



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

CAUSE NO: FSD 54 OF 2023 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF ATOM HOLDINGS

IN CHAMBERS

Appearances: Mr Adam Crane and Ms Nicosia Lawson, Baker and Partners
(Cayman) Limited, for the Petitioners

Before: The Hon. Justice Kawaley

Heard: 8 March 2023

Date of Decision: 8 March 2023

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HEADNOTE

Creditors' winding-up petition based on inability to pay debts-ex parte without notice application to appoint joint provisional liquidators-cryptocurrency exchange-need for independent investigation into affairs of company-standing of petitioners as contingent creditors-need to preserve assets and records-mandatory or directory nature of requirement for cross-undertaking as to damages-right of access to the Court-Cayman Islands Constitution Order 2009 section 7-Companies Act (2023 Revision) sections 92 (d), 139-Companies Winding Up Rules (2023 Revision) Order 1 rule 4 (1A), Order 4 rule 3-Grand Court Rules Order 2

Introductory

1. The Petition dated 3 March 2023 was presented by Ms Kalaivani Kandasani and Mr Ulf Parpart-Hergesell seeking to wind-up the Company pursuant to section 92(d) of the Companies Act (2023 Revision) (the “Act”) on the grounds that the Company is unable to pay its debts. By an *Ex Parte* Summons dated 3 March 2023, supported by the First Affidavit of Kalaivani Kandasani and the First Affidavit of Ulf Parpart-Hergesell, the Petitioners sought the appointment of joint provisional liquidators (“JPLs”) (alternately joint receivers) and suspension of the need to advertise and serve the Petition. A separate Confidentiality Order was sought based on the need to enable immediate asset and record conservation steps to be taken in relation to the Company’s management, the management of which was said to have, effectively, left the corporate ship adrift.
2. Following an *ex parte* hearing on 8 March 2023, in addition to making a Confidentiality /Sealing and Gagging Order (which resulted in the present Judgment being temporarily embargoed from publication), I granted an Order that:

“1. Angela Barkhouse and George Kimberley Leck of Quantuma (Cayman) Ltd., Suite N404, Flagship Building, 142 Seafarers Way, George Town, Grand Cayman, Cayman Islands, be appointed as joint provisional liquidators of the Company (the JPLs).

2. The JPLs shall not be required to give security for their appointment.

3. The JPLs have the power to change the registered office of the Company at their discretion.

4. *The JPLs have the power to act jointly and severally in their capacity as liquidators of the Company and have the power to conduct the ordinary, day-to-day business operations of the Company.*

5. *The JPLs are hereby directed jointly and severally to take such steps as, in their discretion, may be necessary or expedient:*

i. *for the protection and preservation of the value of the Company's assets, rights and/or property of every description, including property held on trust, whether held by the Company, its subsidiaries, or any other person; and*

ii. *for preventing the dissipation or misuse of the Company's assets and those of its subsidiaries.*

6. *For the purposes set out at paragraph 5 above, the JPLs be directed to investigate and report on the affairs of the Company and its subsidiaries within and outside of the Cayman Islands, including in Seychelles, Singapore, Hong Kong, and Malta.*

7. *The JPLs be authorised to exercise without further sanction or order of the Court within and outside of the Cayman Islands the powers specified in Part II of the Third Schedule to the Companies Act, namely;*

i. *To identify, take possession of, collect and get in the property of the Company, including without limitation all bank accounts, computer servers or other related equipment, digital assets, including any property held on trust by the Company, and for that purpose to take all such proceedings as they consider necessary;*

ii. *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; and*

iii. *To do all other things incidental to the exercise of their powers.*

8. Further, the JPLs be authorised to exercise without further sanction or order of the Court within and outside the Cayman Islands the following powers as specified in Part I of the Third Schedule to the Companies Act:

i. To bring or defend any action or other legal proceedings in the name and on behalf of the Company other than the Petition;

ii. To engage staff (whether or not as employees of the Company) to assist in the performance of their functions as JPLs; and

iii. To engage attorneys and other professionally qualified persons to assist them in the performance of their functions.

9. Further and in any event, the JPLs be authorised to exercise without further sanction or order of the Court within and outside the Cayman Islands the following powers:

i. To commence winding up proceedings and/or any insolvency process in the Cayman Islands or any other country in respect of any subsidiaries of the Company;

ii. To ascertain, demand, receive and give valid receipts for and protect the moneys, properties, securities, debts and things in action and all other assets of the Company, whether within or outside the jurisdiction of this Court and for that purpose to take all such proceedings as they consider necessary;

iii. To collect, get in, inspect, review, secure, take possession of and copy the books, records, and documents of the Company and its subsidiaries (whether in hard copy, electronic form or otherwise), with or without the assistance of the Court or a court of competent jurisdiction, in order to: (i) ascertain, and conduct investigations of the affairs of the Company and its subsidiaries; (ii) prevent destruction and/or alteration of those documents and for those purposes to take all such proceedings as the JPLs consider necessary. For the avoidance of doubt, such powers shall include but are not limited to:

a) requiring any of the directors and/or former directors of the Company and its subsidiaries to provide to the JPLs any documents and/or information of the Company and its subsidiaries in their possession or control; and

b) requiring any service providers of the Company and its subsidiaries to provide to the JPLs any documents and/or information in their possession or control which the Company and/or any of its subsidiaries has a right to receive;

iv. To do all such things as may be necessary or expedient for the protection or recovery of the Company's property at law or in equity, including such property held on trust by the Company or its subsidiaries, in such jurisdictions as may be appropriate including, without limitation, in the Cayman Islands, Seychelles, Singapore, Hong Kong, and Malta;

v. To examine individuals on oath or otherwise, both with or without the assistance of the Court or any court of competent jurisdiction, if the JPLs consider it expedient for the purpose of protecting the assets of the Company including as part of the investigation referred to at paragraph 6 above;

vi. To take control of the subsidiaries of, and other companies controlled by, the Company (or such shares of subsidiaries or companies controlled by the Company), to manage the affairs or carry on or close or cease to operate all or any part of the business of such subsidiaries or companies (in accordance with the constitutional documents of such companies) if the JPLs consider it expedient for the purpose of protecting the assets of the Company, including such property held on trust by the Company and its subsidiaries, including as part of the investigation referred to at paragraph 6 above;

vii. To call or cause to be called such meetings of shareholders of the Company or its subsidiaries or companies otherwise controlled by the Company, or take such further and other action, as permitted in accordance with the constitutional documents of such subsidiaries or companies as the JPLs consider it necessary to remove directors or appoint additional directors to the Board of Directors of such subsidiaries or companies as the JPLs consider expedient for the purpose of protecting the property of the Company or property held on trust by the Company or its subsidiaries, or companies otherwise

controlled by the Company, including by assisting with the investigation referred to at paragraph 6 above;

viii. To do all such things as may be necessary or expedient to freeze or preserve property held by any person or entity, whether a related party or otherwise, against which the Company has a claim and where there is a risk of dissipation in such jurisdictions as may be appropriate including, without limitation, in the Cayman Islands, Seychelles, Singapore, Hong Kong, and Malta;

ix. To carry on the business of the Company, to the extent necessary, save that the JPLs shall not make payment on any indemnity save with further order of the Court;

x. To communicate with and carry out any necessary filings with regulatory bodies as appropriate, including, without limitation, the Cayman Islands Registrar of Companies and the Cayman Islands Monetary Authority, in the name and on behalf of the Company;

xi. To appoint agents in the Cayman Islands, Seychelles, Singapore, Hong Kong, Malta, and elsewhere to do any business contemplated by this Order which they are unable to do themselves or which can more conveniently be done by an agent;

xii. To open or to close any bank accounts in the name and on behalf of the Company and to open any bank accounts on behalf of the Company (in provisional liquidation) for the purpose of paying the costs and expenses of the provisional liquidation;

xiii. To render and pay invoices out of the assets of the Company for their own remuneration at the rates prescribed by the Insolvency Practitioners' Regulations (2023 Consolidation) (IPRs) together with all reasonable costs, charges and expenses of their attorneys, and all other agents, managers, accountants or other persons that the JPLs shall employ on an account basis and subject to final approval by the Court;

xiv. To discharge all costs, expenses, and debts incurred by the Company as expenses or disbursements properly incurred in the provisional liquidation;

xv. Pursuant to Regulation 10 of the IPRs the JPLs shall apply to the Court for the approval of their remuneration, such application being made on notice to the Company;

xvi. To employ, appoint, and to dismiss officers and employees of the Company, including the current directors of the Company;

xvii. To effect insurance in relation to the Company's business, assets, and operations;

xviii. To convene meetings of contributories and creditors; and

xix. To constitute an ad hoc committee of creditors as soon as practically possible.

