

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2022/0480

BETWEEN:

Angela Barkhouse and Toni Shukla
(as receivers of Emergent Fidelity Technologies Ltd)

Petitioners

And

Emergent Fidelity Technologies Ltd

Respondent

And

Samuel Benjamin Bankman-Fried

1st Interested Party

BlockFi Inc.

2nd Interested Party

Appearances:

Mr. David Joseph K.C. with Kendrickson Kentish and Kathleen Bennett for the Petitioners
Dr. David Dorsett with Jarid Hewlett for the 1st Interested Party
Mr. Lenworth Johnson for the 2nd Interested Party

2023: 27th January
23rd March

JUDGMENT

[1] **FORRESTER, J (Ag.):** The Petitioner's Petition seeks to place the Respondent into liquidation pursuant to Section 301 (1) (a) and (1) (b) (ii) of the International Business Corporations Act Chapter 222 of the Laws of Antigua and Barbuda (hereinafter referred to as the "IBC Act") and alternatively, pursuant to the inherent jurisdiction of the Court applying the principles in **Lancefield v Lancefield** [2002] BPIR 1108.

[2] Section 301 of the IBC Act provides as follows:

"301. (1) the court may order the liquidation and dissolution of a corporation or any of its affiliated corporations upon the application of a shareholder:

(a) If the court is satisfied that, in respect of a corporation or any of its affiliates,

- (i) Any act or omission of the corporation or any of its affiliates,
- (ii) The business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
- (iii) The powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner,

That is oppressive or unfairly prejudicial to or that unfairly disregards the interest of any security holder, creditor, director or officer; or

(b) If the court is satisfied that:

- (i) Any unanimous shareholder agreement entitles a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred; or
- (ii) It is just and equitable that the corporation be liquidated and dissolved.”

- [3] The Petitioners and the 1st Interested Party have filed evidence on affidavit with regard to the Petition together with submissions.
- [4] The Petition is opposed by the 1st Interested Party, Samuel Bankman-Fried, who filed a Notice of Opposition on 10th January 2023. The grounds of opposition are that the Petitioners are not shareholders of the Respondent, the Petitioners have no locus standi to petition the Court to wind up the Respondent, and the Petition can only be heard in accordance with the IBC Act that governs the Respondent and not the inherent jurisdiction of the Court. Further, that the sole asset of the Respondent is its shares in Robinhood Markets Inc. which on 30th December 2022 were seized by the US Government so there is no purpose in placing the Respondent into liquidation as there is no risk of dissipation or disbursement of the Respondent’s assets. Moreover, the 1st Interested Party asserts that placing the Respondent in liquidation will only result in further fees being incurred which, is not in the interests of its shareholders and or creditors though it has no creditors.
- [5] This Petition was heard on 27th January 2023. Also, on 27th January 2023. After the conclusion of the Petition Hearing, this Court was informed that the Court of Appeal placed a stay on these proceedings pending the determination of the 1st Interested Party’s appeal of the 28th December 2022 decision of the High Court. On 3rd February 2023, the Court of Appeal lifted its stay of these proceedings at the request of the Petitioners but, this Court was belatedly informed of the stay being lifted by the Petitioners on 21st February 2023 when the Court made certain enquiries. The urgent nature of this Petition must have withered for the Petitioners to have failed to inform this Court with alacrity that it succeeded in having the Court of Appeal’s stay lifted.

Issues for determination

- [6] Having regard to the contentions of the various parties, the following are the issues for determination by this Court:
 - 1) Whether the Petitioners have standing to initiate a Section 301 of the IBC petition?

- 2) Whether the Petitioners have satisfied the threshold for the Respondent to be liquidated?
- 3) Whether the Court, pursuant to its inherent jurisdiction, should place the Respondent in liquidation?

Standing/Locus Standi

- [7] The 1st Interested Party has challenged the standing of the Petitioners to present this Petition. The 1st Interested Party asserts that a Section 301 IBC Act Petition can only be brought by the shareholders of the Respondent and not those who are in control of the shares of shareholders. The shareholders of the Respondent are the 1st Interested Party and Gary Wang, not the Petitioners. Moreover, the 18th November 2022 Order made in **Claim No. ANUHCV 2022/0456 Yonatan Ben Shimon (Claimant) and Emergent Fidelity Technologies Ltd (1st Defendant) and Samuel Bankman-Fried (2nd Defendant)** (hereinafter referred to as "**Claim No. 456**") appointing the Petitioners as receivers lapsed and or is liable to be discharged, the consequence of which is that the Petitioners have no standing to commence the Petition. Further, the 1st Interested Party contends that Section 312 of the IBC Act provides the only context in which a legal representative within the meaning of that Act may function and it does not extend to Section 301. Further, if there was a concession on the issue of standing in a prior hearing based on an error it is well within a party's right to move the Court to correct that error.
- [8] In relation to the issue of standing, the Petitioners indicate that they control the shares of the 1st Interested Party in the Respondent in keeping with Orders made in **Claim No. 456**. Consequently, they are entitled to advance this Petition in keeping with the shareholder requirement of Section 301 of the IBC Act. Further, that they were appointed as provisional liquidators on the high likelihood that the petition would be granted, that Counsel for the 1st Interested Party conceded on the issue of standing in a prior hearing, that the effect of the 18th November 2022 Order in **Claim No. 456** gave the Petitioners' standing. Additionally, that the Court already ruled on the issue of standing as seen in the 28th December 2022 Order of the Court.
- [9] Though this Court invited and was presented with full arguments from both the Petitioners and the 1st Interested Party in relation to whether the Petitioners have standing to present this Petition, it is evident that in the Order of the Court dated 28th December 2022, the learned Judge there held that the Petitioners have standing to present this petition. That is evidenced in paragraph 3 of that 28th December 2022 Order where the learned Judge stated:
- "For the purposes of the presentation of the Petition as shareholders of 90% of the shares of Corporation [the Respondent herein] pursuant to the receivership order of the Court made on 18 November 2022 in Claim 0456/2022 (which proceedings remain stayed), the receivers appointed by the said order **shall** have standing to present the petition."
- [Emphasis added]
- [10] The 28th December 2022 Order was made specifically and expressly in the context of an Order that gave directions for the hearing of the Petition though, the determination of the Petition was not the matter then before the Court. The language of the learned Judge is clear, as he states the Petitioners'

