liquidation estate;
 - (d) The JOLs considered it desirable that the appeal question be resolved immediately.
23. Mr Tonner KC submitted that it was premature for this question to be considered now. Mr Harris responded that the JOLs continued engagement with this issue was an impediment to the proper conduct of the liquidation as the possibility of an appeal potentially cast doubt on whether the WU Order was properly made. That was a powerful argument because it helped to illuminate clearly how compelling the merits of the JOLs' position in relation to the appeal was.
24. The primary statutory duty of the Court and the JOLs in relation to the Company (which was hopelessly insolvent and without any liquid assets) was owed to the Company's creditors whose interests would manifestly be undermined by the pursuit of the appeal. In these circumstances it was difficult to see how, even if the Company's former CEO had provided funding for the appeal, the Court could properly have sanctioned the decision to pursue an appeal which was only seemingly adverse to the interests of the relevant stakeholders. It is true that in the course of the winding-up hearing I expressed some concern about the fact that the effect of the WU Order would be to deprive the Company's former management of their appeal rights. Those concerns were, on reflection, misplaced. Those concerns ignored the important fact that the Company could have sought to protect itself from the risk of a winding-up order by filing an appeal against the Liability Judgment and seeking a stay pending appeal at any time between 17 August 2023 (when Judgment was delivered in the Action) and 1 December 2023 when the Petition was presented. Thereafter, a deliberate strategy of pushing back the time for the Company to actually pursue an appeal was adopted, both before and after the JPLs were appointed on 13 December 2023. The Company under

the control of its former management never displayed any conviction of the merits of what was little more than the notion of an appeal against this Court's Judgment which was delivered nearly five months before the WU Order was made.

25. There was, unsurprisingly, no liquidation committee. In these circumstances it was obvious that no need to serve any creditors with the application arose. It was inconceivable that that they would oppose the JOLs' attempts to avoid being distracted by the Company's former management, and not wish them to focus on seeking to recover assets to meet their claims. These circumstances arguably entitled the JOLs to conclude that no serious question arose at all which required the Court's sanction under section 110 as read with paragraph 7 of Part I of Schedule 3 to resolve.
26. This was not simply a meritorious application. In my judgment no reasonable Court, presented with the present application, could properly have declined to grant the sanction sought.

Conclusion

27. For the above reasons, on 12 April 2024, I sanctioned the decision of the JOLs not to pursue an appeal against the Liability Judgment.



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