



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

CAUSE NO: FSD 70 OF 2021 (RPJ)

**IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)
AND IN THE MATTER OF PERFORMANCE INSURANCE COMPANY SPC (IN OFFICIAL
LIQUIDATION)**

Appearances:

Adam Crane and Nicosia Lawson of Baker & Partners (Cayman) Limited
on behalf of the Joint Official Liquidators of Performance Insurance
Company SPC (in Official Liquidation)
Paul Kennedy and Nienke Lillington of Campbells LLP on behalf of SSS
Insurance SP

Before: The Hon. Justice Raj Parker

Heard: 14 June and 18 August 2022

Draft Judgment Circulated: 31 October 2022

Judgment Delivered: 10 November 2022

HEADNOTE

Segregated Portfolio Companies-Joint Official Liquidators remuneration and expenses-Companies Act (2022 Revision)-ss 109,219,220,222,22-Insolvency Practitioners Regulations Regulation 10-reasonableness-obligation to keep assets and liabilities segregated.

JUDGMENT

INTRODUCTION

1. The Joint Official Liquidators (“JOLs”) of Performance Insurance Company SPC (in Official Liquidation) (“the Company”) sought approval of the JOLs’ fees and expenses in respect of the Company and six of 12 segregated portfolios (“SPs”)¹ of the Company for the period from 26 February 2021 to 31 July 2021, and in relation to SSS Insurance SP (“SSS SP”) and Bottini Insurance SP (“Bottini SP”) also for the period from 1 August 2021 to 15 February 2022, on which date the JOLs were replaced by an additional joint official liquidator (“AJOL”), Angela Barkhouse in respect of SSS SP and Bottini SP.
2. The JOLs and the shareholders of some of its segregated portfolios have reached an agreement, regarding the remuneration and expenses of the JOLs and approval was granted separately.
3. This decision concerns only SSS SP. The shareholders of SSS SP are apparently the only stakeholders in respect of the Company and all of the Segregated Portfolios that are advancing substantive objections to the JOLs’ remuneration and expenses.
4. SSS SP is the segregated insurance cell which is owned by the shareholders of a trucking company based in Pennsylvania, USA. The shareholders of SSS SP (Messrs Vargo, Gallagher, Rea and Comunale) effectively self-insure certain liabilities such as workers’ compensation through a captive arrangement with a US insurance carrier and a segregated insurance cell owned by them in the Cayman Islands (SSS SP). They have been ‘caught up’ in a Cayman liquidation and now face claims of hundreds of thousands of dollars from liquidators in order to exit this structure.
5. Kenneth Krys and Neil Dempsey were appointed as joint voluntary liquidators of the Company on 26 February 2021. The liquidation was apparently a result of an alleged fraud which related to certain of the SPs in the Company, although not SSS SP (which was also not a party to the related litigation in Kentucky). The voluntary liquidation was subsequently converted into an official liquidation by a supervision order dated 7 April 2021 and the JOLs were appointed.

¹ The Company has twelve segregated portfolios: Sustainable Insurance Company SP, Gen-1 Insurance Company SP, Smart Insure SP, Triangle RGK SP, Prewett Insurance SP, Greystone Insurance Company SP, Bottini Insurance SP, SSS Insurance SP, Goldenstar Holdings Company SP, Hudson York Insurance Company SP, Omega Insurance Company SP, Performance 5 SP.

6. Due to the perception of a conflict of interest on the part of the JOLs in respect of the solvent and insolvent parts of the Company and the allocation of fees as between them, the Court appointed an additional joint official liquidator (the “AJOL”) over SSS SP and Bottini SP on 15 February 2022.
7. The attorneys for the shareholders of SSP SP, have instructed Philip Daval-Bowden (“Mr Bowden”), an experienced specialist costs consultant, to analyse the fees and expenses claimed by the JOLs in respect of SSS SP in order to assess whether the JOLs have appropriately allocated their fees and expenses as between the Company and the SPs, in accordance with their obligations under the Companies Act (2022 Revision) (the “Act”).
8. The main question which arises from this exercise is whether the JOLs have complied with the legal requirements of the Act in terms of keeping the assets and liabilities of the Company and its SPs segregated.²
9. Mr Bowden says the JOLs have appropriately allocated some of the fees and expenses of the Company’s liquidation (assessed by Mr Bowden in the amount of US\$101,350.39), and the shareholders of SSS SP are agreeable to paying such fees, subject to the submissions they make in respect of reasonableness.
10. The matter was heard on 14th June and 18th August 2022. Mr Paul Kennedy of Campbells appeared for the shareholders of SSS SP. Mr Adam Crane appeared for the JOLs.
11. The Court has carefully considered the numerous written arguments submitted on behalf of the parties and the evidence that has been produced. The Bowden report and Mr Dempsey’s third affidavit have been considered in detail.³
12. There was regrettably a failure to agree a list of issues upon which the Court’s determination was sought following the hearings of this matter. Nevertheless doing its best to reconcile all the competing submissions the Court has formed the following views.