10. The powers of the Company's Board of Directors are hereby suspended, save as far as the JPLs may restore any powers of the directors of the Company in writing as the JPLs in their absolute discretion shall see fit having determined that the exercise of such power is necessary to give effect to this Order.

11. The JPLs be authorised to take any such action as may be necessary or desirable to obtain recognition of the JPLs and/or their appointment in Seychelles, Singapore, Hong Kong, and Malta, and in any other relevant jurisdiction, and to make applications to the courts of such jurisdictions for that purpose or for the purpose of obtaining information to assist them in their investigations pursuant to paragraph 6 of this Order.

12. Until further order, the directors and former management of the Company and its wholly owned subsidiaries as at the date of this Order, shall assist the JPLs in the exercise of their powers and duties, including but not limited to consulting and meeting with the JPLs as the JPLs may require and providing all such documents, information, and assistance as the JPLs may request.

13. The JPLs shall prepare and file written reports to the Court (JPL Reports) setting out the JPLs' analysis and conclusions with respect to their investigations. In the JPLs' reports, the JPLs shall inter alia include confirmation and details of whether they have identified as part of their investigations or have reason to believe, that there may be wrongdoing or potential wrongdoing by any office holders in the Company or parties

connected to the Company. In particular, the JPLs shall prepare and file with the Court copies of the following JPL Reports:

- i. within 28 days, a progress report setting out the status of the JPLs' investigations; and*
- ii. within 70 days, a further report setting out the status of their investigations and conclusions to date.*

14. No disposition of the Company's property by or with the authority of the JPLs in carrying out their duties and functions and exercise of their powers under this Order shall be voided by virtue of section 99 of the Companies Act.

15. No suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the Company in accordance with section 97 of the Companies Act except with the leave of the Court and subject to such terms as the Court may impose.

16. The JPLs and the Company have liberty to apply.

17. The hearing of the petition shall be adjourned until 7 July 2023 or the next available date.

18. The Petitioners shall be entitled to their costs of and incidental to the application for the appointment of joint provisional liquidators which are to be paid out of the assets of the Company as an expense of the provisional liquidation."

3. These are the reasons for that decision.

Factual basis for the Petition

4. The basis for the Petition was primarily set out in the First Affidavit of Kalaivani Kandesan sworn by the Singapore resident on 3 March 2023. It was also supported by the First Affidavit of Ulf Parpart-Hergesell sworn by the German resident on 7 March 2023. As to the Company's business structure, Ms Kandesan deposed as follows:

“10. I understand based on news reports that the Company is the holding company for a group of companies operating in multiple jurisdictions, referred to herein as the Atom Group. Through the Atom Group, the Company carries on business as a cryptocurrency exchange, which offered saving, spot, and futures trading. The Company is the sole shareholder of AAX Limited (AAX Limited) a company incorporated in the Republic of Seychelles, AAX Asia Private Limited (AAX Asia PL), Atom International Technology Limited (Atom IT)...(formerly Atomic International Technology Co., Ltd.), and Atom Holding Limited (Atom Holding Malta). AAX stands for Atom Asset Exchange. AAX and Atom Group are used interchangeably throughout this affidavit to refer to the operations of the Atom Asset Exchange generally.

11. AAX Limited was incorporated in April 2018 in the Republic of Seychelles under the International Business Companies Act of 1994, having company number 211854. From the date of its incorporation to November 2022, at which point the Atom Group and AAX ceased operations, AAX Limited operated in the cryptocurrency and blockchain industry as a centralised cryptocurrency exchange offering a full suite of cryptocurrency services to retail and institutional investors worldwide. The native token offered by the AAX Platform is the AAB Token. According to the AAX Token (AAB) FAQ found on AAX.com, AAX issued a total of 50 million AAB using the ERC-20 protocol. ERC-20 is the most common Ethereum (a blockchain-based software platform) (pages 4 to 6). I understand that AAX Limited is a wholly owned subsidiary of the Company.

12. I understand from the Terms of Use (AAX Terms of Use) (pages 22 to 44) that AAX Limited operated the AAX Platform (AAX Platform), that is AAX's website, its application(s), its application programming interfaces, its notifications and any information or content appearing therein. The AAX Terms of Use are the last known Terms of Use for the users/investors of AAX. An earlier version of the AAX's Terms of Use is at (pages 7 to 21).

13. AAX Asia PL is a Singapore private company limited by shares, incorporated on 23 April 2020 with unique entity number 202012140E. I understand that the category of business for which AAX Asia PL is registered in Singapore is 'other holding companies' with "bank/financial holding companies (including insurance holding company)" as the

secondary activity. AAX Asia PL's paidup capital is one Singapore dollar. AAX Asia PL is the sole shareholder of AAX Singapore Private Limited which was incorporated in Singapore on 12 May 2020 as a private company limited by shares and unique entity number 202013419E. The sole director of AAX Singapore Private Limited is Quek Chih Hsiung. I understand that AAX Asia Private Limited is a wholly owned subsidiary of the Company.

14. Atom Holding Malta was incorporated in Malta on 27 September 2018 with registration number C88507. I understand that the sole director of Atom Holding Malta is Mr Su, one of the ultimate beneficial owners of the Company who beneficially holds a majority shareholding in the Company. Atom Holding Malta is the sole shareholder of AAX Exchange (Malta) Limited (AAX Exchange (Singapore)) which is registered as a foreign company in Singapore with company number T2OFC0021A. AAX Exchange (Singapore) is exempted by the Monetary Authority Singapore from holding a license under the Singapore Payment Services Act (PS Act) for providing account issuance and digital payment token services, meaning that AAX Exchange (Singapore) is not licensed under the PS Act to provide the specific payment services, but is allowed to continue to provide the specific payment services (pages 45 to 47). AAX Exchange (Singapore) is the entity through which Singapore residents were, pursuant to the AAX Terms of Use, required to transact with the AAX Platform. AAX Exchange (Singapore) holds 100% of the shareholding in AAX Exchange (Malta) Limited (AAX Exchange (Malta)), a company incorporated in Malta on 18 October 2018 with company number C88508. I understand that Atom Holding Malta is a wholly owned subsidiary of the Company.

15. Atom IT is a company incorporated on 23 February 2018 as a private company limited by shares registered in Hong Kong with company registration number 2658585. Atom IT is described on the World Wide Web as a fintech company focused on helping clients to architect and build their future financial solutions with leading-edge decentralized technology and digital innovations. The chief executive officer of Atom IT is Chen Zhenxiong (also known as, Thor Chan) and its Chief Operating Officer is Michael Wong. I understand from media reports and archived versions of the Atom IT website that Mr Su is a director of Atom IT and that Atom IT is a wholly owned subsidiary of the Company. Mr Lin is the founder and former CEO of Atom IT.”