shall have standing to present the petition making it such that the issue of standing in relation to the Petition was there determined and not left for determination on the hearing of the Petition.

[11] That decision of the learned Judge on 28th December 2022 cannot be reconsidered by this Court on the hearing of the Petition despite this Court's view that the issue of standing to present a Petition should have properly been considered on the hearing of the actual petition. In oral arguments, Counsel for the 1st Interested Party acknowledged the finding of the Court made on 28th December 2022 and that it is part of its pending appeal however urged that this Court should nonetheless rule again on standing. This Court is not a court of review, and it cannot reverse the decision already taken in relation to standing at this level as judicial restraint must be exercised. Any further consideration of the Petitioners' standing to bringing this Petition is a matter for an Appellate Court despite there being many issues arising in the context of standing, which includes the provisions in Part II and Part IV of the IBC Act relating to receivers that were not taken into consideration when determining standing based on the transcript provided for the 28th December 2022 hearing in this matter.¹

International Business Corporations Act – Interpretation of the legislation

[12] When considering the interpretation to be rendered to any provision of the IBC Act, regard must be had to Section 371 of the IBC Act which states the principles applicable to construing the Act. Section 371 of the IBC Act provides as follows:

- “(1) This Act is to receive such fair, large and liberal construction and interpretation as will best ensure the attainment of its purposes.
- (2) The purposes of this Act are
 - (a) To encourage the development of Antigua and Barbuda as a responsible off-shore financial, trade and business centre;
 - (b) To provide incentives by way of tax exemptions and benefits for off-shore business carried on from within Antigua and Barbuda; and
 - (G) [Sic] to enable the citizens of Antigua and Barbuda to share in the ownership, management and rewards of any business activity resulting therefrom.”

[13] Additionally, the following sections must be noted, that is, Section 367 of the IBC Act in relation to the interpretation to be rendered to the word “shall”, Section 368 of the IBC Act in relation to the interpretation to be rendered to the word “may”, Section 369 of the IBC Act in relation to the interpretation to be rendered to the word “must”. For ease of reference, those sections are reproduced:

Section 367

“(1) Where the auxiliary “shall” is used in a provision of this Act

¹ At the date of delivery of this decision, the written decision for the 28th December 2022 Order in these proceedings was not published though the 28th December 2022 Order and a transcript of that hearing rendering the oral decision were among the documents before the Court. Also, the appeal of that decision was still pending.

- (a) To require that a person do or refrain from doing some act, matter or thing; or
- (b) To require that some act, matter or thing be done or not be done by some specific means, or manner, or in some specific form or at or within some specific time;

The provision is imperative and default in complying with it constitutes a contravention of this Act.

(2) Unless otherwise expressly provided, default in complying with an imperative provision referred to in subsection (1) does not invalidate any act, matter or thing done in contravention of the provision nor prevent the later doing of that act, matter or thing in accordance with the provision.

(3) Compliance with a provision referred to in subsection (1) is enforceable in any court of competent jurisdiction notwithstanding that the contravention of the provision is punishable or has been punished pursuant to statute."

Section 368

"(1) The auxiliary "may" is permissive, empowering and enabling; and when used in the negative form, it negatives any permission, power or capacity to do the act, matter or thing in respect of which the auxiliary is used so that, unless the contrary is expressly provided, the act, matter or thing is to be construed, so far as it can be done without allowing the statute to be made an instrument of fraud, as not being capable of being done in law or in fact.

(2) When the exercise of a power is subject to any qualification or condition, the power is not exercised unless the qualification or condition is met or complied with.

(3) Unless otherwise expressly provided, the doing of any act, matter or thing pursuant to a permission or power is within the sole and absolute discretion of the person to whom the permission or power is given."

Section 369

"(1) Where the auxiliary "must" is used in a provision of this Act,

- (a) To require that a person do or refrain from doing some act, matter or thing,
- (b) To require that an act, matter or thing be done or not be done by some specific means, or manner, or in some specific form or at or within some specific time, or
- (c) To prescribe a qualification or condition for some purpose, office or status, the provision imposes a duty or obligation upon the person required to comply with it."

[14] It is commonly known that the Canadian company law legislation, in particular the British Columbia Business Corporations Act, has been the model used, though not exclusively, for several aspects of the IBC Act.

