COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2023/COM/Com/00053

IN THE MATTER of the Companies Act, 1992

AND

IN THE MATTER of an Application under the Securities Industry Act, 2011

AND

IN THE MATTER of MDollaz Ltd. (trading as Arawak X), a Registered Marketplace and Clearing Facility.

Appearances: **Michael Scott KC with Gwaine Ward, Aramantha Hepburn and Marnique Knowles for the Petitioner**

Kahlil Parker KC with Robertha Quant and Leslie Brown for MDollaz Ltd. (trading as Arawak X)

October 13, 2023

DECISION ON APPLICATION TO APPOINT A PROVISIONAL LIQUIDATOR

WINDER, CJ

This is an application by the Securities Commission of the Bahamas ("the Commission") for the appointment of a provisional liquidator over the assets of MDollaz Ltd. ("the Company").

Background:

[1.] I adopt the background facts as summarized in the Commission's written submissions, with necessary modifications to take into account the position of the Company.

[2.] The Company, trading as Arawak X, was incorporated in The Bahamas on 3 August 2017 under the Companies Act 1992 as a limited liability company. The Company was registered with the Commission on 18 January 2021 under the Securities Industry Act, 2011 ("the SIA") as a Marketplace & Clearing Facility operating under the Securities Industry (Business Capital) Rules, 2021.

[3.] Mr. D'Arcy Rahming Sr. was at all material times the CEO, shareholder and an ultimate beneficial owner of the Company and he, along with Mr. D'Arcy Rahming Jr., the CTO and also a shareholder in the Company, were at all material times responsible for the Company's governance and operational decisions.

[4.] The Commission says that, on 11 October 2022, it became aware that there were issues with the Company when Messrs. Samuel Campbell, Felix Stubbs and Hillary Deveaux came to the Commission and indicated their concerns about how the Company was being run. Mr. Deveaux was a director of the Company who later resigned from the Company. Mr. Campbell described himself as a lender/creditor of the Company. They expressed a number of concerns which alerted the Commission to some regulatory issues with the corporate structure of the Company regarding both directorship and share capital. Issues such as:

(1) Since its operations began, the Company had been "cash strapped" and roughly $1.5 million received from investors had been spent as only one of the six crowdfunding offerings that were listed on the Arawak X platform met its "minimum ask" amount;
(2) Staff had not been paid for several months;
(3) The Company's operating and fiduciary accounts bore only one signatory;
(4) $40,000 was moved from the Company's fiduciary account to the operating account and, when the matter was brought to the attention of Mr. Rahming Sr., he advised that this was an error;
(5) Senior employees of the Company travelled extensively in an effort to promote the business, but, given the Company's financial position, excessive travel was not a prudent measure at the time;

(6) Michael Turnquest, the Company's Chief Financial Officer, was terminated from his position, which raised concerns.

[5.] At the time of the meeting, the Commission was unaware that Mr. Campbell was appointed as a director of not just the Company but also of another entity which was unregulated called MDollaz Technology Ltd. The Commission says that it has since learnt that MDollaz Technology Ltd. was used to receive client funds for the Company.

[6.] The Commission spoke with the Company's principals in October 2022 and they indicated that they had some staff-related issues inclusive of having had to terminate the then-CFO, Mr. Turnquest; staff hadn't been paid their entire salary but they were receiving compensation; there was a temporary issue with comingling of investor funds but this was corrected; and the audit for 2022 was being prepared. When ultimately interviewed by the Commission, Mr. Turnquest confirmed that client funds were spent on operating expenses and business expenses as the Company had no cash. The Company complains that the statements made by Mr Turnquest are untested by them.

[7.] In November 2022, the Company informed the Commission that its bank accounts at Bank of The Bahamas ("BOB") were frozen. The Commission reached out to BOB to ascertain the reason for the freeze. At the time, BOB was unclear on what the issue was and said that they were getting a legal opinion on it. Ultimately, the Company indicated they were addressing the matter via the Court.

[8.] The Commission's investigation began with a For-Cause exam on 7 January 2023. The Commission says that it found a considerable number of issues which led to the imposition of conditions on the Company's registration via a letter dated 23 March 2023. The Commission says that, from about January to August 2023, it conducted an investigation into the Company's operations, and, based on the information received, the Commission was compelled to restrict the Company's operations and then to issue a cease order to stop any further breach of the SIA. Ultimately, the Commission suspended the Company's registration altogether, as, in its view, to allow the Company to continue operating would be potentially irresponsible on its part as the regulator.