5. In short, the 1st Petitioner had no direct contractual relationship with the Company, which carried out business through its subsidiaries. The principal business was the cryptocurrency exchange known as the “AAX Platform”, which was operated by AAX Limited. However, AA Exchange Singapore was the entity with which Singapore residents conducted transactions with the AAX Platform. Ms Kandesan sets out various announcements made to AAX users in November 2022, when AAX customers found they were unable to make withdrawals from their accounts, and then avers:

“48. The statements appear to be false. It does not appear that AAX was trying to protect its users' accounts and assets or intended to initiate any legal procedures ‘to secure and ensure the distribution of assets with continuous communication to [AAX] global user base and relevant stakeholders on relevant details’. It appears to me that AAX, for whatever reason, was experiencing liquidity issues and therefore was unable to satisfy customer withdrawal requests and may have been trying to ‘buy time’ as it decided how to respond to the increasing number of withdrawal requests it was receiving in the wake of the suspension of the AAX Platform and the FTX collapse. Additionally, Mr Su, absconded with keys to the wallet(s) presumably holding AAX users' assets.

49. To date, AAX customers are unaware of the status of their investments. I am aware from media reports that two top executives of AAX have been arrested in Hong Kong where the Hong Kong police believe that they were trying to abscond with assets belonging to AAX users...The reason(s) behind AAX's actions may only be uncovered thorough forensic investigation undertaken by independent officers appointed over the Company by the Court...

51. On 27 November 2022, the internal documents and official domains of AAX were deleted. On 18 December 2022, AAX's website and application were shut down. Investors have not received any further updates from AAX.

52. On 30 November 2022, the online digital asset news publication Coindesk.com published an article titled ‘Hong Kong Crypto Exchange AAX Unlikely to Reopen, Former Communications Chief Say,’ and subtitled: ‘The exchange shuttered on Nov. 13 after a reported hack’. The article reported on comments by Ben [Bernhardt] Caselin (Mr Caselin), former Vice President of Global Marketing and Communications Lead at AAX,

following his resignation from AAX, on the unlikelihood that AAX would return to normal operations: 'I think that it is a much more likely scenario that the company moves to a more legal procedure of unfolding'. The article also noted that Mr Caselin said that things 'seemed fine' at the company until two weeks prior, but since then, Mr Caselin had lost his optimism, and his role as communications chief became untenable. The article quoted Mr Caselin as saying 'The information flow was deteriorating very fast, decision making became more opaque' as tasks with potential investors proceeded.

53. Since the closure of AAX, the ultimate beneficial owners of the Company have become unreachable. Media reports suggest that Mr Su, a Chinese national, is living in Dubai and is believed to hold the missing key(s) to the AAX Platform, Mr Su is alleged to have transferred approximately 5,000 Ethereum (currently the equivalent of US\$8.1 million) from an AAX wallet, depleting the assets available to AAX users/creditors (pages 78 to 79). I understand from media reports that Mr Su is purported to be the mastermind behind the Atom Group.

54. Contact has also been lost with Mr Lin and Mr Hung.”

6. Messrs Su, Lin, and Hung are said by the deponent to be directors and beneficial owners of the Company. She cites news reports suggesting that prejudiced investors are located in various parts of the world. The Hong Kong Police have already arrested two AAX executives and the Petitioners have each filed criminal complaints in Hong Kong.
7. As regards the Petitioners' standing and the grounds for seeking a winding-up, the 1st Petitioner (whose evidence is adopted by the 2nd Petitioner) avers as follows:

“65. I am concerned that:

a. The various Atom Group entities (including the Company) are bankrupt and do not have sufficient assets to cover all customer deposit obligations and withdrawals, i.e., unable to pay its debts as they fall due. My concern is fueled by AAX's statement on 15 November 2022 that there was 'acute pressure on AAX's capital position' and that if it is 'able to inject additional capital by the end of this week, AAX should be able to resume services as usual'. Clearly that did not happen.

b. The shareholders, directors, and or officers of the Atom Group entities, and more specifically the Company and its subsidiaries have siphoned customer assets from AAX's crypto wallets and/or misappropriated customers' assets...

67. I believe, and understand from discussions with other AAX users/investors that they also believe, that the shareholders, directors, and/or officers of the various Atom Group entities (including the Company) were misleading AAX users/investors, causing AAX users/investors to believe that AAX and its principals were acting in the best interests of the AAX users/investors, and that the AAX Platform would be functional again. I believe that the shareholders, officers, and/ or principals of the Atom Group entities, and more specifically the Company and its subsidiaries, were aware of and/or responsible for misappropriating AAX's customer assets...

69. In light of the foregoing, I (as well as other AAX users/investors) have potential causes of action independently against the Company and jointly against those individuals and companies associated with the Atom Group, including the Company and its directors/former directors, officers/former officers, or other principals, including but not limited to the misappropriation of AAX users/investors assets, breach of contract, breach of trust, dishonest assistance, and knowing receipt. As such, I am a creditor or contingent creditor of the Company and therefore I have a tangible interest in the Company.

70. In circumstances where the scope and extent of the loss of the assets is still unclear, particularly where the top executives and beneficial owners of the Company and other AXX entities are incommunicado, I believe that there is a real need for independent liquidators to be appointed by the Court in order to:

a. Seek the Court's guidance, direction, and assistance in relation to the above issues;

b. Allow a substantive and independent forensic investigation into the Company's business and affairs, including the Company's subsidiaries, to be carried out so as to establish the Company's true financial position and solvency; and

c. Allow proceedings to be brought to recover assets which have been misappropriated, if the joint official liquidators form the view that such proceedings are necessary.

71. The AAX Platform allegedly had up to two million to three million users in November 2022, meaning customer assets valuing tens of millions (if not hundreds of millions) of dollars are unaccounted for. The Petitioners and many other users/investors are retail investors, some of which are unsophisticated individuals, who could benefit from an investigation of the Atom Group's affairs, including that of the Company and its subsidiaries, in particular AAX Limited, AAX Platform, AAX Exchange (Malta), AAX (Singapore), and Atom Holding Malta, by suitably qualified professionals.

72. It is my view that the provisional liquidation of the Company is essential to investigate the involvement of the Company and its managers and advisors in the misappropriation of the assets held within the Atom Group entities on behalf of its investors, and to prevent the dissipation of such assets and the assets of the Company. There is also a need to investigate the Company's subsidiaries, in particular AAX Limited, to facilitate the reasonable possibility that the investigations may lead to the recovery of assets for the benefit of all users/investors of the AAX Platform who have suffered because of the collapse of AAX and the apparent misappropriation of users/investors assets.”

Legal findings

Appropriateness of ex parte without notice hearing

8. The Petitioners' Skeleton Argument commended the following principles to the Court as to when it was legally appropriate to grant relief on an *ex parte* basis without notice, derived from a trilogy of decisions by David Doyle J in this Court:

“42. At paragraph 25 of Cathay Capital, Doyle J referred to an extract from Gee on Commercial Injunctions, 7th edition, which concisely sets out the position under English law:

‘It is a basic principle of fairness that an order should not be made against a party without giving him an opportunity to be heard. Under CPR r25.3 (1) the court may grant an interim

remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice. This can be: (1) when there is a risk that were notice to be given this would defeat the purpose of the injunction; or (2) when there is no time to give prior notice. Under CPR r25.3 (3) if the applicant makes an application without giving notice, the evidence and support of the application must state the reasons why notice is not being given. In practice, cases falling within the second category are rare; normally it is possible to give notice by email, text or telephone and to do so within minutes.

In the first category the exception applies when it appears likely that: (1) if notice of an application were to be given, the defendant or others would take action which would defeat its purpose before the order could be made; and (2) any damage which may be caused by the order could be compensated under the cross undertaking; or the risk of loss for which compensation would not be an adequate remedy is outweighed by the risk of injustice to the applicant if the order is not made without notice.