[15] One now proceeds to consider the sections relied upon by the Petitioners to liquidate the Respondent. In addition to the provisions of the legislation that guides that consideration, I have been assisted in part by a consideration of the rules of statutory interpretation generally, as well as

interpretations that have been given to the expressions “oppressive”, “unfairly prejudicial”, “unfairly disregards” and, “just and equitable” in the context of a request to liquidate a corporation. This is expanded upon below despite there being a dearth of case law specifically from Antigua and Barbuda on these matters though these are known concepts in Insolvency law.

[16] The Court notes that Section 288 of the IBC Act makes provision for a receiver-manager to begin proceedings in Court for the liquidation and dissolution of the Respondent under Section 300 of the IBC Act or for the re-organisation of the Respondent as the circumstances require. The Petitioners herein, though initially interim receivers appointed by the Court in **Claim No. 456**, have not moved the Court on the basis of Section 288 of the IBC Act. Instead, the Petitioners as Receivers (also now Provisional Liquidators), have moved the Court based on Section 301 of the IBC Act.

Section 301 (1) (a) IBC Act

[17] One of the grounds stated in the Petition is that the circumstances to trigger liquidation pursuant to Section 301 (1) (a) of the IBC Act have been satisfied. That section requires a consideration of whether there are acts, omissions, conduct or power exercised in a manner that is oppressive or unfairly prejudicial or that unfairly disregards the interest of any security holder, creditor or officer of the Respondent. The Petitioners have specifically advanced this Petition in the interest of creditors of the Respondent.

[18] In the Antigua High Court case, **Marcus A. Wide and Hugh Dickson as Joint Liquidators of Stanford International Bank Limited (In Liquidation) v Amicus Curiae and another** [2015] ECSCJ No. 252², the Court made the following observations when considering the expressions “oppressive”, “unfairly prejudicial” conduct and “unfairly disregards” the interests, in the context of Section 204 of the IBC Act:

“344 The three expressions, of “oppressive” or “unfairly prejudicial” conduct, or that which “unfairly disregards the interests” of the persons stated in the section, I accept, overlap and need to be read together to reflect the underlying concern of the section.

345 The term “unfair”, I further accept, is used in a broad sense, and means a “visible departure” from the standards of fair dealing, viewed in the light of the history and structure of the particular company, and the reasonable expectations of, not just its members in Antigua and Barbuda, but also its creditors.

346 I also agree with the Amicus that, as in Canada, “oppressive conduct” is to be judged by a more rigorous standard than “unfair prejudice” and may require an element of coercion

² **Marcus A. Wide and another v Amicus Curiae and another** [2017] ECSCJ No. 212 is the Appellate decision. The Court of Appeal examined whether the liquidators in that matter could utilise Section 204 of the International Business Corporations Act after such an entity had been placed in liquidation and found that Section 204 was a pre-liquidation remedy. The learning in relation to what is the meaning of “oppressive conduct”, “unfair prejudice” and “unfairly disregards” were not reconsidered on the appeal.

to be shown and certainly a lack of probity and fair dealing to the stakeholder in the matter of his proprietary rights as such. "Unfair prejudice" is less culpable but still has unfair consequences. Also, I agree that "unfairly disregards" means "unjustly and without cause pay no attention, to ignore or treat as of no importance, contrary to the stakeholder's reasonable expectations".

[19] Though Section 204 of the IBC Act deals with complaints of oppression, restraining oppression and the Court making an order to rectify such matters, one notes that Section 301 is listed as an alternative remedy to Section 204 in Section 204 (7). This Court adopts the meaning accepted by the Court in **Marcus A. Wide and Hugh Dickson as Joint Liquidators of Stanford International Bank Limited (In Liquidation) v Amicus Curiae and another** to the expressions "oppressive conduct", "unfairly prejudice" and "unfairly disregards" and views it as being equally applicable in the context of Section 301 (1) (a) of the IBC Act.

[20] It is useful to consider the purpose of the Respondent and what it does to determine whether Section 301 (1) (a) has been triggered. The Articles of Incorporation of the Respondent indicate that its corporate purpose is:

- 1) "software development and all business permitted by the laws of Antigua other than International Banking, Trust and Insurance, Betting and Bookmarking or any activity which requires a license under the International Business Corporations Act".
- 2) acquiring and dealing with any real or personal property, and "generally to do all acts and things which, in the opinion of the Company or the Directors, may be conveniently or profitably, or usefully acquired and deal with, carried on, erected or done by the Company in connection with said property"
- 3) "To generally have and exercise all powers, rights and privileges necessary and incident to carrying out properly the objects of the Company".

[21] The Petitioners have indicated that the Respondent is not a trading company, instead, it is referenced as a company that has been used to hold an asset which assertion the 1st Interested Party has not denied, but acknowledged. As far as is currently known, the sole asset of the Respondent is its shares in Robinhood Markets Inc. Robinhood Markets Inc. is a NASDAQ-listed company and the Respondent's shares in that company is valued at over US\$400 million.