[9.] The Commission received information primarily from the Company concerning its operations and practices. The Commission then also interviewed a number of persons, including employees and former employees. The Commission also interviewed investors after learning from the Company that it had approached both investors, and persons from the public alike, to invest in the Company.

[10.] Prior to approaching persons to invest, the Company changed its share structure from 5,000 shares to 10,000,000 shares sometime in July 2020. However, the Company only sent notice of the change in structure to the Commission a year later in July 2021. This, the Commission says, was in contravention of Regulation 27 and 34 of the

Securities Industry Regulations, 2012 ("the SIR"), which require a regulated person to inform the Commission of any material change and to obtain the Commission's prior written consent before changing its capital structure.

[11.] The Commission also says that the Company gave different valuations of the Company to persons without any support for the valuation. The valuations ran from over 4 million in 2022 to over 201 million in 2020 notwithstanding during these time periods the financials show the Company was indebted. This, the Commission says, was in breach of Regulation 22 of the SIR, which requires that regulated persons maintain standards of solvency required from the initial application stage, which must continue throughout the period of registration under the SIA.

[12.] On 30 August 2023, the Commission suspended the Company's registration for 15 days, per section 133(3) of the SIA, and gave notice to the Company that they would have the opportunity to be heard on 13 September 2023. The Commission says that the Company received an opportunity to be heard and opted to not respond to any of the Commission's concerns as outlined in its 30 August 2023 letter of suspension.

[13.] On 12 September 2023, the Commission says that it extended the suspension of the Company's registration for 5 days, per section 133(4) of the SIA, in order to consider the Company's anticipated response given the late reply from the Company in its letter of 12 September 2023 (which the Commission says did not respond to any of the Commission's concerns). The Commission says that when the principals of the Company were asked whether there was a plan that did not involve earning its way to solvency, they declined to answer, with their attorney saying it would prejudice them. The Company says that its response was due to the fact that it needed more time to respond, not because it was unwilling to respond.

[14.] The Company says that it was not given a proper hearing as contemplated by the relevant legislative framework. The Company says that the Commission has failed to reasonably, fairly, and impartially discharge its statutory functions. The Company also complains that the restrictions imposed upon it by the Commission and the Commission's failure to act on the Company's efforts to change its share structure has had a considerable impact its business.

The Application

[15.] On 18 September 2023, the Commission brought a petition for the winding up of the Company ("the Petition"). The Petition chronicled the concerns of the Commission and the troubles of the Company since its incorporation. Paragraph 73 of the Petition stated and prayed as follows:

73. In light of the information above, the Commission is satisfied that the Company's insolvency issues, governance irregularities, regulatory breaches and possible criminal infractions have together become insurmountable, resulting in there being more than sufficient evidence to have the Company wound up.

I (a) is insolvent in the sum of at least 2.4 million dollars;
(b) it has committed certain breaches under the SIA that warrant criminal penalties;
(c) That the Company has not been able to sufficiently provide reasons and/or documentation to satisfy the Commission that it can remediate its issues.

II That it is in the public interest and in the interest of clients and/or investors that the Company be would up.

III That it is just an equitable that the Company be wound up.

[16.] The Commission has applied for the appointment of Mr. James Gomez as the provisional liquidator of the Company. Pending the hearing of the application, it was ordered by consent on 15 September 2023 that the Company be restrained and prohibited from:

i) Trading in all securities and/or soliciting of crowdfunding activity via the platform operating as Arawak X;
ii) Promoting trading in any securities generally;
iii) In any way facilitating any activity on the Arawak X platform for or by any person and/or soliciting any new funds from any person, including new or existing clients or investors in the Company, any issues, project initiators and/or promotors of crowdfund offerings as well as new investors in crowdfund offerings;
iv) In any way handling or dealing with money or assets presently held on account of or to the order of existing clients of the Company or Arawak X;
v) Promoting the Company and/or the platform ArawakX in any way whatsoever; and
vi) Seeking to raise additional capital and/or investment in the Company from Members of the public, including accredited/professional investors.

[17.] In support of the application for the appointment of the provisional liquidator, the Commission relied upon the following evidence:

(a) Two Affidavits of Christina R. Rolle both dated 18 September 2023

(b) The Affidavit of Fitness of Mark Munnings dated 18 September 2023

(c) The Second Affidavit of Christina R. Rolle dated 05 October 2023

(d) The Third Affidavit of Christina R. Rolle dated 20 October 2023

(e) The Fourth Affidavit of Christina R. Rolle dated 20 October 2023

(f) The Fifth Affidavit of Christina R. Rolle dated 30 October 2023

[18.] The Company opposed the application and relied on the following evidence:

(a) The Affidavit of D'Arcy Rahming Sr. dated 26 September 2023

(b) The First Affidavit of Kenneth Donathan dated 5 October 2023

(c) The First Affidavit of Winston C Rolle dated 6 October 2023

(d) The Second Affidavit of D'Arcy Rahming Sr dated 12 October 2023

(e) The First Affidavit of D'Arcy Rahming Jr dated 8 November 2023

The Law

[19.] Section 199 of the Companies Act (as amended by the Companies (Winding Up Amendment) Act, 2011) provides:

> 199. Provisional liquidator: appointment, powers and termination.
>
> (1) Subject to this section and any Rules made under section 252, 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 any relevant regulator 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-
>
> (i)to prevent the dissipation or misuse of the company's assets,
>
> (ii)to prevent the oppression of minority shareholders,
>
> (iii)to prevent mismanagement or misconduct on the part of the company's directors, or
>
> (iv)in the public interest. ...

[20.] In ***The Attorney-General et al v. Baha Mar Ltd. and others; [2015] 2 BHS J. No. 97***, the Supreme Court considered the requirements for the exercise of the Court's discretion to appoint provisional liquidators under section 199. At paragraphs 55-60 of the decision it was stated:

> 55 The legal requirements necessary for the exercise of the courts discretion to appoint provisional liquidators are therefore: (1) the existence of a prima facie case for the making of a winding up order; and, (2) the existence of one or more of the necessities cited in section 199(2)(b)(i) to (iv). The Petitioner says that the appointment is necessary to prevent the dissipation of the company's assets (199(2)(b)(i)) and in the public interest (199(2)(b)(iv)).

Whether there is a prima facie case for the making of a winding up order

56 The Petitioners argue that, putting aside issues as to whether there are grounds for the "just and equitable" winding up, the Respondents are undoubtedly insolvent and there is a prima facie case for the making of a winding up order. ...

57 The Respondents assert that the test to be utilized is that there is a "likelihood" that a winding up order will be made based upon the English Court of Appeal's decision in HMRC v. Rochdale Drinks Distributors Ltd [2011] EWCA Civ 1116. In Rochdale Drinks, Rimer LJ stated at paragraph 76 - 77:

> [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 Re Union Accident Insurance, Plowman J explained the two-fold approach that he proposed to adopt. He said (see [1972] 1 All ER 1105 at 1110):
>
> > '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 at 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] 1 All ER 504 at 507, [1975] AC 396 at 404, 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.

58 The environment in which Rochdale Drinks and Union Accident Insurance was decided did not appear to include a statutory provision such as section

199(2) which speaks specifically to a prima facie standard. This is reflected in paragraph [75] of the ruling in Rochdale Drinks where Rimmer LJ stated:

> [75] The court's jurisdiction to appoint a provisional liquidator is conferred by s 135 of the Insolvency Act 1986. Section 135(1) provides that:
>
> > 'Subject to the provisions of this section, the court may, at any time after the presentation of a winding-up petition, appoint a liquidator provisionally.'
>
> Section 135(2) provides that in England and Wales-
>
> > '... the appointment of a provisional liquidator may be made at any time before the making of a winding-up order; and either the official receiver or any other fit person may be appointed.'
>
> Section 135(4) provides that the provisional liquidator shall carry out such functions as the court may confer on him; and s 135(5) provides that his powers may be limited by the order appointing him. The power to appoint a provisional liquidator is, therefore, a broad and general one in the sense that, provided that the jurisdictional conditions in s 135(1) and (2) are met, the section imposes no limitations upon, nor does it prescribe, the criteria to be adopted by the court when considering an application for such an appointment (see Re Union Accident Insurance Co Ltd [1972] 1 All ER 1105 at 1109, per Plowman J; and Re Highfield Commodities Ltd [1984] BCLC 623 at 633-634, [1985] 1 WLR 149 at 158-159 per Sir Robert Megarry V-C).

59 The imposition of a higher standard of "likelihood of a winding up order being made", in light of the clear language of section 199(2)(a) (which requires only a prima facie case) could not be supported on the strength of the dicta in Rochdale Drinks. Parliament is deemed to know the common law and as the CWUA is fairly recent, had the legislature intended a higher test of "likelihood" it would have so stated. I am satisfied that the appropriate standard is, as stated in section 199(2)(a), a prima facie case.

[21.] Section 134(b) of the SIA provides:

134. Application to court.

Notwithstanding any other provision, if the Commission considers it in the public interest to do so, the Commission may, at any time and without a hearing, apply to the court for an order

(a) To enforce a directive or order made by the Commission under securities laws;

(b) For a market participant to be wound up dissolved, liquidated or otherwise terminated, as appropriate or

(c) To take any other action as the Commission considers necessary".

