



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

**CAUSE NO. 70 OF 2021 (RPJ)**

**IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)**

**AND IN THE MATTER OF THE COMPANIES WINDING UP RULES (2018)**

**AND IN THE MATTER OF PERFORMANCE INSURANCE COMPANY SPC (IN OFFICIAL  
LIQUIDATION)**

**Before:** The Hon. Raj Parker

**Heard:** On the papers

**Date of decision:** 10 November 2022

**Draft Reasons circulated:** 16 December 2022

**Reasons delivered:** 29 December 2022

***HEADNOTE***

*Costs determination-applications for approval of JOL remuneration and an additional JOL-s.24  
Judicature Act (2021 Revision)-Part V (winding up of companies) and Part XIV(segregated portfolio  
companies) of Companies Act-(Companies Winding Up rules (CWR)) Order 24,11,20- GCR Order  
62-ss 218-223 Companies Act -set off.*

## Introduction

1. I gave judgment in this matter on 10 November 2022.
2. I directed that the Court would deal with costs on the basis of written submissions. I have reviewed the written submissions of 8 December 2022 on behalf of the JOLs and on behalf of the shareholders of SSS Insurance SP (“SSS SP”).
3. The shareholders of SSS SP successfully challenged the amount of US\$216,078.53 in fees and expenses claimed by the JOLs in the Amended Remuneration Summons on the basis that the JOLs had wrongly allocated certain fees and expenses to SSS SP. The Court approved under half (US\$101,350.39) of the JOLs fees and expenses.
4. SSS SP and the shareholder of Bottini SP had also sought the appointment of an additional joint official liquidator (“AJOL”) in relation to SSS SP and Bottini SP. By the Judgment of this Court dated 6 April 2022 the shareholders of Bottini SP and SSS SP were also successful on that application. The Court directed that the parties also address the costs of the AJOL application as part of their written submissions.

## *The Legal Framework*

5. Section 24(1) of the Judicature Act (2021 Revision) provides that, subject to the provisions of the Act or any other Law and rules of court, the costs of and incidental to all civil proceedings in the Grand Court shall be in the discretion of the Court. Sub-section 24(3) provides that the Court shall have full power to determine by whom and to what extent the costs are to be paid.
6. Whilst the Court’s power is discretionary, the discretion must be exercised in accordance with well-established principles: see Doyle J in *Re ICG I (FSD 192 of 2021 (DDJ), 10 August 2021, unreported)* at §5.
7. The statutory framework applicable to the official liquidation of the Company is comprised of Part V (Winding Up of Companies) and Part XIV (Segregated Portfolio Companies) of the

Companies Act (2022 Revision) (“Companies Act”) and the Companies Winding Up Rules (“CWR”). The Grand Court Rules are not of general application to liquidation proceedings.

8. The application made by the AJOL Summons is an application in the liquidation proceedings within the meaning of CWR Order 24, rule 2.
9. The application made by the Amended Remuneration Summons is a sanction application within the meaning of CWR Order 11, rule 1.

***Rules as to costs of sanction applications***

10. The general rules as to costs of sanction applications are set out in CWR Order 24, r.9:

*(1) This Rule applies to every sanction application under Order 11, including any application for the approval of the official liquidator's remuneration.*

*(2) The official liquidator's costs of making a sanction application shall be paid out of the assets of the company unless the Court is satisfied that –*

*(a) the application ought not to have been made because the directions sought by the official liquidator were unnecessary and served no useful purpose;*

*(b) the directions sought by the official liquidator were wholly unreasonable;*

*or*

*(c) the official liquidator has misled the Court or otherwise acted improperly in connection with the application.*

.....

*(4) In the case of a sanction application which is made or opposed by a creditor or contributory, the general rule is that –*

*(a) his costs of successfully making or opposing the application should be paid out of the assets of the company, such costs to be taxed on an indemnity basis if not agreed with the official liquidator; and*

*(b) no order for costs should be made against a creditor or contributory whose application or opposition is unsuccessful, unless the Court is satisfied that his position was wholly unreasonable or he is guilty of having misled the Court or otherwise acting improperly in connection with the application.*

*(5) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional circumstances and special reasons which justify making some other order or no order for costs.*

***Rules as to costs of non-sanction applications made in liquidation proceedings***

11. As the application made by the AJOL Summons is an application in the liquidation proceedings which does not fall within one of the special costs rules under Part II of CWR O.24, the general costs rules under GCR Order 62 continue to apply by virtue of GCR Order 1, rule 2(4).
12. Kawaley J held in *Re Oakrun Precious Metals Funds Ltd (FSD 9 of 2019 (IKJ), 30 April 2019, unreported)* at §45:

*“The effect of these parallel provisions is that GCR Order 62 applies to winding up proceedings save to the extent that special costs rules under the CWR are engaged. Even where Order 62 does apply, the way in which the Court’s discretion is exercised may be shaped by any distinctive characteristics of the winding-up context.”*

13. Accordingly the general principles of GCR O.62, r.4 as to entitlement to costs apply. GCR O.62, r.4(2) provides that:

*“The overriding objective of this Order is that a successful party to any proceedings should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.”*

14. GCR O.62, r.4(5) provides that:

*“If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or part of the costs.”*

15. Pursuant to GCR O.62, r.4(11), the Court may make an *inter partes* order for costs to be taxed on the indemnity basis if it is satisfied that the paying party has conducted the proceedings improperly, unreasonably or negligently. The successful party is only required to satisfy the Court that one of the three limbs are satisfied.