[22] The Petitioners contend in summary, that the pledging of the Respondent's Robinhood Markets Inc. Shares to BlockFi Inc. by the 2nd Interested Party herein, only a day or so before the collapse of FTX Trading Ltd may be viewed as being unfairly prejudicial to the interests of the creditors of the Respondent. Those shares were allegedly pledged by the 1st Interested Party to BlockFi as security for obligations of Alameda Research Ltd ("Alameda"), to which the 1st Interested Party has admitted lending half of the US\$16 billion in client assets held by his cryptocurrency exchange platform, FTX Trading Ltd ("FTX"). The pledging of the Robinhood Shares took place on 9th November 2022 one day before the Supreme Court of the Bahamas appointed provisional liquidators to FTX and two days before FTX applied for Chapter 11 bankruptcy protection in the United States. These steps were taken when the 1st Interested Party was the sole director of the Respondent and its 90% shareholder. Additionally, the 1st Interested Party, at the material time, was also the co-founder and majority owner of FTX and the co-founder and majority owner of Alameda.

[23] BlockFi Inc. is the 2nd Interested Party in these proceedings, and it took a neutral position on this Petition insofar as the Petition does not seek to determine issues arising in the BlockFi complaint. BlockFi Inc. and others have filed a complaint against the Respondent and others in Case No. 22-19361 in the United States Bankruptcy Court District of New Jersey (the “BlockFi complaint”). The BlockFi Complaint alleges amongst other things that:

at paragraph 18: “BlockFi entered into a pledge agreement with Emergent [the Respondent] as of November 9, 2022 (the “Pledge Agreement”). The Pledge Agreement was given in consideration for BlockFi Lending and BlockFi International entering into an Amendment & Forbearance Agreement also dated November 9, 2022 (the “Forbearance Agreement”).

at paragraph 19: “Under the Forbearance Agreement, BlockFi Lending and BlockFi International agreed to forbear from exercising certain rights and remedies then available to them under various loan documents as a result of multiple events of default. BlockFi Lending and BlockFi International also agreed to extend certain payment obligations, provided the borrower complied with its obligations under the Forbearance Agreement, including making timely payments in accordance with a payment schedule described therein.”

at paragraph 20: “Emergent [the Respondent] acknowledged it would receive a direct or indirect benefit from the Pledge Agreement.”

at paragraph 21: “Under the Pledge Agreement, Emergent [the Respondent] absolutely, unconditionally, and irrevocably guaranteed the payment obligations of the borrower under the Forbearance Agreement. Emergent’s [the Respondent] guaranty was secured by a first priority security interest—in favour of BlockFi—in all of Emergent’s [the Respondent] rights, titles, and interests in, among other things, the collateral described in the Pledge Agreement, including certain shares of common stock (collectively, the “Collateral”). The Collateral has value to the BlockFi bankruptcy estates.”

at paragraph 22: “Emergent [the Respondent] was required to deliver all Collateral shares to BlockFi Inc. pursuant to the terms of the Pledge Agreement.”

at paragraph 23: “Emergent [the Respondent] breached the Pledge Agreement by, among other things, failing to satisfy its payment obligations and to promptly deliver the Collateral to BlockFi Inc. BlockFi Inc. has otherwise perfected its security interest in the Collateral through the filing of a UCC-1 Financing Statement.”

at paragraph 24: “On November 10, 2022, BlockFi Lending and BlockFi International notified Emergent [the Respondent] that the forbearance period had ended due to an event of default, including borrower’s failure to timely make a required payment in accordance with the payment schedule. As a result of the event of default, Emergent [the Respondent] was notified that all obligations under the Pledge Agreement were immediately due and payable and that BlockFi Lending and BlockFi International intended to exercise all remedies available to them under the Pledge Agreement, including the sale of all or any part of the Collateral.”

at paragraph 25: “In the Pledge Agreement, Emergent [the Respondent] granted BlockFi a power of attorney to act as its true and lawful attorney-in-fact with full and irrevocable power and authority in Emergent’s [the Respondent] name or in its own name, to take after an event of default, any and all action and to execute any and all documents and instruments which BlockFi deems necessary or desirable to accomplish the purposes of the Pledge Agreement.”

[24] The Petitioners’ position is that the 2nd Interested Party is part of a larger scheme perpetuating and participating in a larger fraudulent transaction. Without intervention by this Court, the Respondent will not be properly represented in the BlockFi Compliant to defend those proceedings, because the 1st Interested Party who was the director and shareholder of the Respondent is highly unlikely to put forward a defence for the Respondent in those proceedings. If that is allowed to happen, it will be detrimental to the creditors of the Respondent whose interest should be protected.

[25] This Court accepts that the Petitioners’ evidence demonstrates that acts of the Respondent and the business of the Respondent may have been conducted through powers exercised by its directors, in a manner that is oppressive, unfairly prejudicial and or unfairly disregards the interests of its creditors as provided for in Section 301 (1) (a) of the IBC Act. The allegations that the Respondent is being used as part of a massive fraud, if made out, and the decision to pledge its sole asset to a third party who conveniently the following day calls in the pledge and commences its own bankruptcy proceedings is concerning. The actions of the Respondent may well be acts aimed at putting the assets of the Respondent beyond the reach of its creditors and may amount to fraudulent conveyance which may well be unfairly prejudicial to the interests of creditors as it unfairly disregards their interests in an oppressive manner. It must be noted that the above all stem from allegations made against the 1st Interested Party as actions and decisions taken using and or involving the Respondent. Those allegations have not been found as a fact by any Court of competent jurisdiction. That presents grave difficulty in terms of this Court proceeding on assumptions arising from those allegations in relation to the Respondent and whether it should properly be put into liquidation on that basis.