Preliminary observations

² See Mr Bowden’s Fee Allocation Report at pp 1-58

³ As well as Dempsey 2 and Krys 5

13. The Court accepts the submission of Mr Kennedy that the determination of the JOLs' fees and expenses has been made more complex by the way the JOLs have approached certain matters. It is notable that the JOLs did not propose a remuneration agreement at the outset of the Company's liquidation which addressed the specific structure in the liquidation and how the JOLs proposed to allocate their fees. The JOLs also did not separately record time and fees as against the Company and each individual SP from the outset until, at least, 30 April 2021 necessitating an 'after-the event' re-allocation.
14. In addition, the JOLs seek approval of their fees and expenses only in relation to six out of the 12 SPs of the Company. The shareholders of SSS SP says they are able to determine that the JOLs have spent over US\$3.1 million in respect of the Company's liquidation in one year, but it is not possible to assess SSS SPs' fees and expenses in comparison to any of the SPs not addressed in this application (the remaining 6 SPs with whom the JOLs have negotiated privately).
15. As to a remuneration agreement, the Supervision Order includes the following two clauses :

“10. The JOLs remuneration and expenses be paid out of the general assets of the Company in accordance with section 109 of the Companies Act, the Insolvency Practitioner's Regulations (as amended) and the Companies Winding Up Rules (“CWR”). To the extent that the actions of the JOLs benefits any or all of the Segregated Portfolios, the JOLs shall have leave to apply to the Court for directions and approval of the apportionment of fees and expenses amongst the Company and the Segregated Portfolios.

11. The JOLs be at liberty to meet all disbursements reasonably incurred in the performance of their duties out of the general assets of the Company as expenses of the winding up. To the extent that the disbursements are related to or for the benefit of any or all of the Segregated Portfolios, the JOLs shall have leave to apply to the Court for directions and approval of the apportionment of disbursements amongst the Company and the Segregated Portfolios.” (Emphasis added.)

16. The JOLs did not take up this invitation to apply to the Court for directions and approval of any proposed apportionment of fees and expenses. Instead they have sought approval after having

expended large sums in fees having allocated amounts themselves to the various SPs, instead of seeking prior approval for their methodology of apportionment.

17. The Court agrees with Mr Kennedy that it is regrettable that they did not seek prior approval as many of the issues highlighted by Mr Bowden indicate a failure to properly record and segregate fees and expenses and has led to costly challenges which have taken up Court time to resolve and the scope for further disputes to arise.

Statutory Framework Applicable to Fee Allocation in relation to a segregated portfolio company

18. The statutory position is clear. The Company is a segregated portfolio company (“SPC”), which means that it contains one or more (and in this case, 12) separately identifiable SPs. The SPC’s key feature is that the assets and liabilities of each SP are separate and ‘ring-fenced’ from every other SP within the SPC and from the assets and liabilities of the SPC itself (s. 216(1) of the Act).
19. As a result, a creditor of one SP does not have recourse to the assets of another SP. Similarly, any assets held by the SPC itself (and not held by an SP) are general assets of the Company (s. 222 of the Act).
20. Maintaining the integrity of the segregated portfolio structure is essential in order to make the SPC-structure work.
21. In order to safeguard the separation of assets and liabilities of distinct SPs, s. 219(6) of the Act imposes the following duty on the directors of an SPC:

“It shall be the duty of the directors of a segregated portfolio company to establish and maintain (or cause to be established and maintained) procedures –

- a. to segregate, and keep segregated, portfolio assets separate and separately identifiable from general assets;*
- b. to segregate, and keep segregated, portfolio assets of each segregated portfolio separate and separately identifiable from segregated portfolio assets of any other segregated portfolio; and*

c. to ensure that assets and liabilities are not transferred between segregated portfolios or between a segregated portfolio and the general assets otherwise than at full value.”