43. *In In the matter of Seahawk China Dynamic Fund (FSD 23 of 2022 (DDJ)) (Unreported, 10 February 2022) at paragraphs 22 to 26, Doyle J permitted an application to proceed on an ex parte short notice basis because further notice to the Company's principal would increase the immediate risk of the dissipation of assets and the risk of concealment or destruction of documents and records – defeating the purpose of the application.*

44. *In In the Matter of Principal Investing Fund I Ltd (FSD 268 of 2021 (DDJ))(Unreported, 29 September 2021) at paragraphs 26 to 28 [AB / Tab 11/ page 8], Doyle J permitted an application to proceed on an ex parte basis in the circumstances where providing notice would enable to alleged wrongdoers in control of the funds to defeat the object of the applications entirely or to some significant extent, including the dissipation and misuse of assets, inappropriate actions by the company's principals, and the risk of destruction and/or fabrication of documents and records.” [Emphasis added]*

9. The Petitioners' counsel reliance on 'Doyle on ex parte relief' was entirely sound. The most clear-cut generally applicable justification for proceeding ex parte without notice is “when there is a risk that were notice to be given this would defeat the purpose of the injunction”: *Re Cathay Capital*

Holdings III, LLP, FSD 245 of 2021 (DDJ), Judgment dated 24 August 2021 (unreported) at paragraph 25. This ground was demonstrably made out in all the circumstances of the present case.

The standing requirements

10. The standing requirements are on the face of it straightforward and uncontroversial. An application may be made under section 104 (1) “*by a creditor or contributory of the company*”: section 104 (2) of the Act. However, because the position of contingent creditors appears to have received limited attention in local cases and was addressed in some detail by counsel, the content and application of the standing test will be considered more fully below.

The grounds for appointing provisional liquidators

11. The grounds for making an appointment under section 104(1) were straightforward and uncontroversial and stated expressly in section 104 (2):

“(2) An application for the appointment of a provisional liquidator may be made under subsection (1) ... 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.”

12. Decisions illustrating the approach to these jurisdictional grounds which were placed before the Court included *Re ICG I*, FSD 192 of 2021 (DDJ), Judgment dated 4 August 2021 (unreported). In that case, before considering how those grounds could be made out, 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’)....”*

Procedural requirements: dispensing with the cross-undertaking in damages

13. The Petitioners’ counsel also addressed the law relating to circumstances in which the usual cross-undertaking in damages may be dispensed with. Most broadly, I accepted that the principle is that articulated by Doyle J in the passage in the *Cathay Capital Holdings III, LP* case reproduced above. The cross-undertaking will not be required as a condition for granting *ex parte* relief without notice where *“the risk of loss for which compensation would not be an adequate remedy is outweighed by the risk of injustice to the applicant if the order is not made without notice.”* That accurately reflects the general legal position. Mr Crane, however, was careful to address the more restrictive context of applications to appoint provisional liquidators which are governed by the Companies Winding Up Rules (2023 Consolidation) (“CWR”). Whether this rule permits the requirement to be dispensed with is a point not seemingly addressed by any considered local authority:

“97. CWR O.4, r.3[AB / Tab 6] says that an applicant shall give an undertaking to the Court to pay ‘any damage suffered by the company by reason of the appointment of the

provisional liquidator’ and ‘the remuneration and expenses of the provisional liquidator, in the event that the winding up petition is ultimately withdrawn or dismissed.’

98. *The proposed provisional liquidators have consented to the dispensation of the requirement for the Petitioners to undertake to pay their remuneration and expenses in the event that the winding up petition is ultimately withdrawn or dismissed.*

99. *There does not appear to be any reported case law in the Cayman Islands on the point of dispensing with the requirement to provide such an undertaking.*

100. *This Honourable Court has the inherent discretion to waive strict compliance with the CWR. This Honourable Court also has jurisdiction under the Grand Court Rules Order 2 as well CWR O.1, r.4 (1A).*

101. *In Gee on Commercial Injunctions at 11-024 [AB / Tab 20], the author states that:*

‘...Normally an undertaking which can be relied upon to pay damages if ordered will be a requirement if an injunction is to be granted. Even though the applicant is impecunious, the court may in rare cases where the merits are strongly in favour of the applicant, in its discretion, still decide to grant the relief sought, accepting that the risk that the undertaking may not be honoured if called upon should not prevent the injunction being granted, or even exceptionally in special circumstances, dispensing with the need to give a cross-undertaking when the claimant was in no position to give one and this may have been caused by alleged fraud of the defendants... Whether to require an undertaking from whom and in what terms is a question of discretion which depends on the facts of the individual case and considerations of fairness.’

102. *In French, Applications to Wind Up Companies, 4th Ed 2021 at 4.43, the author states that:*

Unless an application is made in the public interest, the court will not normally appoint a provisional liquidator unless the applicant gives the court a cross-undertaking in damages.

103. The footnotes in the above passage from French include a reference to an Australian case, *Lubavitch Mazal Pty Ltd v Yeshiva Properties No 1 Pty Ltd* [2003] NSWSC 535m 47 ACSR 197, which says that a similar undertaking was not required because there was no practical possibility of damage.” [Emphasis added]

14. The CWR Order 4 provides in material part as follows:

“Security (O.4, r.3)

3. (1) *The applicant shall give an undertaking to the Court to pay —*

(a) any damage suffered by the company by reason of the appointment of the provisional liquidator; and

(b) the remuneration and expenses of the provisional liquidator, in the event that the winding up petition is ultimately withdrawn or dismissed.

(2) The Court may require the applicant to give security for the applicant’s undertaking in such manner as the Court thinks fit.”

15. This rule on its face appears to impose a mandatory requirement for a cross-undertaking in damages to be given by an applicant seeking the appointment of a provisional liquidator. Mr Crane contended it was in substance directory because GCR Order 2 applied to winding-up proceedings by virtue of CWR Order 1, rule 4 (1A). GCR Order 2 provides so far as is material:

“Non-compliance with rules (O.2, r.1)

1. (1) *Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise

its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit...”

16. I had never previously considered that Order 2 could be deployed to contend, in effect, that the Court possessed the inherent jurisdiction to dispense with the requirement of any rule so that the use of “shall” should in all cases be construed as having directory as opposed to mandatory effect. It was impossible to accept so broad a proposition. The *Supreme Court Practice 1999* paragraph 2/1/5 states:

“An irregular step or order remains irregular until application is successfully made to the court to correct it (Metroinvest Anstalt v. Commercial Union Assurance Co. plc [1985] 1 W.L.R. 513; [1985] 2 All E.R. 318 CA). An order of the Court which is irregular, however, cannot be ignored with impunity by the person to whom it is addressed; it must be observed unless and until it is set aside (Isaacs v. Robertson [1985] A.C. 97; [1984] 3 All E.R. 140, PC).”

17. It is true that Order 2 is designed in part to eliminate the need to distinguish between those forms of non-compliance which result in invalidity and those which do not. But this merely means that a failure to comply with the Rules is not necessarily fatal, and that an Order obtained through a process which involves non-compliance with the GCR or CWR will be valid until it is set aside. The power to set aside on the grounds of an irregularity can only be exercised when some form of non-compliance with the Rules has occurred. The existence of this remedy cannot in my judgment permit the Court to authorise a deliberate departure from what is intended to be a mandatory procedural requirement.
18. However, the reference to GCR Order 2 did have a significant forensic impact on the legal analysis in the context of an urgent *ex parte* application to the following extent. It confirmed that however Order 4 rule 3 was to be properly construed, if the Court accepted Lord Denning’s encouragement to be a “bold spirit” rather than a “timorous soul” and appointed the JPLs without requiring an undertaking based on what proved to be a mistaken view of the scope of the rule, the Order made would be valid until set aside. Having taken the time to articulate reasons for a decision which, on this narrow point alone was unsupported by any direct authority, it seems appropriate to supplement the analysis supported by the material placed before me by referring to additional materials which were not.