[26] The 1st Interested Party has raised a valuable point of whether there are indeed any known creditors of the Respondent. There is no case law at present interpreting who is to be treated as a “creditor” in relation to Section 301 of the IBC Act. Per the Oxford English Dictionary, the ordinary meaning of creditor is “a person or company to whom money is owed” which, confirms that a creditor is one who is actually owed and not one who is a prospective creditor or a contingent creditor. There is case law that discusses creditors in the context of Section 204 of the IBC Act as seen in **Marcus A. Wide and Hugh Dickson as Joint Liquidators of Stanford International Bank Limited (In Liquidation) v Amicus Curiae and another**. There, at paragraph 334, Justice Wallbank essentially stated that a creditor has to be an existing creditor at the time of the alleged oppressive conduct and that it is not enough that the creditors should become a creditor as a result of the conduct complained of. This Court adopts that finding of Justice Wallbank as being applicable to creditors in the context of Section 301 given that there is no definition in the legislation and the meaning of creditor should have a consistent application, particularly having regard to the fact that Section 204 can be a basis on which the Respondent could have been put into liquidation together, with the ordinary meaning of the word creditor. Put succinctly, the Petitioners should properly be seeking to act in the interests of existing creditors of the Respondent at the time of lodging this Petition.

[27] The Petitioners have not been able to present to this Court any existing creditor(s) of the Respondent. The reference to Yonatan Ben Shimon in **Claim No 456** shows that he is a litigant who has a pending claim against the Respondent. Mr. Shimon's claim is a proprietary tracing claim where it is alleged that the Respondent knowingly received assets of another dishonestly in breach of trusts and seeks damages. That makes Mr. Shimon a potential or prospective creditor of the Respondent, but the fact is that he is not yet a creditor. Mr. Shimon has not presented this Petition. The evidence in relation to him has not been presented on the basis that he has a debt that is not disputed on genuine and substantial grounds having regard to his case as advanced thus far in **Claim No. 456**.

[28] At the date of delivery of this judgment, Mr. Shimon had not yet filed a Statement of Claim in **Claim No. 456**, and the time period for doing the same may have well expired based on the 18th November 2022 Order in those proceedings. That also means there is no Defence filed in **Claim No. 456** in response to Mr. Shimon's Claim by any Defendant in those proceedings, as that happens after service of the Statement of Claim. One does acknowledge that there has been evidence on affidavit filed by the 1st Respondent in **Claim No. 456** as to whether there is a good and arguable case against him in relation to his application to discharge the freezing order of 18th November 2022, but the Court notes that the threshold for a good and arguable case to obtain a freezing order is a low threshold. In the absence of the pleaded case of the parties in **Claim No. 456**, this Court cannot genuinely examine if that claim is disputed on genuine and substantial grounds insofar as it may be placed into consideration for the purposes of satisfying the provisions of Section 301(1) (a) of the IBC Act to grant the requested Petition.

[29] Moreover, the Petitioners speak of contingent creditors but have not developed or in any substantive manner explained who precisely are these contingent creditors of the Respondent in the context of whether these contingent creditors actually exist or whether these are people or entities that may become such creditors other than stating "*it is those who have had their monies unlawfully taken from FTX*"³ as there is no indication of who are in fact those contingent creditors. In **Re a company (No 003028 of 1987) [1988] BCLC 282**, the Court there examined Section 124(1) of the UK Insolvency Act 1986 in relation to contingent creditors and who may apply to wind up a company at pages 292 to 294 of that judgment stating:

"Subject to the provisions of this section, an application to the court for the winding up of a company shall be by petition presented either by:

The company, or the directors, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately."

...

"If a contingent creditor seeks to wind up on the just and equitable ground, the court would have to look very closely at what was alleged in support of the petition to see whether the contingent creditor did in fact have such an interest in the company as to make it proper to wind up on that ground. Ordinarily, the interest of a creditor is in obtaining repayment of his debt. If his debt is repayable and is not repaid, the creditor can apply to wind up on the ground that the company cannot pay its debts... If the petitioner were a contingent creditor,

³ Paragraph 22 of Petitioners' 24th January 2023 Skeleton Arguments

the debt would not be immediately repayable, and in order to obtain a winding-up order the contingent creditor would have to show something in the affairs of the company to justify the apprehension that when the time for repayment of the debt arrived, the company would be unable to repay, and that in those circumstances the company ought to be at once wound up. Current inability on the part of a company to pay its debts would not necessarily entitle a contingent creditor to succeed in a winding-up petition. The contingent creditor would, I think, be expected to show, not only and not necessarily a current inability by the company to pay its debts, but rather an inability to pay its debts at the time when the contingent debt became payable.”

[30] Whilst the issue here is not whether a contingent creditor is seeking to wind up a company, it is whether the Petitioners can base its Petition on seeking to secure the interest of contingent creditors. It must be noted that the express terms of the IBC Act do not provide that creditors may be contingent just as it does not provide for prospective creditors. As such, seeking to secure the interest of contingent creditors does not advance the Petitioners’ request to liquidate, even on a liberal construction of the word creditor. To add classes of creditors to include prospective or contingent creditors is a decision best left for the Parliament of Antigua and Barbuda to undertake.

[31] Insofar as the Petitioners have stated that they seek an order to liquidate pursuant to Section 301 (1) (a) of the IBC Act for the interests of creditors, having not identified existing creditors and this Court not being satisfied as a matter of fact that there are any such creditor interests to protect, it is evident that the Petitioners have not satisfied the provisions of this section of the Act to obtain an order for the Respondent to be liquidated.