[22.] The Commission also relies on the obligations of the Company under the SIA, the SIR and the Securities Industry (Business Capital) Rules, 2021 (the "Business Rules") –

a) Section 43 - the powers of the SCB to obtain information for investigation.
b) Section 45 - compliance inspection by the SCB of regulated persons.
c) Section 58 - Registration
d) Section 59 - Conditions and restrictions on registration
e) Part IX – governs Distributions and Prospectuses (sec. 97 - Offence)
f) Section 133(3) and (4) - suspension orders in the public interest.
g) Regulation 22 – Requirements (solvency)
h) Regulation 27 - Notice of change in information after registration
i) Regulation 34 - Security holders and transfers of securities
j) Rule 11 – Payment of distribution funds
k) Rule 17 – Registration of platforms
l) Rule 24 - Return of purchaser's funds

Analysis and Discussion

[23.] The Commission says at paragraphs 31-34 of its submissions that:

> [31.] MDollaz has demonstrated through both its actions and its omissions, that it cannot be allowed to continue, not least because it is insolvent, but also because the breaches committed cannot be regularised by the Commission. MDollaz acted in misusing client funds in breach of the Act, Regulations and Rules, then omitted to act in obtaining the Commission's approval for a distribution or offering as required by the Act. Notably, the omission didn't cure the action but compounded it, because MDollaz via its principals should never have used client funds which appears to have then led to soliciting persons via the unlawful offering of shares to the public and not telling the Commission anything.
> [32.] MDollaz situation is fairly simple – they are insolvent and have been for quite some time – the audited financials confirm this. The Commission cannot be seen as a prudent regulator to allow a regulated entity that is very clearly insolvent to the tune of over 2 million dollars to continue soliciting funds from the public without the required approvals and promoting itself as a properly run operation.
> [33.] Given the background to this matter and what the Commission finds to be an insurmountable issue on the part of MDollaz being an insolvent company, the Commission sees the only way forward is for the appointment of a Provisional Liquidator while pursuing the winding up of MDollaz subject to the court's supervision.

[34.] The Commission makes this application pursuant to its mandate and purpose under statute. Its primary purpose is ensuring that the statutory provisions are correctly followed and the appropriate sanctions put in place if they are not. After careful investigation and giving MDollaz the opportunity to address those findings, noting that MDollaz was unable to give the Commission an answer to the main question concerning its insolvency, whether it can overcome that state and if so how, the decision has been taken pursuant to the Commission's statutory duties to apply for the appointment of a Provisional Liquidator.

[24.] The Company's complaints are summarized at paragraphs 2-5 of their written submissions:

[2.] The significance of section 134 (b) is that it is the only means by which the Applicant can approach the Court for the winding up of a market participant in the public interest "without a hearing". Section 133 of the Act, which covers "orders in the public interest", provides at section 133 subparagraph (o), that: "If the Commission considers it in the public interest to do so, the Commission may, upon a settlement with the person or after a hearing apply to the court for an order that the person be wound up by the court. (emphasis ours)" Therefore, in the ordinary course, absent an agreement with the person in question, the Applicant can only apply to the Court for a winding up order in the public interest "after a hearing".

[3.] It is incumbent, therefore, upon the Applicant, by its application upon the said Winding Up Petition, to demonstrate to the satisfaction of the Court that there is a reasonable and legitimate public interest in its applying to have the Respondent wound up by the Court "without a hearing".

[4.] It is submitted that the Applicant herein has failed to pass this preliminary test, entitling the Court upon substantive consideration of this application to not only dismiss the Applicant's application but to order that the Respondent be afforded its right to a hearing pursuant to and in accordance with the Act.

[5.] As is demonstrated by both Affidavits of Ms. Christina Rolle, filed herein for the Applicant, the Applicant has presented unsubstantiated and untested allegations regarding the Respondent's reasonable and lawful conduct during the Applicant's eleven month long investigation and during the operation of its business. As the First Affidavit of D'Arcy Rahming, filed herein on the 27th day of September A.D. 2023, demonstrates, the Applicant has oppressively, unreasonably, and unlawfully presented a cynically curated narrative so as to prejudice the Respondent in these proceedings. Whatever view is taken of the purported irregularities and allegations raised in support of this application by the Applicant, they do not justify the Applicant's failure to afford the Respondent its statutory right to a hearing, complained of herein by the Respondent, and they raise serious and fundamental doubts about the Applicant's ability to reasonably,

fairly, and impartially discharge its statutory functions in the circumstances. Instead of affording the Respondent a fair hearing pursuant to the Act, and arriving at reasoned and lawful conclusions further thereto, before making application for the Respondent's winding up, the Applicant has presented a narrative of untested allegations and innuendo in the hope that the Court would be persuaded to perform the Applicant's regulatory function.