22. Section 220 of the Act deals with the general principles of segregation of assets and liabilities:

Segregated portfolio assets

- a. shall only be available and used to meet liabilities to the creditors of the segregated portfolio company and holders of segregated portfolio shares who are creditors or holders of segregated portfolio shares in respect of that segregated portfolio and who shall thereby be entitled to have recourse to the segregated portfolio assets attributable to that segregated portfolio for such purposes; and*
- b. shall not be available or used to meet liabilities to, and shall be absolutely protected from, the creditors of the segregated portfolio company and holders of segregated portfolio shares who are not creditors or holders of segregated portfolio shares in respect of that segregated portfolio, and who accordingly shall not be entitled to have recourse to the segregated portfolio assets attributable to that segregated portfolio. [Emphasis added]*

23. Section 223(1) of the Act provides that strict segregation must be maintained in a liquidation:

*“Notwithstanding any statutory provision or rule of law to the contrary, in the winding-up of a segregated portfolio company, **the liquidator** –*

- a. shall deal with the company’s assets only in accordance with the procedures set out in section 219(6); and*
- b. in discharge of the claims of creditors of the segregated portfolio company and holders of segregated portfolio shares, shall apply the segregated portfolio company’s assets to those entitled to have recourse thereto under this Part.”*

24. It is clear from these sections that a liquidator’s ability to pay a company’s general liquidation expenses (including his or her own remuneration) out of the company’s assets does not extend to the SPs of an SPC in liquidation. Costs associated with the liquidation of the SPC cannot automatically be allocated pro rata to the SPs.

25. Indeed, as this Court has already pointed out, the assets of SPs are not available to back stop or guarantee the general liabilities or expenses of an SPC. This is explicitly provided not to be different in a liquidation (s. 223(1) of the Act).

Law on approval of the JOLs' remuneration and expenses

26. Section 109 of the Companies Act deals with the remuneration of official liquidators

Remuneration of official liquidators

109. (1) The expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.

(2) There shall be paid to the official liquidator such remuneration, by way of percentage or otherwise, that the Court may direct acting in accordance with rules made under section 154; and if more liquidators than one are appointed such remuneration shall be distributed amongst them in such proportions as the Court directs.

27. The Court exercises this jurisdiction pursuant to the Insolvency Practitioners' Regulations 2018 (IPR), Regulation 10:

"... an official liquidator is not entitled to receive any remuneration out of the assets of a company in provisional or official liquidation (including a liquidation under the supervision of the Court) without the prior approval of the Court."

28. Apparently no liquidation committees were formed in respect of the SPs as the Supervision Order did not require liquidation committees for the SPs, and because the SPs were solvent and the intention from the commencement of the Company's liquidation was to novate the SPs.
29. When assessing remuneration and expenses of an official liquidator, the Court considers whether the JOLs' remuneration is fair and reasonable in all the circumstances.

Mr Bowden's report

30. The JOLs take issue with the Fee Allocation Report (prepared by Mr Bowden dated 25 May 2022) and complain that the shareholders of SSS SP should have sought the Court's permission to adduce expert evidence. The Court does not accept this is the case. The Bowden report is admissible in evidence and does not require permission to be adduced.
31. This application gives rise to technical fee issues in the context of insolvency proceedings. It is to be expected that the shareholders of SSS SP (and/or any other SP) may wish to rely on the analysis of a specialist costs consultant to make sense of the enormous amount of data provided by the JOLs in respect of their fees and expenses on these applications.
32. In addition, the JOLs centrally recorded time costs in circumstances where they were aware of the statutory framework. The Court accepts Mr Kennedy's submission that the JOLs methodology makes it difficult to assess whether fees and expenses have been properly allocated without the assistance of an expert.
33. The Court also rejects the JOLs' *ad hominem* criticisms of Mr Bowden's experience and expertise. It is evident from his CV and from §§ 3 and 5 of the Fee Allocation report that he is an experienced costs consultant who has been involved in high-profile litigation, including various insolvency matters.
34. The Court does not accept the JOLs' submission that the fee allocation report lacks objectivity and independence. To the contrary the Court finds it reliable and helpful.

*Preliminary points arising from the Bowden report**Privilege*

35. The Court accepts shareholders of SSS SP's case that the JOLs have redacted or failed to produce narratives in support of US\$17,148.04 of fees and expenses. There is no basis for the assertion of privilege against the shareholders of SSS SP in respect of matters which are properly allocated to that SP. If the relevant privilege relates to non-SSS SP matters then the relevant fees or expenses should not be allocated to SSS SP.

Kentucky

36. It also accepts the shareholders of SSP SP's case that the JOLs wrongly attribute significant sums to SSS SP for matters broadly relating to the issues arising in Kentucky (these arise not just under the heading of "Kentucky Litigation" but also D&O Policy, Third Party Funding, and others) and the fallout from the fraud on the basis that one of the Kentucky litigants initially (and wrongly) included all of the SPs on a blanket basis in its proof of debt.
37. The Court accepts that that was not a valid basis for this allocation and the JOLs should have been aware that SPs such as SSS SP were uninvolved and unaffected by those issues. Campbells for the shareholders of SSS SP resolved that confusion on the part of the Kentucky litigants (Campbells wrote to State National's attorneys on 1 June 2021 and they responded on 8 June confirming their clients were prepared to withdraw their proofs of debt).