Section 301 (1) (b) (ii) of the IBC Act

[32] Section 301 (1) (b) (ii) of the IBC Act is another ground in the Petition on which the request to liquidate the Respondent has been based. That section requires a consideration of whether it is just and equitable that the Respondent be liquidated. There is no need for the Petitioners to establish that there has been oppressive or unfairly prejudicial conduct and or even wrongdoing when determining whether it is just and equitable to liquidate a corporation.

[33] In **Loch and Another and John Blackwood, Limited** [1924] A.C. 783 the Privy Council in a decision delivered by Lord Shaw of Dunfermline in relation to the expression “just and equitable” in the context of whether to liquidate an entity stated:

“It is undoubtedly true that at the foundation of applications for winding up, on the “just and equitable” rule, there must lie a justifiable lack of confidence in the conduct and management of the company’s affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company’s business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company’s affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.”

[34] In the Canadian Case **Palmieri v. A.C. Paving Co.** [1999] B.C.J. No. 1648, Justice Levine stated:

“26 Petitioner's counsel referred to the British Columbia Corporations Law Guide (North York, Ont.: CCH, 1997) at p. 8301, where the grounds for finding that it is just and equitable to wind up a company are summarized:

Notwithstanding the need to proceed according to the facts and circumstances of each case, there have emerged from the cases four principle grounds of when it is "just and equitable" to wind up a company:

(1) Loss of substratum; (2) justifiable lack of confidence; (3) deadlock; and (4) the partnership analogy.”

[35] In the Eastern Caribbean Court of Appeal in **Kathryn Ma Wai Fong (as the personal representative, executrix and trustee, and in her personal capacity as a beneficiary of the estate of the late Wong Kie Nai) v Wong Kie Yik and others** [2019] ECSCJ No. 107, Justice of Appeal Webster stated:

“158 The classic case on winding up on the just and equitable ground is *Re Westbourne Galleries Ltd.* On appeal, the sole issue was whether the company and the individual respondents were entitled to a restoration of a winding-up order made on the basis that the court was 'of the opinion that it was just and equitable that the company should be wound up' under section 222(f) of the Companies Act 1948. The House of Lords restored the winding-up order. Lord Wilberforce described the statutory judicial discretion to wind up thus:

"The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure... The "just and equitable" provision does not... entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

[36] In the Eastern Caribbean Court of Appeal Case **Chu Kong v Lau Wing Yan and another** [2020] ECSCJ No. 5, Justice of Appeal Blenman when considering whether it was just and equitable to liquidate an entity pursuant to the Insolvency Act of the Territory of the Virgin Islands stated:

“47 Whether it is just and equitable that a company should be wound up is also referred to as an "inference of law" from the facts of the case before the court. This long-standing characterisation is evidenced in decisions as far back as that of Jessel MR in *Re Rica Gold Washing Co.*...²⁷ Stated differently, a judge's conclusion on a winding up application made on the footing of the just and equitable ground is a legal finding based on an evaluation of

the relevant circumstances of the application. In *J F Ming Inc. et al v Ming Siu Hung, Ronald et al* this Court stated that: "[t]he court has to look at all of the relevant circumstances in deciding what kind of order it is just and equitable to make. It is not limited merely to reversing or putting right the immediate conduct which has justified the making of the order." This Court's recent decision in *Kathryn Ma Wai Fong v Wong Kie Yik et al* has also acknowledged this settled judicial principle.

48 Importantly, there are many bases upon which a court can determine that it is just and equitable to wind up a company. There is no exhaustive list or closed category of events that defines what amounts to just and equitable grounds for winding up a company. On this point, I accept and am guided by Lord Wilberforce in *Ebrahimi v Westbourne Galleries* where his Lordship stated that:

"There has been a tendency to create categories or headings under which cases must be brought if the just and equitable clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances."

Lord Wilberforce's statement, to a large extent, underscores the fact that the court's discretion to wind up a company on just and equitable grounds, must be exercised after having evaluated the particular facts and circumstances before it."

[37] The concept of just and equitable liquidation is not peculiar to the legislation in Antigua and Barbuda. As the referenced case law confirms, it is a discretionary undertaking to be made by the Court having regard to all the circumstances arising on the Petition. The circumstances arising in this Petition are that US\$540 Million was allegedly provided by the 1st Interested Party and one Gary Wang to the Respondent to purchase shares in Robinhood Markets Inc. without any proper documentary support. The summarisation of the evidence in paragraphs 20 to 25 of this decision relating to the pleading of those shares to BlockFi Inc. (which will not be repeated) also adds perspective to the circumstances surrounding this Petition to liquidate the Respondent. The Petitioners' evidence collectively supports the proposition that the Respondent is one of several entities that are involved in a large fraudulent scheme of which the 1st Interested Party finds himself at the centre being the common thread throughout all of the allegations. Whilst the Respondent is neither a subsidiary nor a parent company of the entities owned by the 1st Interested Party for whom proceedings have been commenced against in foreign jurisdictions likewise, that the 1st Interested Party and the Respondent have separate legal personalities, it is apparent that the alleged steps of the 1st Interested Party may have involved the Respondent indirectly in the wider web of the alleged fraudulent scheme of the 1st Interested Party and companies owned and controlled by him. Additionally, the 1st Interested Party has had criminal and civil proceedings commenced against him all relating to the alleged scheme all of which he challenges though Mr. Gary Wang, the other shareholder of the Respondent and shareholder of several other entities with the 1st Interested Party, has pleaded guilty to several criminal charges in relation to the larger scheme specifically conspiracy to commit wire fraud on customers, conspiracy to commit commodities fraud and conspiracy to commit securities fraud in connection with the unlawful use of FTX's deposits. This Court continues to be mindful that no judicial findings have been made, be it convictions or such, against the 1st Interested Party at the time of rendering this decision and it is not for this Court to make such findings.