Preliminary objections

[25.] At the hearing of the application for the appointment of a provisional liquidator, the Company raised several preliminary issues which it says ought to lead to the striking out of the Petition.

[26.] The first preliminary issue concerned the efficacy of the Petition and its supporting affidavits. The Company asserted that, in contravention of *inter alia* the Rules, a properly signed and sealed Petition was not served and the supporting affidavits of Christina Rolle did not state the sources of the information being recited therein. Notwithstanding the Company relied in part on the Supreme Court (Civil Procedure) Rules 2022, which do not apply to insolvency proceedings[1], I am satisfied that any lapses in procedure, which the Commission denies, even if they were mandatory (which I am satisfied they are not), have nonetheless now been cured[2].

[27.] The Company also says that the Commission is precluded by section 134(b) of the SIA from pursuing this petition. Mr. Parker KC says that the Court's power to appoint a provisional liquidator is conditional upon the lawful exercise of power by the Commission to make an application to the Court. They argue that:

> Section 133 of the Act, which covers "orders in the public interest", provides at section 133(1) subparagraph (o), that: "If the Commission considers it in the public interest to do so, the Commission may, upon a settlement with the person or after a hearing apply to the court for an order that the person be wound up by the court. (emphasis ours)" Therefore, in the ordinary course, absent an agreement with the person in question, the Applicant can only apply to the Court for a winding up order in the public interest "after a hearing.

[28.] Section 133 of the SIA provides:

> 133. Orders in the public interest.

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[1] Preliminary rule 2(4) of the Supreme Court (Civil Procedure) Rules 2022
[2] Paragraph 7 of the 4th Affidavit of Christina Rolle

(1) If the Commission considers it in the public interest to do so, the Commission may, upon a settlement with the person or after a hearing -

(a) order a person to comply with -
  (i) securities laws or a Commission decision, or
  (ii) the regulatory instruments or a decision of a person registered under Part V;

(b) order a person, a class of persons or all persons to cease trading a security, a class of securities or all securities;

(c) order that any or all of the exemptions in securities laws do not apply to a person;

(d) prohibit a person from -
  (i) acting as a partner, director or officer of another person;
  (ii) acting as a registrant, or representative of a registrant;
  (iii) acting as a party related to an investment fund;
  (iv) acting as an auditor of a market participant;
  (v) acting in a management or consultative capacity in connection with activities in the securities market: or
  (vi) promoting the trading of a security or of securities generally;

(e) issue a censure or reprimand;

(f) impose conditions or restrictions on a registration, or suspend or revoke a registration;

(g) restrict the trading or advising activities of a registrant or a person exempt from registration;

(h) order a person to change a document;

(i) order a person to publish information or a document;

(j) order a person not to publish information or a document;

(k) order a person that is a market participant to make changes to its practices and procedures;

(l) appoint a person to advise a regulated person on the proper conduct of its affairs and to report to the Commission thereon;

(m) appoint a person to assume control of a regulated person's affairs who shall, subject to necessary modifications, have all the powers of a person appointed as a receiver or manager of a business appointed under the law governing bankruptcy or winding up;

(n) apply to the court for an order to take such action as it considers necessary to protect the interests of -
  (i) clients or creditors of a registrant;
  (ii) investors or creditors of an investment fund; or
  (iii) investment funds administered by an investment fund administrator or creditors of an investment fund administrator;

(o) apply to the court for an order that the person be wound up by the court;

(p) order that a distribution of securities cease and that any subscription funds collected be repaid to subscribers;
(q) order the disgorgement of profits or other unjust enrichment plus a Penalty not to exceed twice the amount of such profits or unjust enrichment;
(r) order restitution; or
(s) impose any other sanctions or remedies as the justice of the case may require.

[29.] According to Mr Parker KC, section 134(b) only applies when the Commission is presented with a situation that suggests that there is public interest in, not in the winding-up generally, *but a public interest in winding-up without a hearing*. That, he says, is the difference between section 133(1)(o) and section 134(b) which is the "significant element and the departure". He says that there is no public interest in winding-up without a hearing here.

[30.] Respectfully, I did not accept the Company's submission as to section 134 being unavailable to the Commission. In my view, sections 133 and 134 are not conjunctive and must not be read together, as the Company seems to suggest. Section 134 confers upon the Commission an unfettered jurisdiction to apply to the Court, without affording the Company a hearing, so long as the requirement under section 134, that the Commission *"considers it in the public interest"* to do so", is satisfied. This is supported by the opening words of section 134, which begins: *"Notwithstanding any other provision"*.