## **Decision**

### ***SSS SP’s costs***

16. SSS SPs aggregate costs of the AJOL Summons and of successfully resisting the Amended Remuneration Summons are said to be US\$305,213.85.

### ***Costs should follow the event***

17. The shareholders of SSS SP are entitled to their costs having successfully applied for the appointment of the AJOL and opposed the Amended Remuneration Summons.

### ***Basis of taxation***

18. They are entitled to their costs of the Amended Remuneration Summons to be paid on the indemnity basis by CWR 24 r 9 (4)(a).
19. There are no sufficiently strong reasons which would support a decision that such costs should be taxed on the indemnity basis under GCR O.62, r.4(11), for the AJOL application. I have concluded that these costs should be taxed on the standard basis if not agreed.

***From which estate should they be paid***

20. Where the shareholders of an SP successfully challenge the official liquidators of an SPC in relation to a sanction application, the costs to which such shareholders are entitled should not be “attributed” to the assets of their own solvent segregated portfolio in which they have the sole economic interest, but should be considered liabilities of the SPC pursuant to s. 222(1) of the Companies Act (see below).

***Priority***

21. GCR O. 20, r. 1 of the CWR provides that “*any order for costs made by the Court in favour of any creditor or contributory in the winding up proceedings*” ranks in priority to the “*remuneration of the official liquidator*” in the order of payment of expenses “*out of the company's assets*”.

***JOL's costs***

22. The JOLs’ costs are said to be US\$40,096.50 in relation to the AJOL Summons, US\$210,334.14 in relation to the Amended Remuneration Summons (adjusted to reflect a 20% discount as against total costs incurred), plus the JOLs’ Approved Remuneration at US\$101,350.39 as per the Judgment of this Court.
23. There is no good reason why in these proceedings they are not entitled to these costs as office holders conducting litigation to resolve disputes.

*From where should they be paid*

24. The JOLs' fees and expenses should be considered liabilities of the SPC pursuant to s. 222(1) of the Companies Act and paid out of the general assets of the Company. They should not, as the JOLs contend, be payable out of the estate of SSS SP.
25. The reasons for this are as follows:
- i) Section 219(3) of the Companies Act provides that SPCs have general assets which are not segregated assets of an individual SP.
  - ii) Section 219(6)(c) of the Companies Act requires directors and office holders to ensure that assets and liabilities are not transferred between SPs or between a SP and the general assets of the SPC.
  - iii) Section 221(2) of the Companies Act provides that *“where a liability of a [SPC] to a person arises or is imposed otherwise than from a matter in respect of a particular segregated portfolio or portfolios, such liability shall extend only to, and that person shall in respect of that liability, be entitled to have recourse only to, the company’s general assets.”*
  - iv) Section 222(1) of the Companies Act stipulates that *“liabilities of a [SPC] not attributable to any of its [SPs] shall be discharged from the company’s general assets”*.
26. The Court has decided how the segregation principle should apply in relation to the allocation of fees and expenses in accordance with sections 219(6), 220 and 223(1) of the Companies Act.
27. The statutory provisions allow the JOLs to attribute fees and costs to a specific SP when acts are performed *“on behalf of”* or *“to the benefit of”* the SP (see s. 218(1) of the Companies Act).

28. In neither the AJOL or the Amended Remuneration application could the JOLs be characterised as acting for or on behalf of SSS SP nor have their actions enured to the benefit of SSS SP. The reality is that they have been adverse to SSS SP in both applications (however neutral they intended to be) and effectively represented the interests of the SPC and/or other stakeholders in the liquidation.

### *Personal liability*

29. I have examined the conduct of the JOLs carefully and conclude that the JOLs' conduct has not been so egregious as to warrant an Order (which SSS SP argued was open to the Court) that they should bear expenses and disbursements personally and ordered to pay the costs of a third party personally (pursuant to O.20, r.2 of the CWR).

### *Reduction*

30. I have also come to the conclusion that although this litigation has been conducted disproportionately there is no good reason to reduce the JOLs' costs as argued for by SSS SP.

### *Set Off*

31. In case I am wrong about the application of s.222(1) of the Companies Act so that costs liabilities fall to be attributed to the SPC, the shareholders of SSS SP will be able to rely on the rule in *Cherry v Boulton* 41 ER 171, to have their entitlement to the costs of their successful applications to be set off against any liabilities owed to the JOLs.
32. That case is authority for the proposition that:

*“where a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed so to participate unless and until he has fulfilled his duty to contribute”*<sup>1</sup>

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<sup>1</sup> Derham on the Law of Set-Off, 4th ed., OUP, 14.01.



33. It applies in liquidation proceedings<sup>2</sup>.

***Conclusion***

SSS SP should pay the JOLs' remuneration assessed by the Court in the amount of US\$101,350.39.

SSS SP shareholders' costs of the AJOL Summons should be paid by the JOLs out of the assets of the Company, in priority to the JOLs' remuneration, to be taxed on the standard basis if not agreed.

SSS SP shareholders' costs of the Amended Remuneration Summons should be paid by the JOLs out of the assets of the Company, in priority to the JOLs' remuneration, to be taxed on the indemnity basis if not agreed.

The JOLs' costs of the AJOL Summons and Amended Remuneration Summons should be paid out of the assets of the Company.

A set off is to apply if necessary, between the Company and the JOLs on the one hand and SSS SP on the other.



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**THE HON. MR JUSTICE RAJ PARKER  
JUDGE OF THE GRAND COURT**

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<sup>2</sup> Ibid. at 14.07