Aubit International: Guidance on the Appointment of Restructuring Officers in the Cayman Islands

Introduction

In August 2022, the Cayman Islands introduced the restructuring officer regime (the "**Regime**") by amending the Cayman Islands Companies Act (the "**Act**"). Please see our previous briefings on this subject here. By way of summary, the Regime permits the presentation of a petition by a company for the appointment of a restructuring officer.

The grounds for bringing such a petition must be because[1]:

- the company is or is likely to be unable to pay its debts; or
- the company intends to present a compromise or arrangement to its creditors (or classes thereof) by way of a "consensual restructuring".

Whilst there are annals of Cayman Islands case law on restructurings which attempted to circumnavigate the restrictive (and arguably clumsy) legal position prior to the introduction of the Regime, there is relatively little jurisprudence available on the Regime's specific provisions as it has been in place for a little over one year. The recently published judgment in the matter of Aubit International[2] ("**Aubit**") provided a welcome consideration of the requirements of section 91B of the Act (as summarised above) as well as a useful consolidation of previous case law.

Aubit International

In August 2023, Aubit presented a petition for the appointment of Restructuring Officers under the Regime on the basis that (1) Aubit was unable to pay its debts due to its inability to access approximately US$60.4m (which was held in a combination of fiat currencies and cryptocurrencies through its broker in Greece); and (2) Aubit intended to present a compromise or arrangement to its creditors, all in accordance with section 91B of the Act (the "**Petition**").

[1] Section 91B(1) of the Act.
[2] Grand Court of the Cayman Islands, FSD 240 of 2023 (DDJ)

The Petition also had considerable support from Aubit's creditors – 126 letters of support were noted (including creditors connected with Aubit's management)[3].

However, it was conceded by Aubit that its proposed restructuring was "unusual, if not unique"[4] because it needed to take place in two distinct phases. The first phase essentially amounted to an information gathering phase and which would enable the restructuring plan to be formulated whilst the second phase would be pursuit of such restructuring plan once Aubit's financial position had been properly established.

In support of the Petition, counsel for Aubit cited section 91B(4) of the Act which provides that the Court may confer powers and the ability to perform certain functions on appointed Restructuring Officers, and which could include the ability to gather missing information with a view to subsequently presenting a restructuring plan. It was acknowledged by Aubit that the order sought by it would, if granted, be in the "widest scope of powers that any Court had ordered to date"[5].

Aubit argued that the authority of the Restructuring Officers (if appointed) would greatly assist in the quest to obtain the missing information and documentation.

Relevant considerations

In consideration of the Petition's merits, the Court noted prior case law and the specific provisions of section 91B of the Act and found that when considering applications for the appointment of Restructuring Officers, there are a number of issues the Court should consider. The published judgment in Aubit listed 25 such considerations but for the purposes of this article, we would specifically note the following[6]:

- previous case law which dealt with the appointment of restructuring or "light touch" provisional liquidators are likely to be relevant and persuasive;

- before Restructuring Officers can be appointed pursuant to section 91B of the Act, the burden is on the applicant to demonstrate to the Court that both limbs of that section are satisfied on a balance of probabilities;

- whilst it was acknowledged that the Court's powers are wide, the Court must be satisfied that it is in the interests of those with a financial stake in the relevant company for the company to be rescued and the Court must guard against abuse of the Regime by companies who are "hopelessly insolvent" but wish to continue to trade. The need to guard against abuse is particularly acute in the context of the statutory moratorium which

[3] *Ibid.* at para 45(8)
[4] *Ibid.* at para 2
[5] *Ibid.* at para 45(10)
[6] *Ibid.* at para 45

is provided for by section 91G of the Act which applies from the submission of the petition for the appointment of Restructuring Officers and which prevents any "suit, action or other proceedings, other than criminal proceedings" from being brought against the company[7];

- due weight should be given by the Court to the wishes of creditors, with whom the company should "positively and constructively engage". The Court will expect to see evidence of such engagement prior to a petition to appoint Restructuring Officers being presented as the position of unsecured creditors is "paramount". More weight will be given by the Court to the views of creditors who aren't connected with the company's management;