19. In my judgment there was two more fundamental bases on which the Court could confidently conclude that CWR Order 4, rule 3 should not be construed as depriving the Court of the power to decide whether or not justice required the prescribed cross-undertaking to be given. These bases were:
- (a) the proper construction of the rule required account to be taken of the right of access to the Court embodied in the fair hearing rights protected by section 7 of the Cayman Islands Constitution Order 2009, which are derived from article 6 of the European Convention on Human Rights. CWR Order 4, rule 3, made under the Act, could not validly be construed as operating so as to deprive an applicant financially unable to give the usual cross-undertaking of their rights of access to the Court; and (further and in any event)
 - (b) the proper construction of the rule required account to be taken of the extent to which the governing statutory provisions of section 102 of the Act could be construed as validly permitting the creation of a mandatory procedural requirement for seeking the appointment of provisional liquidators that only well-resourced creditors and contributories could ever meet.
20. There is authoritative local judicial support for the general proposition that procedural rules should not be construed as impairing a litigant’s right of access to the Court. In *H.E.B. Enterprises Limited and Bodden Jr. v. Richards* [2020 (2) CILR 855] (CICA), Birt JA opined as follows:

“18 Mr. Russell was correct to concede that this court does not have power to extend the twenty-one day period. It is well established that, where a time limit for doing some act in relation to proceedings is contained in a statute, a court has no power to extend that period unless the statute itself so provides: see, for example, *Mucelli v. Government of Albania* (2).

19 Although it was not raised in argument, I add for the sake of completeness that the only possible exception is where an extremely short time limit may in some circumstances ‘impair the very essence’ of the right of access to a court in the determination of civil rights, in which event the court may exercise a discretion to extend a statutory time limit in exceptional circumstances if this is necessary to prevent a breach of the right of access

to a court pursuant to art. 6 ECHR; see Pomiechowski v. Legnica District Ct. (Poland) (3). The same argument may well apply in respect of s.7 of the Constitution..." [Emphasis added]

21. The quoted observations in a case to which I was not referred at the hearing support a wider principle which I considered to be self-evident. Statutory procedural requirements cannot generally be construed in a manner which would “*impair the very essence’ of the right of access to a court in the determination of civil rights*”. Where Parliament has created a substantive statutory remedy, such as the right to seek the winding-up of a company, and defined who has standing to enforce such a right, any related procedural provisions should ordinarily be construed as intended to allow persons with standing to enforce their right of access to the Court. Unless Parliament may be deemed to have intended that in certain circumstances the statutory remedy should be lost altogether, procedural requirements should not be construed in a way which will (particularly from the outset of proceedings) bar the litigant’s path to the Court’s door altogether.
22. I had these important general principles very much in mind (at least subliminally) at the *ex parte* hearing in the present case. Because the Court was faced with a very stark choice between denying the Petitioners the relief they sought on the grounds of their inability to meet a cross-undertaking as to damages requirement (if it was mandatory) and granting them relief if the cross-undertaking requirements were discretionary. As I observed in *Re First Virginia Reinsurance Ltd* [2003] Bda LR 47, considering a different aspect of the winding-up jurisdiction of the Bermuda Supreme Court (at page 9):

“Another ground which supports the rejection of shareholder approval as a precondition for filing a winding-up petition flows from the interpretative requirement to avoid a statutory construction inconsistent with fundamental rights.

If this rule has any weight in the United Kingdom where the Courts are not competent, even under the recent Human Rights Act 1998, to directly strike down statutory provisions which override fundamental rights, it must have far greater force in Bermuda. Here, the Constitution does not permit Parliament to enact legislation inconsistent with, inter alia, the fundamental rights and freedoms protected by Chapter 1 of Bermuda Constitution. And the Courts may declare offending statutory provisions to be null and void.

The right of access to the Court has been recognized by the English courts and the European Court of Human Rights as a facet of the right to a fair trial under article 6 of the European Convention on Human Rights, on which section 6 of the Bermuda Constitution is substantially based. It has also been regarded as reflective of an older common law right: R v Lord Chancellor, exp. Witham [1987] 3 LRC 349 at 358e, per Laws, J.”

23. There is in fact more pertinent local authority which confirms how these high-level principles operate in the specific context of security for costs applications under the GCR, albeit that the Court is under the GCR exercising what is unambiguously a broad discretionary power. Marlene Carter J (Acting) refused a security for costs application on the grounds that it would stifle the plaintiff’s claim in *Evangelina Curry v Zoltan Szucs*, GC 0418 of 2015, Judgment dated April 26, 2018 (unreported). Although Carter J did not find it necessary to formally consider the constitutional backdrop, the following seemingly uncontroversial submissions were cited with apparent approval:

“22. The Plaintiff contends that an order for security for costs would have the effect of stifling her claim. She argues that the order would restrict her right of access to justice on the instant claim and asked the court to pay heed to the ECHR principles which are incorporated in the Bill of Rights in the Constitution. In this regard counsel for the Plaintiff referred the court to the decision of Nasser v United Bank of Kuwait. In that case, the court noted the approach of the ECHR on the application of that right as it relates to orders for security for costs in the case of Tolstoy Miloslavsky v United Kingdom.¹

‘59. The court reiterates that the right of access to the courts secured by article 6(1) may be subject to limitations in the form of regulation by the state. In this respect the state enjoys a certain margin of appreciation. However, the court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. It follows from established case law that article 6(1) does not guarantee a right of appeal. Nevertheless, a contracting state which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees in article 6. However, the manner of application of article 6 to proceedings before such courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court

therein. The court's task is not to substitute itself for the competent British authorities in determining the most appropriate policy for regulating access to the Court of Appeal in libel cases, nor to assess the facts which led that court to adopt one decision rather than another. The court's role is to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation.'

23. *In Al-Koronky and another v Time Life Entertainment Group Ltd and another, it was accepted that:*

'An important consideration, especially having regard to the need for equality of arms under the CPR and the Claimants' right of access to justice under Article of the European Convention, is whether the order sought or indeed any order for security for costs will have the effect of stifling their claim. That is a major factor in the present case. I need to remember, however, that it is necessary for the Claimants to demonstrate the probability that their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approach the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a particular order will have the effect of stifling. The test is whether it is more likely than not.

There are interesting recent observations in this context in the case of Brimko Holdings Limited v Eastman Kodak Company [2004] EWHC 1343 (Ch), to which Miss Page drew my attention. Park J, having referred to the burden of proof, continued:

'Secondly, the court should not restrict its evaluation of the ability of a claimant to provide security to the means of the claimant itself. If the claimant cannot provide the security from its own resources, the court will be likely to consider whether it can reasonably be expected to provide it from third parties, such as, in the case of a corporate claimant, shareholders or associated companies or, in the case of a corporate claimant, shareholders or associated companies or, in the case of an individual claimant, friends and relatives. If the case moves to the stage of considering whether the security should be regarded as being available from third parties, the burden still rests on the claimant. He or it has to show that,

realistically, there do not exist third parties who can reasonably be expected to put up security for the defendant's costs.' ..."