[31.] There is a subjective element in section 134. On the evidence, it is clear that the Commission considers it in the public interest to apply to the Court for an order that the Company, a market participant, be wound up, whether under Mr. Parker KC's formulation of "wound up without a hearing" or otherwise. In their view, and on advice, no further suspensions were possible when the suspensions in place vis-à-vis the Company expired and the Commission took the view that it would be irresponsible as a regulator to continue to permit the Company to continue to operate. In the Commission's view, whether accurate or not, the Company was taking a non-responsive position and raising an issue of prejudice in refusing to respond to direct questions posed by the Commission as to the Company's plan to arrest its insolvency, a matter of vital concern for the Commission.

[32.] The fact that the Commission may have embarked on a process to grant a hearing to the Company did not preclude the Commission from taking a different course as section 134 enables the Commission to act *"at any time"*. Complaints as to fairness and legitimate expectation, which the Commission denies, are issues for judicial review proceedings rather than these proceedings.

[33.] In the case of ***In the Matter of Mintbroker International Ltd 2020/COM/com/00020 (15 December 2021)***, Stewart J, heard a winding up petition brought by the Commission under section 134(b) of the SIA. While the specific complaint raised by the Company here did not arise for her consideration, her comments following consideration of the Court of Appeal decision in ***Securities Commission of The Bahamas v Alliance Investment Management Ltd*** are nonetheless useful. At paragraphs 108 and 109 of the decision, she stated:

> 108. The Court of Appeal had to consider whether the order made by the Securities Commission was in breach of the company's right to be afforded a fair hearing. Although the Company in this case did not raise the issue of being denied the right to be heard, I adopt the Court's findings that the Commission has the authority to intervene quickly and nip in the bud, practices or actions which may be harmful to the country's financial sector which include the cessation of operating a business as a licensee without the proper approval or compliance with the directives of the Commission. The Commission's responsibilities are important and onerous. Their task is to regulate, guide and protect the reputation of the industry and its users.
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> 109. Here, the Commission chose to intervene and seek the assistance of the Court, to nip in the bud the Company's breaches of various provisions of the securities legislation. The statutory provisions are not whimsical or arbitrary. They are there for a reason.

Appointment of a Provisional Liquidator

[34.] I am compelled to point out that whilst the appointment of a provisional liquidator is a serious step, it is not the appointment of an official liquidator on the winding up of a company. Rather different considerations apply. Even if a provisional liquidator is appointed, the Company may never go into a full liquidation.

[35.] Section 199(2) of the Companies Act empowers the Court with the discretion to appoint a provisional liquidator on the application of a regulator (such as the Commission) where:

(1) there is a 'prima facie case for making a winding up order; and
(2) the appointment of a provisional liquidator is necessary-
    (i)to prevent the dissipation or misuse of the company's assets,
    (ii)to prevent the oppression of minority shareholders,
    (iii)to prevent mismanagement or misconduct on the part of the company's directors, or
    (iv)in the public interest. ...

[36.] The first requirement therefore is that there must be a "prima facie case for making a winding up order". Sections 186 and 187 of the Companies Act outline the statutory requirements for the making of a winding up order. Sections 186 and 187 provide:

> 186. Circumstances in which a company may be wound up by the court.
> A company may be wound up by the court if-
> (a) the company has passed a resolution requiring the company to be wound up by the court;
> (b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
> (c) the company is insolvent;
> (d) the members are reduced in number to less than two;
> (e) the court is of the opinion that it just and equitable that the company should be wound up; or
> (f) a regulator petitions for the winding up of a company over which it has regulatory authority and whose licence or registration has been suspended or revoked.
>
> 187. Meaning of "insolvent".
> A company is insolvent if-
> (a) the company is unable to pay its debts as they fall due; or
> (b) the value of the company's liabilities exceeds its assets.

[37.] Sections 186(c), (e) and (f) provide for the winding up of a company where a regulator brings a petition for the winding up, the company is insolvent or it is just and equitable that the company be wound up. For the purposes of section 199(2) and the appointment of a provisional liquidator, I am required to be satisfied that a prima facie case has been made out as to any of these three matters.

[38.] The standard required, of a prima facie case, is not a very high bar at all. For a prima facie case, the Commission need only demonstrate that there is sufficient, rather than conclusive, evidence of the facts to support the relevant ground relied on.

[39.] This case easily qualifies as one in which a winding up order may be made pursuant to section 186(c) as the registration of the Company, a market registrant regulated by the Commission, has been suspended and the Petition has been brought by its regulator. I can therefore easily be satisfied that the necessary facts have been made out at a prima facie level.