[38] Interestingly, the 1st Interested Party has not put forward evidence to contradict in any meaningful manner the assertions against him and how he may have used the Respondent in opposition to this Petition. The 1st Interested Party's contention is that there is no standing for this Petition to be presented, there is no risk of dissipation or disbursements of the assets of the Respondent, the company has no creditors and therefore, there is no purpose to the liquidation. Instead, it will be "an exercise in futility to achieve the end of recovering fees and charging further fees - neither of which is in the interests of the shareholders or any creditors".⁴ The issue of standing was dealt with earlier in this judgment and will not be repeated. The issue of creditors was also previously examined. Whilst there are no existing creditors of the Respondent presented to this Court, the presence or absence of creditors is not determinative of whether it is just and equitable to liquidate the Respondent. In relation to the assets of the Respondent, though the Government of the United States of America has seized the Respondent's sole known asset, that is, the shares of the Respondent in Robinhood Markets Inc., when Counsel for the 1st Interested Party was asked if that is a state of affairs that may change, Counsel for the 1st Interested Party indicated that it cannot speak to what may happen, the assets may be confiscated or others things which, is at best bare and vague averments offering no meaningful input. This Court does not view the actions of the US Government in relation to the Respondent's sole asset as a step that makes putting the Respondent into liquidation a step that serves no useful purpose.

[39] The effect of an order to liquidate, having regard to Section 305 (1) (a) of the IBC Act, is that the corporation shall cease to carry on business, except the business that is, in the opinion of the liquidator, required for an orderly liquidation. It is apparent that the 1st Interested Party is embroiled in what may be described as a larger international fraudulent scheme. Further, it is very possible, as the evidence before this Court portrays, that the monies used by the 1st Interested Party and Mr. Wang to invest in the Respondent who in turn purchased shares in Robinhood Markets Inc., were monies obtained by the 1st Interested Party and Mr. Wang unlawfully, lending itself to an inference that the Respondent may have been used by its sole director for an improper purpose not in keeping with its stated purpose in its Articles of Incorporation and or lawful business activities. There is a great risk that a continuation of the suspected conduct and improper use of the Respondent may be maintained if the 1st Interested Party, who was also the sole director of the Respondent (prior to the Petitioners appointing themselves as directors) and sole shareholder (whose shares are controlled by the Petitioners), is allowed to control the decision making and overall business of the Respondent.

[40] This Court finds that there is sufficient evidence before it to demonstrate a lack of confidence in the conduct and management of the Respondent's affairs by its directors particularly noting that it may have been used for an improper purpose and or to facilitate unlawful activities in foreign jurisdictions which is at minimum, against public policy in this jurisdiction. The conduct and management of the Respondent's affairs should be supervised by independent third parties accountable to the Court who will investigate the affairs of the Respondent and collect and distribute its assets in keeping with the legislation in an orderly manner. Having regard to the full circumstances arising on the Petition and contentions of the various parties, this Court finds that it is just and equitable to place the Respondent in liquidation.

Lancefield v Lancefield/Inherent Jurisdiction of the Court to liquidate

⁴ 1st Interested Party's Notice of Opposition filed 10th January 2023

[41] Having been satisfied that pursuant to Section 301 (1) (b) (ii) of the International Business Corporation Act the Respondent may be liquidated, there is no need for this Court to consider whether its inherent jurisdiction should be invoked in the circumstances of this case. However, one does observe that Parliament has made provisions for how to liquidate entities like the Respondent. As such, the Court ought not to disregard what Parliament has stipulated in its wisdom and act based on the inherent jurisdiction of the Court as that would amount to an improper encroachment by the judiciary unto another arm of Government. Doing such would disregard the principles of separation of powers when there is nothing exceptional arising in this case that warrants such a step to be taken by the judiciary.

Appointment of Proposed Liquidators Angela Barkhouse and Toni Shukla

[42] The credentials of the proposed liquidators have been presented and both are deemed to be highly competent and capable of performing duties as liquidators. In fact, Ms. Angela Barkhouse and Ms. Toni Shukla have served as interim receivers and now provisional liquidators in relation to the Respondent and are therefore familiar with the Respondent and are already in communication with relevant parties concerning the Respondent. Further, there has been no objection to the appointment of either of the proposed liquidators. Consequently, there is no apparent reason presented to this Court why the proposed liquidators should not be appointed if the Petition is granted.

Conclusion

[43] Having considered the matter in full, the Petitioners' petition is hereby granted on the basis that it is just and equitable to liquidate the Respondent pursuant to Section 301 (1) (b) (ii) of the IBC Act.