24. Where the Court has an explicitly unfettered discretion in relation to security for costs, as under GCR Order 23, there is no need to rely upon the right of access to the Court to construe the rule. However the application of the rule clearly takes the right of access to the Court into account through the now settled principle that security for costs will not generally be ordered where the effect of this would be to stifle the plaintiff's claim. The common law principles governing the exercise of the discretionary power mirror the overarching constitutional principle. CWR Order 4, rule 3 must accordingly be construed with due regard for the narrow context of section 102 of the Act and Order 4, rule 3 of the CWR, while also viewing the rule in its wider legislative and constitutional context. The constitutional context is for these purposes an important signpost as to where a sensible purposive construction of the statutory regime ultimately leads.
25. The starting point is the following provisions of the Act:

“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]

26. The pursuit of the statutory remedy is intended to be procedurally regulated by rules of Court, but the standing requirements and grounds for appointing relief are spelt out by the statute. The remedy is less easy to obtain than an injunction in that a *prima facie* case for winding-up has to be made out, but the importance of the remedy as a means of, *inter alia*, preventing the dissipation of assets on an urgent interim basis is broadly analogous to injunctive relief. This is why the closest analogy to the ‘security for costs’ provisions of CWR Order 4, rule 3 is the common law practice of requiring the applicant for interim injunctive relief to provide (in appropriate cases) a cross-undertaking in damages. However, appointing a joint provisional liquidator in place of directors of a company may be in many cases a far more intrusive form of relief with more extensive and immeasurable potential damage risks than an injunction imposed on a single defendant. To this extent, it is easy to see why (as the Petitioner’s counsel appeared to accept by reference to French, *‘Applications to Wind Up Companies’*), it is more unusual in the provisional liquidator appointment context for the Court to dispense with requiring the usual cross-undertaking.
27. On the other hand there is nothing within the legislative regime of the local Companies Act which suggests that there is any legislative policy mandate which envisages that only those creditors or contributories which have the means to give a cross-undertaking in damages should be able to access the provisional liquidation regime, no matter how compelling their case for obtaining such relief and ultimately winding-up the company might be. The facts of the present case served to highlight how manifestly inconsistent with the overall policy of the Act and the recognised public interest in protecting the reputation of the Cayman Islands as a well-regulated financial centre such a ‘security for costs’ policy would be. It would effectively mean that ‘retail’ creditors of companies set up to conduct global business on a mass ‘retail’ scale would have no effective access to interim relief against corporate fraud and mismanagement.
28. There is nothing in the primary legislation which confers the power to make the CWR to suggest that the Rules Committee was expressly or impliedly authorised to impose the ability to provide a cross-undertaking in damages as, in effect, an additional standing requirement which litigants seeking to appoint a provisional liquidator must invariably meet. It is true that it will probably be rare that litigants of modest means will resort to the winding-up jurisdiction at all, but this is an entirely different matter. It is one thing to construe a statute as intended to grant relief to a limited class of persons; it is an entirely different thing to construe a statute as creating a remedy which not every litigant will be able to pursue with equal ease in every case. If an undertaking was mandatory in all cases, this could not in my judgment be based on a deemed intention to exclude an entire

class of litigants from entitlement to the main interim limb of the winding-up jurisdiction. It could only be on the assumption that the undertaking was considered to be too important a safeguard to be dispensed with on financial hardship grounds. The basis for inferring this legislative intention was weakened by the fact that it required little reflection to realise that there could easily be many cases where the risks of harm flowing from wrongfully appointing a provisional liquidator might be so minimal as to extinguish the need for any undertaking altogether. I was ultimately unable to countenance construing section 104 of the Act and CWR Order 4, rule 3 in a way which would achieve what appeared to me to be an absurd result, namely that otherwise deserving applicants seeking provisional liquidator relief must be refused relief unless they were able to give a cross-undertaking in damages and/or obtain security for such an undertaking if required.

29. In my judgment it is also self-evident that the power to make rules “*giving effect to*” primary legislation is implicitly limited to creating a procedural framework which facilitates rather than impedes the fulfilment of the legislative purposes expressed in the relevant primary legislation. As Lady Justice Hale (as she then was) has observed in relation to another procedural rule, “[t]he rule making power is, among other things, for ‘regulating the exercise of the rights of appeal conferred in the Act. A power to regulate the exercise of a right does not normally include a power to remove it’”: *Saleem-v-Secretary of State for the Home Department* [2000] EWCA Civ 186 at page 15. Section 104 (1) states in very general terms that the Court’s jurisdiction is subject to “*any rules made under Section 155*”. That section, so far as is material for present purposes, merely provides in equally general as follows:

“155. (1) *The Insolvency Rules Committee shall have power —*

- (a) *to make rules and prescribe forms for the purpose of giving effect to Parts IV, V and XVI...*”

[Emphasis added]

30. Accordingly, the rule-making power pursuant to which the CWR were made were expressly intended, as one would expect, to be used for the purpose of “*giving effect to*” the relevant provisions of the primary legislation. CWR Order 4, rule 3 is only valid to the extent that it implements the legislative intent expressed in section 104; it is invalid to the extent that it purports to either constrict or expand the substantive provisions of the Act to a material extent. Procedural rules typically establish a framework litigants are expected to adhere to which regulate the manner in which substantive claims should be conducted without either effectively stifling the substantive claim or creating an entirely new claim. It is interesting to note that Doyle J’s “four hurdles” test

for appointing provisional liquidators focussed on the section 104 jurisdictional and standing requirements; his discussion on ‘standing’ did not mention the requirements under the CWR Order 4, rule 3 in relation to the provision of an undertaking at all.

31. I was at the date of the hearing and still am unaware of any other British Commonwealth jurisdiction where the appointment of provisional liquidators is subject to an inflexible statutory requirement that a cross-undertaking in damages should be provided. I have always assumed that Cayman Islands practice relating to the appointment of provisional liquidators is broadly similar to that in England and Wales. It is helpful to confirm the summary conclusion which I reached at the hearing by a brief reference to the English legal position. In *Abbey Forwarding Limited (in liquidation)-v-Her Majesty’s Revenue and Customs* [2015] EWHC 225 (Ch) (at paragraph 162), David Richards J (as he then was) cited the following passage to explain the modern English approach to cross-undertakings in the appointment of provisional liquidator context:

“95. The court is naturally cautious about appointing a provisional liquidator to a trading company where the consequence is almost inevitably to bring the company’s trading to an end. In some cases (for example, where the trading is believed to be in fraud of the public) this may be the object of the appointment, but the importance of treading warily is just the same. The need for caution was a matter to which in Rochdale Rimer LJ (at [76]) and Lewison LJ (at [109]) both referred. In cases where such an appointment is to be made, the court’s inclination will be to want to provide the company with some kind of protection in the event that it turns out that the appointment should not have been made. Extracting from the petitioner an undertaking in damages to the company as a term of the appointment is the obvious step to take and, in my experience, the course usually followed. In other cases, especially where there is nothing to suggest dishonesty on the part of those who control the company, the court will explore whether some lesser remedy, for example a freezing injunction or an order for the production of documents, may suffice.”¹ [Emphasis added]

32. The English law approach is clearly broadly analogous to the interim injunction context, but more caution is required where the effect of the appointment would be to bring trading to an end no matter what the grounds relied on may be. An undertaking is “usually” required, but the rationale for doing so is clearly grounded in a practical need to protect the company from the financial

¹ *Re Parkwell Investments Limited* [2014] EWHC 3381 (Ch) (Sir William Blackburne J).

consequences of an improper appointment. The Court is essentially engaged in a risk assessment exercise which is flexible enough to dispense with the cross-undertaking requirement in appropriate cases based on the facts of the relevant case. It is difficult to identify any tangible basis for concluding that the Cayman Islands legislative approach to this topic manifests an intention to adopt a materially different approach. It is true that section 104 departs from section 135 of the UK Insolvency Act by codifying the judge-made grounds upon which an appointment can be made under English law. But this legislative approach, favouring specificity over generality, makes it even more difficult to conclude that Parliament would have failed to express explicitly so surprising an intention as making the remedy created by section 102 unavailable to creditors and contributories of modest means.

33. Against this background, one can turn again to the relevant CWR provisions:

“3. (1) The applicant shall give an undertaking to the Court to pay —

(a) any damage suffered by the company by reason of the appointment of the provisional liquidator; and

(b) the remuneration and expenses of the provisional liquidator, in the event that the winding up petition is ultimately withdrawn or dismissed.

