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

Before:	The Hon. Justice David Doyle
Heard:	On the papers
Draft Judgment Circulated:	28 November 2023
Judgment Delivered:	1 December 2023

HEADNOTE

Determination of costs issues in respect of a Winding-Up Petition and a Strike-Out Application

JUDGMENT

1. On 16 October 2023, for reasons stated in a judgment delivered that day, I made a winding-up order and at paragraphs 14 and 15 gave LedgerScore International Pte Ltd, LS Litigation Holdings LLC and Earn Guild Pte Ltd (the "Petitioners") and AuBit International (the "Company") the opportunity to file concise written submissions regarding orders as to the Company's costs of the Petition and the Strike-Out Application as defined in such order.

2. By written submissions dated 30 October 2023 the Petitioners accept that ordinarily the Company's costs would be paid from the Company's assets. The Petitioners maintain that in this case the costs of the Company should not be met from funds needed to pay the creditors. The form of order sought by the Petitioners is that the Company's costs should not be paid out unless and until all other creditors have been paid, in effect becoming last in the order of distribution priorities, a so-called *Bathampton Order* named after *Bathampton Properties Ltd* [1976] 1 WLR 168 which was followed in the Cayman Islands in *Banco Economico SA v Allied Leasing and Finance Corporation* 1998 CILR 333 with the Companies Winding Up Rules ("CWR") being introduced subsequently. *Banco Economico* was an exceptional case. Graham J at page 337 referred to the company's "hopeless, not to say egregious, opposition to the petition". The "clearest possible warnings" had been given to the company and its legal representatives. A finding was made that an alleged agreement and side letter were part and parcel of a "put-up job" to mislead the court (at page 338). The Petitioners say that a *Bathampton Order* can only be made in "exceptional and special circumstances". The Petitioners say that as explained by Kawaley J at paragraph 17 in *Re Principal Investing Fund* (FSD unreported judgment 27 July 2023) under CWR Order 24 rule 8 the court essentially applies the test as for indemnity costs by analogy.

3. The Petitioners submit that the conduct of the Company's defence to the Petition was unreasonable in that the costs which were incurred were designed to keep the directors and/or management in place and were not incurred for the benefit of the unsecured creditors.

4. By written submissions dated 13 November 2023 the Company refers to CWR Order 20 rule 1 (1)(a) and submits that upon the making of a winding-up order, the usual order is that the company's costs shall be paid out of the assets of the company as an expense of the official liquidation and there is no reason in this case to deviate from what the Company describes as the "usual rule". Order 20 rule 1 (1)(a) (which was not provided with the Company's written submissions) provides that the expenses of the liquidation are payable out of the assets of the company in the following order of priority "the costs of the petitioner and of any person appearing on the petition whose costs are allowed by the Court". It begs the question as to whether the costs "are allowed by the Court."

5. The Company submits that companies should, in the interests of justice and fairness, always be permitted to defend winding-up petitions as vigorously as the facts will allow and having regard to creditors' interests.

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6. The Company submits that the court should make the "usual compulsory order" in relation to the Company's costs of the Petition and the Strike Out Application and direct that they are to be paid out of the assets of the Company as an expense of the liquidation.

7. I should record that by email dated 14 November 2023 5:35PM Kobre & Kim on behalf of the Joint Official Liquidators (the "JOLs") brought to the court's attention that the submissions filed by the Company "were neither authorised by them nor provided to them in draft ahead of being filed" and indicated that "The JOLs are available to provide concise submissions ...". Sinclairs, who had filed the Company's submissions, responded at 6:14PM and in effect maintained that the Company's written submissions had been properly and timely filed. By email dated 16 November 2023 9:16AM my PA communicated to counsel as follows:

> "Justice Doyle is minded to give the JOLs 7 days to file any concise written submissions (no more than 5 pages) with any concise written submissions in response (no more than 5 pages) to be filed within 7 days thereafter."

8. In an email dated 23 November 2023 9:20AM Kobre & Kim stated "the JOLs wish to remain neutral on the issue of whether a *Bathampton* order is appropriate", and "they do not consider they can helpfully add to the points already taken by those interested."

9. I should also add that on 23 November 2023 10:07AM Sinclairs filed, outwith the order made on 16 October 2023 and with no permission from the court, submissions on behalf of "Sinclairs in its capacity as creditor and as attorneys of record for the Company in the petition proceedings." I have nevertheless considered such submissions.

10. Although I have found much of the conduct of the Company unimpressive (as should be plain from this and previous judgments) I have not been persuaded that there are in this case "exceptional and special circumstances" or, if applicable by way of analogy as suggested by the Petitioners, unreasonable conduct to a high degree outside the norm or that otherwise a *Bathampton Order* is justified. Each case, of course, must be decided on its own facts and circumstances. I have not been persuaded on the facts and circumstances of this case that an exceptional *Bathampton Order* would be justified and I do not make such an order.

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11. I therefore make an order that the Company's costs of the Petition (which, of course, includes the Amended Petition) and the Strike-Out Application should be paid out of the assets of the Company as an expense of the official liquidation.

12. Counsel should within 5 days from the delivery of this judgment provide an agreed draft order reflecting the determinations in this judgment.

David Doyle

The Honourable Justice David Doyle
Judge of the Grand Court