[40.] The Petition also cites insolvency. There is more than sufficient evidence to find that the Company is insolvent, if only to a prima facie standard. The evidence includes:

(1) The Company's Draft Audited Financials as at 31 July 2022 which demonstrate:
   (i) Major net loss in 2022- $1.75M ($909k in 2021) – loss has grown by 2 times for same 12 month period;
   (ii) Company has a negative equity of $2.3M (31-Jul- 22) which grew substantially from the negative $551k in 2021 as a result of the net loss incurred in 2022;
   (iii) Income of $200k is only enough to pay the annual rent and cannot cover other operational expenses;
   (iv) Note 14 indicated that the Company raised $1.9M from persons not approved by the Commission. The auditor, as a result, is proposing in the draft to classify these persons as creditors rather than equity investors. The Commission has no evidence that approval from these investors has been sought for such reclassification;
   (v) Note 10 indicated that accounts payable grew by 1032% and additional debts of approximately $500k were indicated in Notes 11 and 12; and
   (vi) The Company does not have sufficient total assets to discharge itself of its debts, hence the equity is negative.
(2) Some investors have been unable to receive refunds.
(3) The Company is unable to pay staff salaries. One of the employees, instead of receiving her salary, got in lieu, a subscription agreement, and they issued or offered her shares.

[41.] Indeed, there is no real evidence advanced by the Company to counter the Commission's assertion that it is insolvent. I am therefore satisfied that a prima facie case for the Company's insolvency has been made out.

[42.] Having regard to my findings as to the grounds under sections 186(c) and (f) of the Companies Act there is no need to consider the just and equitable ground under section 186(e).

[43.] The second requirement under section 199(2) of the Companies Act is that the appointment of the provisional liquidator must be necessary-
   (i) to prevent the dissipation or misuse of the company's assets,
   (ii) to prevent the oppression of minority shareholders,
   (iii) to prevent mismanagement or misconduct on the part of the company's directors, or
   (iv) in the public interest. ...

[44.] The Commission says that the appointment of a provisional liquidator is necessary to prevent the dissipation or misuse of the Company's assets, to prevent mismanagement or misconduct on the part of the Company's directors, and/or in the public interest. This was borne out paragraph 72 of the First Affidavit of Christina Rolle

and now more forcefully in paragraphs 8-14 of the Fourth Affidavit of Christina Rolle. At paragraphs 8-14 of the Fourth Affidavit, Mrs. Rolle states:

> 8. The Commission notes that with respect to the need to appoint a provisional liquidator, given the circumstances, particularly the lack of cash and other assets, the Commission is nonetheless satisfied that a provisional liquidator must be appointed in order to cause an independent determination to be made with respect to the matters outlined in paragraphs 12 and 21 – 26 of the Second Affidavit. The state of the Respondent's affairs and the integrity of their business and corporate records are such that these determinations can only be made under the supervision and direction of the Supreme Court and ought to be made prior to the appointment of an Official Liquidator for the reasons set out below.
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> 9. For clarification and further emphasis, the Commission notes that with respect to the resolutions of 10 January 2022, 4 October 2022 and 5 October 2022 referred to in paragraphs 21 and 22 of the Second Affidavit, the Commission is unable to clearly resolve the directorship of the Respondent. Particularly, the Commission notes that directors' resolutions were passed on 4 October 2023, citing that previous resolutions were illegal and hence void ab initio on the basis that they were not approved by the Commission. The position as stated in this 4 October 2023 resolution is not the position of the Commission. The Respondent's failure to apply for and obtain the Commission's approval with respect to the 10 January 2022 resolutions means that the Respondent was then, and still remains today, in breach of its statutory obligations with respect to the 10 January 2022 resolutions, not that they are nullities. The Commission is concerned that the Respondent may be perversely seeking to benefit from its regulatory breaches. The Commission is further concerned that it cannot appropriately make a determination with respect to the directorship of the Respondent and the identity of the directors, as to do so would potentially inject the Commission into a commercial dispute which is outside the Commission's regulatory remit.
>
> 10. The above issue compounds the determination of other governance related issues. In particular, notwithstanding the fact that the Respondent had not, and still has not today, applied to the Commission for the approval of additional shareholders, the Commission became aware, during the course of its investigations, of 130+ subscribers in the Respondent as detailed in the Second Affidavit. The Commission is not aware that required directors' resolutions were passed to issue any additional shares. Moreover, the Commission is concerned by other issues related to these subscriptions as outlined in paragraph 12 of the Second Affidavit.
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> 11. The mentioned resolutions collectively represent prima facie evidence of misconduct and mismanagement of the Respondent's affairs on the part of the Respondent's directors and requires the appointment of a Court Supervised Provisional Liquidator.
>
> 12. The Commission is further concerned that all information obtained during the course of the Commission's investigation were only obtained as a result of requests made by and under compulsion of the Commission. As a result, the Commission believes that the appointment of a Court Supervised Provisional