(2) The Court may require the applicant to give security for the applicant’s undertaking in such manner as the Court thinks fit.” [Emphasis added]

34. Read literally, CWR Order 4, rule 3 clearly distinguishes between (1) the requirement that the “applicant shall give an undertaking” and (2) providing that the “Court may require” security for the undertaking. There being no wider rationale in the CWR read as a whole for adopting a literal interpretation of “shall” in rule 3 (1), the following considerations within rule 3 itself cumulatively weigh heavily against adopting such an approach:

(a) it makes little sense to construe rule 3 (1) (a) as imposing an inflexible requirement that an undertaking be given in all cases while 3 (2), read literally, permits the Court to require no security at all on broad discretionary grounds;

- (b) it makes little sense to construe rule 3 (1) (a) as imposing a mandatory obligation to provide a cross-undertaking as to the company's costs and rule 3 (1) (b) as providing a discretionary power to require a cross-undertaking in relation to the provisional liquidator's costs. The key prefatory word "shall" applies to both sub-paragraphs (a) and (b) of the rule. In my experience rule 3 (1) (b) is in practice treated as a directory rather than a mandatory requirement and provisional liquidators are routinely appointed in the Cayman Islands with no undertaking being given in relation to the provisional liquidators' costs;
- (c) it makes little sense to construe Order 4 rule 3 as intended to deprive the Court of the jurisdiction to waive the requirement of the undertaking even in circumstances where, *inter alia*:
 - (i) there is a *prima facie* case for winding-up;
 - (ii) provisional liquidators are sought to be appointed to investigate fraud and/or to prevent a dissipation of assets;
 - (iii) the company is no longer trading and the risks of damage to the company are negligible;
 - (iv) the company's creditors are all or mostly ordinary consumers who lack the means to offer any meaningful cross-undertaking in damages and so the effect of requiring strict compliance with the rule literally read would be to stifle the applicants' ability to obtain any prompt and effective relief, contrary to the spirit (if not the letter) of their fundamental right of access to the Court under section 7 of the Bill of Rights.

35. For these reasons, and comforted by Mr Crane's incontrovertible submission that if this analysis were shown to be wrong any Order made would be effective until set aside on the grounds of irregularity under GCR Order 2, I concluded that the word "shall" in CWR Order 4, rule 3 (1) should be construed as directory only. As regards how the discretion under Order 4 rule 3 (1) (a) should be exercised in relation to the company's costs, the operational meaning of the word "shall" will likely be "shall usually" to avoid depriving an entire class of creditors and/or contributories (those of modest means) of access to the Court under section 104 of the Act. The relevant rule

applied to the circumstances of the present case did not deprive the Court of the discretion to dispense with the generally obligatory undertaking in circumstances where:

- (a) requiring an undertaking would effectively deny the applicant Petitioners access to relief under section 104 of the Act to which they would otherwise be entitled and would further potentially infringe their rights under section 7 of the Cayman Islands Constitution Order 2009; and
- (b) the risks of damage to the non-trading and rudderless Company (the management of which was publicly known to be subject to criminal investigation abroad), if the appointment was subsequently shown to be wrong were heavily outweighed by the risks of prejudice to the Petitioners and the public interest.

Findings: substantive merits of application (the “four hurdles”)

(1) Presentation of petition hurdle

36. The Petition dated 3 March 2023 was presented on 6 March 2023 and so the Petitioners had clearly overcome the first hurdle.

(2) Standing hurdle

37. The Petitioners relied on their standing as contingent creditors. The Petition contained the following key averments:

“39. In light of the foregoing, the Petitioners (as well as other AAX users/investors) have potential causes of action independently against the Company and jointly against those individuals and companies associated with the Atom Group, including Company and its directors/former directors, officers/former officers, or other principals, including but not limited to the misappropriation of AAX users/investors assets, breach of contract, breach of trust, dishonest assistance, and knowing receipt. As such, the petitioners are creditors or contingent creditors of the Company and therefore have a tangible interest in the Company.”

38. The Petitioners’ adduced credible evidence that the Company is a holding company which controlled the operating companies while those subsidiaries were arguably used to cause deliberate

commercial harm to the interests of investors. Although I initially was concerned that the standing issue had not been adequately addressed, I was ultimately persuaded that the Petitioners had demonstrated that they possessed potentially valid non-contractual contingent claims on the basis pleaded in paragraph 39 of the Petition.

39. In the Petitioners' counsel's Skeleton Argument it was submitted:

“60. Considering the contingent claims by the Petitioners against the Company and other entities and individuals associated with the Atom Group, the Petitioners have standing to present the Petition.

61. A creditor (including a contingent and prospective creditor) has standing to present a petition to wind up a company (Companies Act, section 94(1)(b)); Re Exten Investment Fund and Others (FSD 96 of 2017 (IMJ), Unreported, 23 June 2017) at paragraphs 62-64 (Exten); Adamas Heracles Multi Strategy Fund and Adamas Asian Origin Fund SPC (FSD No 133 of 2021 (IKJ) and 140 of 2021 (IKJ), Unreported, 23 July 2021) (Adamas Heracles) at paragraph 12).

62. Section 139(1) of the Companies Act [AB/ Tab 3] states that:

All debts payable on a contingency and all claims against the company whether present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company and the official liquidator shall make a just estimate so far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages or which for some other reason do not bear a certain value.²

63. The standing bar is not a high one (Adamas Heracles at paragraph 22). Justice Mangatal held in Exten at paragraph 65 that:

‘In my judgment, it is not necessary for either section 151(3) or 131(b) for the Petitioner’s claim to have reached the level of being a provable claim or for the Petitioner to have

² Section 139 further provides:

“(2) Foreign taxes, fines and penalties shall be admissible to proof against the company only if and to the extent that a judgment in respect of the same would be enforceable against the company pursuant to the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) or any laws permitting the enforcement of foreign taxes, fines and penalties.”

submitted a claim as a contingent creditor under section 139(1) of the Companies Law. In any event, it is clearly not fatal that no such claim had yet been made. This is because the investigations are still to be carried out and completed.'

64. *The Petitioners clearly qualify as contingent creditors under section 139 of the Companies Act.*" [Emphasis added]

40. As was clear from a full reading of Ingrid Mangatal J's judgment in *Exten*, her conclusions about the standing to seek a supervision order were founded on her views as to the contingent creditor's right to petition to wind-up under section 94 of the Act. It is true that the Judge's conclusions about the threshold a qualifying contingent claim had to reach was not supported by any authority directly addressing the standing of a contingent creditor under section 94 as read with section 139 of the Act. Nonetheless it appeared to me to be clear as a matter of principle that standing to petition to wind-up a company under section 94 as a contingent (or prospective) creditor, as much as standing to petition as a creditor, is to be defined by reference to the standing to prove in the liquidation under section 139 should the company be wound-up. The right to prove, primarily set out in section 139(1) of the Act, is expressed in broad terms which are substantially similar to the more compressed wording of rule 14.2 of the UK Insolvency Rules 2016:

"(1) All claims by creditors except as provided in this rule, are provable as debts against the company or bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages."

41. Brief reference to further authority confirms the soundness of the submissions advanced at the hearing in the present case by the Petitioner's counsel. As to the scope of standing to prove as a contingent creditor, that standing is clearly very broad. It is clearly established under Cayman Islands law that non-contractual claims, such as a damages claim for fraud, qualifies for proof under section 139 (1) of the Act. In *Re Awal Finance Company Limited and Seven Others* [2011 (1) CILR 487], Anthony Smellie CJ (as he then was) held as follows:

"17 In the present circumstances, I entertain no doubt that the JOLs are under an obligation to take account of and make provision for contingent liabilities of the companies when determining the state of their solvency. In this regard, Mr. Keightley is plainly correct when he submits that s.139 (1) of the Companies Law applies, which provides as follows:

‘All debts payable on a contingency and all claims against the company whether present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company and the official liquidator shall make a just estimate so far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages or which for some other reason do not bear a certain value.’