- to satisfy the first limb of section 91B of the Act (requirement for the company to be insolvent), this must be supported by credible evidence either from the relevant company or other source. The second limb of section 91B (restructuring plan) must be satisfied by showing the Court "credible evidence of a rational proposal with reasonable prospects of success" and such plan has or will potentially be supported by a majority of the company's creditors as an alternative to liquidation;

- the intention to submit a restructuring plan for the purposes of section 91B must be a "realistic, genuine, *bona fide* held intention on adequate grounds, even if it is only provided "in outline" – the requirement is not to present the Court with "the finished fully grown plant but the seeds must be sufficient to suggest that it is likely the plant will bear some fruit before too long", it being noted that abstract or hypothetical restructurings will not meet the required standard. With this in mind, in most cases the Court will find a two-phase process (where the first phase is information / document gathering) "unattractive";

- the Court will often benefit from <u>independent</u> evidence of the merits of a restructuring over winding-up. The views of management will be considered in this respect but the potential for scrutiny of their behaviour by liquidators may skew their views;

- the company's management should be able to provide an accurate assessment of the company's financial position to the Court, the suggestion therefore being that if management cannot do this, an application for the appointment of Restructuring Officers may be premature. To this end, petitioners should have "all their ducks in a row" before seeking to appoint Restructuring Officers; and
- creditors and companies cannot confer jurisdiction to appoint Restructuring Officers on the Court – the Court needs to be satisfied that it is entitled to exercise its discretion to

[7] Section 91G of the Act.

approve any appointment which will arise when it is objectively satisfied that the requirements of section 91B are met.

The Court's decision in Aubit

In Aubit, the Court held that Aubit had satisfied the first limb of the test in section 91B on the grounds that it had itself conceded its inability to pay its debts,[8] which is sufficient to meet this limb.

In relation to the second limb in section 91B, the Court concluded that the information concerning the proposed restructuring plan was "extremely limited"[9] and "is devoid of any meaningful detail"[10]. Indeed, in relation to the "Short Restructuring Plan" which had been submitted, the Court made the pointed observation that "no one has, understandably, had the courage to identify themselves as the author"[11]. Accordingly, the Court was not able to conclude that there was a genuine intention to present a meaningful restructuring plan which had a reasonable prospect of success. Accordingly, the second limb of section 91B was not satisfied and so the Petition was dismissed by the Court.

Interestingly, the Court stated that it was not satisfied that the proposed two-phase process suggested by Aubit was appropriate "in the circumstances of this case". This therefore suggests that it might be appropriate in some limited cases although this was not expanded upon in the judgment.

On the matter of creditor support for the Petition, the Court noted that whilst many creditors had confirmed their support for the appointment of Restructuring Officers, they had not expressed support for any particular *restructuring plan*, as a satisfactory one didn't exist.

It appeared to the Court that the primary motivation behind the Petition was to assist Aubit in continuing forensic investigations into its affairs, commencing legal proceedings, obtaining assets, documentation and information and to add respectability and credibility to the management of Aubit. The Court observed that this is not a "proper use" of the Regime[12].

The Court also concluded that even if it had been sympathetic to Aubit's submissions, it did not have the jurisdiction to appoint Restructuring Officers in any event as Aubit had "failed to get out of the starting blocks" by not being able to satisfy the second limb of section 91B of the Act[13].

Conclusions

It would be understandable for some practitioners or companies who are considering whether the Regime is the right option for them, to be dissuaded by the judgment in Aubit. However, as

[8] *Op cit.* at para 150
[9] *Ibid.* at para 151
[10] *Ibid.* at para 158
[11] *Ibid.* at para 154
[12] *Ibid.* at para 170
[13] *Ibid.* at para 177

the Court was at pains to stress in its reasoning, the facts of this case were most unique. Provided a company is able to submit a restructuring plan (or at the very least an *outline* restructuring plan that has a reasonable prospect of being successful), unlike Aubit, there is every chance that a petition will succeed, subject to the other statutory requirements.

If anything, in our view, the judgment in Aubit is to be welcomed as it serves to provide a useful illumination of the path that the Court will follow when considering future petitions to appoint Restructuring Officers pursuant to the Regime.

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