Liquidator is vital in order to seize control of the Respondent's records, make a determination with respect to the directors, shareholders and/or subscribers of the Respondent and to account for all creditors of the Respondent. These determinations ought to be made prior to proceeding to an Official Liquidation in order to determine the appropriate parties who may have standing in the Official Liquidation.

13. With respect to other reasonable and lawful bases to appoint a Court Supervised Provisional Liquidator, the Commission notes that public interest concerns as well as issues regards the dissipation and misuse of assets were already outlined in the Principal and Second Affidavits.

14. With respect to the assertion that the appointment of a Provisional Liquidator will undermine an ongoing litigation and/or negotiation with Bank of The Bahamas, the Commission's notes that the appointment of a Provisional Liquidator would in no way interfere with the ability of the matter to proceed and the provisional liquidator would be obliged to carry on the matter on behalf of the Respondent, provided there is merit to the matter which would be beneficial to the Respondent and/or their creditors.

[45.] According to Mr Parker KC, *"there is nothing on the record to demonstrate there is an acute risk of mismanagement or misconduct on the part of company that would be abated or everted by the appointment of the provisional liquidator between the dates of the hearing of this application and when the court sets a hearing for the substantive winding-up. The appointment of a provisional Liquidator, they submit, is a step that requires an explicit demonstration of a pressing necessity to prevent something that is articulated to the court."*

[46.] Mr Rahming Jr., at paragraph 13 of his First Affidavit, contends that there is no public interest in the appointment of a provisional liquidator for the Company. Instead, he says, the public interest lies in preventing the Commission, a regulator, from continuing to abuse its statutory power to avoid accounting for an eleven month-long investigation by requiring the Commission to afford the Company a hearing pursuant to the SIA and a reasoned decision with respect thereto.

[47.] I accept, on the evidence, that the Commission is satisfied that the Company's insolvency issues, governance irregularities, regulatory breaches and possible criminal infractions have together become insurmountable, resulting in there being more than sufficient cause to have the Company wound up. I am satisfied that the Commission has made out a case that there is a necessity to appoint provisional liquidators to prevent mismanagement or misconduct on the part of the company's directors and that it is in the public interest.

[48.] The Commission has made out a case that there have been numerous breaches by the Company of the provisions of the SIA, the SIR and the Business Rules, arising from its management by the Company's directors. I accept the evidence of Mrs. Rolle

set out at paragraph 44 above. Such breaches include but are not limited to the Company's insolvency, comingling of its funds with that of its clients and/or investors, disposing of client fiduciary assets for the Company's benefit, failing to maintain segregated accounts and governance issues arising from the decision to change the share structure in 2020 (the Commission was only advised in July 2021) to 10,000,000 shares at $1 each. It is noteworthy that certain of these breaches under the SIA warrant criminal penalties. I therefore did not accept Mr. Parker KC's submission that there was no acute risk of mismanagement or misconduct in the period before the hearing or the Petition.

[49.] The Company says that it is in continued negotiations with BOB as to litigation which is afoot. Whilst these negotiations appear to be a disputed issue, it nonetheless raises a consideration relevant to the need for the intervention of a provisional liquidator. Should a company, which is woefully insolvent, and charged by its regulator with regulatory breaches, including misuse of client's funds, be permitted to continue to be managed by the management which has led it to the state it is in, at the risk to its creditors and other stakeholders, whilst its regulator's winding up petition is extant? The situation is more acute in a circumstances where management's actions may cause the Company to continue to incur debt.

Conclusion

[50.] In all the circumstances, I am satisfied that there is a prima facie case for the making of a winding up order and that the appointment of a provisional liquidator is necessary to prevent the dissipation or misuse of the company's assets, to prevent mismanagement or misconduct on the part of the Company's directors, and/or in the public interest. Continued control and involvement of the directors and management ought to be arrested and a provisional liquidator installed until the hearing of the winding up petition, which may result in the condemnation or vindication of their actions.

[51.] I will hear the parties as to the opposition to Mr. Gomez's appointment and the terms of reference and powers to be given to the provisional liquidator and give directions for progress of the Petition.

Dated this 9th day of November 2023

Sir Ian R. Winder
Chief Justice