18 It has been said of this provision (as it then appeared as s.161 of the Companies Law (2004 Revision)), in In re Bristol Fund Ltd. (1) (2008 CILR 317, at para. 55):

‘It will be immediately apparent from that provision, that whether or not a contingent, or future, claim is admissible to proof cannot depend only on whether it is possible to make a just estimate of it. If the debt is one which exists, albeit payable only upon a contingency, it shall be admissible to proof. The requirement then arises for a just estimate of its value, so far as is possible, to be made.’

19 In that case, it was decided that a debt, for which provision should be made in the winding up, included a debt or liability (in that case as could arise from an indemnity given by the company to its former auditors) to which a company may become subject after the date of liquidation by reason of any obligation incurred before that date. Such is the nature of the contingent liability that may become actualized in the event of AHAB’s claim in Cause FSD No. 54 of 2009 succeeding.

20 The fact that when a company is in liquidation, future or contingent debts are debts which are provable in the liquidation pursuant to English Insolvency Rules 1986, r.12.3 (enshrined in s.139(1) of the Companies Law) was also specifically recognized by Vos, J.A. in giving the judgment of the Court of Appeal in Strategic Turnaround (3) (2008 CILR 447, at paras. 24 and 42).”

42. In *Re Nortel Companies & Ors* [2014] AC 209, Lord Neuberger opined as follows:

“92. *The Report of the Review Committee on Insolvency Law and Practice* (‘the Cork Report’, 1982, Cmnd 8558), para 1289, described it as a ”basic principle of the law of

insolvency” that “every debt or liability capable of being expressed in money terms should be eligible for proof” so that “the insolvency administration should deal comprehensively with, and in one way or another discharge, all such debts and liabilities”.

*93. The notion that all possible liabilities within reason should be provable helps achieve equal justice to all creditors and potential creditors in any insolvency, and, in bankruptcy proceedings, helps ensure that the former bankrupt can in due course start afresh. Indeed, that seems to have been the approach of the courts in the 19th century before the somewhat aberrant decisions referred to in para 88 above. Thus, in *Ex p Llynvi Coal and Iron Co; In re Hide* (1871) LR 7 Ch App 28, 32, James LJ described one of the main aims of the bankruptcy regime as to enable the bankrupt to be ‘a freed man – freed not only from debts, but from contracts, liabilities, engagements and contingencies of every kind’. If that was true in 1871, it is all the more true following the passing of the 1986 and 2002 Acts, and as illustrated by the amendment to rule 13.12(2) effected following the decision in *In re T & N Ltd* [2006] 1 WLR 1728, so as to extend the rights of potential tort claimants to prove.”*

43. As Lord Sumption noted in his concurring judgment in *Nortel* (at paragraph 136):

“It is not a condition of the right to prove for a debt or liability which is contingent at the date when the company went into liquidation that the contingency should be bound to occur or that its occurrence should be determined by absolute rather than discretionary factors.”

44. For these reasons, I concluded that the Petitioners had established their standing as non-contractual contingent creditors of the Company and surmounted the standing hurdle.

(3)Prima facie case hurdle

45. The Petitioners’ counsel submitted:

“65. In the circumstances, the Petitioners have made out a prima facie case that a winding up order will, at the very least, likely be made.

66. In In the Matter of Grand State Investments Limited (FSD 11 of 2021 (RPJ))(Unreported, 28 April 2021), Parker J quoted, at paragraph 83, the following

passage from the judgment of Segal J in *Re Asia Strategic Capital Fund LP* [2015] (1) CILR Note 4:

'In establishing whether a good prima facie case has been made for a winding-up order, as is required to the appointment of a provisional liquidator ... it is not necessary to demonstrate that a winding-up order will be granted: a prima facie case is established if the allegations made in the petition for the appointment of provisional liquidators are supported by the evidence and have not been disproved, with any conflicts of evidence to be resolved at a substantive hearing.'

67. At paragraph 94, Parker J also referred to the English Court of Appeal's decision in *Revenue and Customs Commissioners v Rochdale Drinks* finding that a prima facie case required a petitioner to show that they were likely to obtain a winding up order:

'Given the potential seriousness of the appointment of a provisional liquidator, I consider that in the case of a creditor's petition the threshold that the petitioner must cross before inviting such an appointment ought to be nothing less than a demonstration that he is likely to obtain a winding up order on the hearing of the petition.' Per Rimer LJ (my emphasis)

68. The Petitioners' case is that the Company is unable to pay its debts in accordance with 92(d) of the Companies Act. The statements made by the entities within the Atom Group show that the Company and its related Atom Group entities have insufficient assets to continue to operate the AAX Platform. Further, the AAX users are left without the return of their assets deposited on the AAX Platform, and it is anticipated that AAX users' losses range from the tens of millions to the hundreds of millions or more. On this basis, it should be inferred that the Company and the related Atom Group entities are insolvent. The evidence shows that AAX made public statements and is sought capital injections from its shareholders (which would include the Company and the Company's directors who are the beneficial owners of the Company's shareholders) in order to return the AAX Platform to operations. The AAX Platform has not resumed operations.

69. Alternatively, and perhaps more strongly, is the ground that the Company should be wound up on a just and equitable basis because: (1) there is a need for an investigation; and (2) the Company has lost its substratum." [Emphasis added]

46. Both Parker J in *Re Grand State Investments Limited* (at paragraph 84) and Doyle J in *Re ICG I* (at paragraphs 19-21) cited with approval Rimer LJ's somewhat stricter *prima facie* case test in *Revenue and Customs Commissioners v Rochdale Drinks* [2013] BCC 419; [2012] 1 BCLC 748. On the basis of this test I found the Petitioners had surmounted the "*prima facie* case" hurdle both on the grounds of inability to pay debts and, more decisively, on the alternative just and equitable grounds because of the obvious (and seemingly incontrovertible) need for an investigation. The relevant passage in the English Court of Appeal's leading judgment merits reproduction in full:

"76. The appointment of a provisional liquidator to a trading company is, however, a most serious step for a court to take. It is likely in many cases to have a terminal effect on the company's trading life. It is not an order to be made lightly and its making requires the giving by the court of the most anxious consideration. In Union Accident Assurance, Plowman J. explained the twofold approach that he proposed to adopt. He said, at [1972] 1 All ER 1105, 1110b:

'There are two matters though, which seem to be relevant for me to consider. The first is whether the department has made out a good prima facie case for a winding-up on the hearing of the petition. Any views I express about the matter now are of course provisional only because I am not trying the petition at the present time. If the department has not made out a good prima facie case for a winding-up order then clearly I think it would not be right to appoint a provisional liquidator. On the other hand, if the department has made out a good prima facie case for a winding-up order then the second matter for my consideration arises, namely, whether in the circumstances of this case it is right that a provisional liquidator should have been appointed.'

*77. With one qualification, I would respectfully regard that as a good working approach to the disposition of an application for the appointment of a provisional liquidator. The qualification is that I would, however, regard the continued use in this context of the phrase 'good prima facie case' as unsatisfactory. In *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396, at 404F, Lord Diplock said of the phrase 'prima facie case' that it 'may in some contexts be an elusive concept', and Plowman J's chosen phrase also included a 'good', which may perhaps tend to increase the risk of elusiveness. Given the potential seriousness of the appointment of a provisional liquidator, I consider that in the case of a creditor's*

petition the threshold that the petitioner must cross before inviting such an appointment ought to be nothing less than a demonstration that he is likely to obtain a winding-up order on the hearing of the petition.” [Emphasis added]

(4) Necessity hurdle

47. The necessity hurdle was Mr Crane’s ‘slam-dunk’ point, which the Petitioners were able to almost casually skip over. The need to prevent the dissipation of assets or mismanagement were jointly relied upon with the essence of a compelling case crisply summarised thus: “*The Company’s directors have either absconded with assets, including AAX users’ assets or are incommunicado*”.

Conclusion

48. For the above reasons on 8 March 2023, I granted the Petitioners’ *ex parte* application to appoint the JPLs on their Petition for the winding-up of the Company on the grounds of insolvency, alternatively on just and equitable grounds.



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