[44] On granting the Petition, it is hereby ordered as follows:

- 1) Emergent Fidelity Technologies Ltd, of Unit 3B, Bryson's Commercial Complex, Friars Hill Road, St John's, Antigua is hereby put into liquidation under the provisions of the International Business Corporations Act, Cap. 222 (the "Act").
- 2) Both Angela Barkhouse, of Quantuma (Cayman) Ltd, Suite N404, Flagship Building, 142 Seafarers Way, George Town, Grand Cayman, Cayman Islands, and Toni Shukla, of Quantuma (BVI) Ltd, Coastal Building, Wickhams Cay II, Road Town, Tortola, British Virgin Islands (the "Liquidators") appointment as Provisional Liquidators pursuant to the Order of the Court dated 5th December 2022 is hereby discharged.
- 3) Angela Barkhouse, of Quantuma (Cayman) Ltd, Suite N404, Flagship Building, 142 Seafarers Way, George Town, Grand Cayman, Cayman Islands, and Toni Shukla, of Quantuma (BVI) Ltd, Coastal Building, Wickhams Cay II, Road Town, Tortola, British Virgin Islands (the "Liquidators") are appointed as joint liquidators of the Respondent to act jointly.
- 4) The Liquidators shall function and comply with the provisions of Section 305 of the Act.

- 5) The Liquidators shall comply with the provisions of Section 307 of the Act.
- 6) The Liquidators shall have the powers of liquidators pursuant to Section 308 (1) of the Act:
 - (a) To retain solicitors, accountants, engineers, appraisers and other professional advisers;
 - (b) To bring, defend or take part in any civil, criminal or administrative action or proceedings of any kind in the name and on behalf of the Respondent within Antigua and Barbuda and in Foreign Courts of competent jurisdiction;
 - (c) To carry on the business of the corporation as required for an orderly liquidation;
 - (d) To sell by public auction or private sale any property of the Respondent with the sanction of the Court;
 - (e) To do all acts and execute any documents in the name and on behalf of the Respondent;
 - (f) To borrow money on the security of the property of the Respondent with the sanction of the Court;
 - (g) To settle or compromise any claims by or against the Respondent with the sanction of the Court;
 - (h) To make financial provision in respect of the custody of the documents and records of the Respondent after dissolution; and
 - (i) To do all other things necessary for the liquidation of the Respondent and the distribution of its property.
- 7) Further to Section 308 (2) of the Act, the Liquidators shall incur no liability as liquidators if they rely in good faith upon:
 - (a) Financial statements of the Respondent represented to them by an officer of the corporation or in a written report of the auditor of the Respondent to reflect fairly the financial condition of the Respondent; or
 - (b) An opinion, a report or a statement of a solicitor, accountant, an engineer, an appraiser or other professional adviser retained by the Liquidators.
- 8) Further to Section 308 (3) of the Act, if the Liquidators have reason to believe that any person has in his possession or under his control, or has concealed, withheld or misappropriated any property of the Respondent, the Liquidators may apply to the court for an order requiring that person to appear before the court at the time and place designated in the order and to be examined;

- 9) Further to Section 308 (4) of the Act, if the examination referred to in subsection (5) discloses that a person has concealed, withheld or misappropriated property of the corporation, the court may order that person to restore the property or pay compensation to the Liquidators;
- 10) Further to Section 308 (5) of the Act, the Liquidators must pay the costs of liquidation out of the property of the Respondent and must pay or make adequate provision for all claims against the Respondent;
- 11) The Liquidators may obtain funding on commercial terms for the performance of their duties, including in connection with any legal proceedings for which funding is permitted under the applicable law;
- 12) The Liquidators are not required to give security for their appointment.
- 13) The Liquidators are entitled to reasonable remuneration for their time spent in the performance of their duties, such remuneration to be assessed by the Court and to be indemnified in keeping with the order of priority stated in Section 289 of the Act.
- 14) Claims in the liquidation are to have priority in keeping with the provisions of Section 289 of the Act or any modification and or re-enactment of the Act.
- 15) Without prejudice to Section 312 of the Act, all claims brought against the Respondent in this jurisdiction are stayed, including **Claim No. ANUHVC2022/0456** insofar as it relates to the Respondent save that the orders made in those proceedings on 18th November 2022 granting a freezing injunction and appointing receivers in relation to the Respondent shall continue in effect until further order. For clarity, **Claim No. ANUHVC2022/0456** is not stayed with respect to the Claim between Yonatan Ben Shimon and Samuel Bankman-Friend. The stay in relation **to Claim No. ANUHVC2022/0456** is without prejudice to the right of any party and or person with an interest in that matter to apply to the High Court of Antigua and Barbuda in either **Claim No. ANUHVC2022/0456** or these proceedings to lift the stay in whole or in part.
- 16) The Petitioners' costs of this Petition are to be paid from the Respondent's assets as expenses of the Respondent's liquidation in the order of priority set out in Section 289 of the Act.
- 17) In keeping with Section 309 of the Act, within one year after the Liquidators' appointment, and after paying or making adequate provision for all claims against the Respondent, the Liquidators must apply to the Court:
 - (a) for approval of the final accounts of the liquidation and for an order permitting them to distribute in money or in kind the remaining property of the Respondent to its shareholders according to their respective rights; or
 - (b) For an extension of time, setting out the reasons therefor.

18) The Liquidators are to submit quarterly reports on the progress of the liquidation to the Court.

Justice Dia C Forrester
High Court Judge (Ag.)

By the Court

Registrar