Company and creditor matters

38. It also accepts the shareholders of SSP SP's case that certain Company and creditor matters are wrongly allocated to SPs in circumstances where the Court has already found that a reasonable perception of a conflict of interest existed as between various competing interests in the liquidation. The JOLs could have on an initial application for directions in respect of allocations and for approval of their remuneration, indicated various statutory or other matters which the Company itself could not fund and which would either require voluntary funding from some or all SPs or a direction from the Court. Rather the JOLs proceeded on a basis which they deemed to be "fair and equitable" but which was not agreed in advance or directed by the Court. This was unfortunate as it has resulted in much after the event wrangling and considerable time and expense over what might be fairly observed to be significant but not very large amounts in dispute. The Court has been left with the distinct impression that sledgehammers have been used to crack various nuts in this case with disproportionate amounts of party expense and Court time, which has not been in keeping with the Overriding Objective to conduct cases proportionately and economically.
39. The Court has carefully considered the responses to Mr Bowden's criticisms which are set out in Dempsey 3 and can be summarised as follows:

- a. The JOLs and their advisors did not set up billing codes for all of the SPs at the commencement of the liquidation and/or record time separately, and the JOLs' methodology for the reallocation of the centrally recorded costs creates inequity;
- b. That certain work streams were not applicable to or for the benefit of SSS SP, and should therefore not be allocated or specifically billed to SSP SP;
- c. All redacted time entries should be removed entirely from the remuneration and expenses claimed against SSS SP;
- d. Certain time entries which have been allocated to or specifically billed to SSS SP should have been billed to another SP or split amongst a number of SPs;
- e. The JOLs have recorded Specific Time Costs in respect of SSS SP with a matching Allocated Time Cost centrally recorded against the Company, which was then divided up amongst the Company and the Segregated Portfolios (this was classified in the Bowden Report as a "double-division").
- f. The JOLs' remuneration and expenses in respect of the summons advanced by the shareholders of SSS SP and Bottini SP for the appointment of the AJOL should be excluded from the calculation of the JOLs' remuneration and expenses pending the Court's determination on costs.

Fees and expenses 26 February 2021-31 July 2021

Allocated time costs

40. Having reviewed the competing submissions and the evidence, the Court accepts that the Fee Allocation Report comes to a sensible conclusion on the basis of a detailed analysis of the JOLs' underlying data. The Court accepts that US\$10,907.20 was properly allocated to SSS SP (of US\$39,296.74 claimed) (see para. 122 of the Fee Allocation Report.)

Specific time costs

41. Having reviewed the competing submissions and the evidence, the Court accepts US\$5,586.50 was properly allocated to SSS SP (of US\$16,972.00 claimed) (see para. 143 of the Fee Allocation Report).

Legal expenses

42. Having reviewed the competing submissions and the evidence, the Court accepts US\$10,151.43 (of US\$30,978.07) can be properly allocated to SSS SP (see para. 162 of the Fee Allocation Report).

Allocated disbursements

43. The JOLs are seeking to allocate the sum of US\$2,600.82 to SSS SP. The Court accepts that US\$1,247.69 appears to relate to a data platform for the hosting of discovery documents disclosed in the Kentucky Litigation. SSS SP should not bear the costs of the Kentucky Litigation in circumstances where it is not a party to such litigation.

The Court accepts that US\$1,353.13 is to be allocated to SSS SP.

44. In summary the Court accepts the position that US\$38,011.26 can be properly allocated to SSS SP (as opposed to the US\$100,047.27 sought by the JOLs) with regard to Fees and Expenses from 26 February 2021 – 31 July 2021.

Fees and Expenses from 1 August 2021 – 15 February 2022

45. The Court accepts in relation to the *Kentucky Litigation (Allocated Time Costs)* that SSS SP was not a party to the Kentucky Litigation and the Kentucky Litigants had clarified by June 2021 that they were not claiming (by way of proof of debt) as against SSS SP, and so time costs incurred in relation to the Kentucky Litigation cannot be properly allocated to SSS SP.
46. In relation to *Novation (Allocated Time Costs)* the Report highlights a number of time-entries which have been wrongly included in this category and which are not properly attributable to SSS

SP. The Court accepts that after subtraction of those entries, the share which could be allocated to SSS SP amounts to US\$986.43 (of US\$1,290.44).

47. In relation to *Statutory and Creditor Matters (Allocated Time Costs)*, the Court accepts that the fees incurred largely relate to a creditors' meeting which the JOLs have confirmed related to the Company, Goldenstar SP, Hudson York SP and Omega SP, in their Third Interim Report. Indeed, it is also stated there that the meeting of contributories of SSS SP had been indefinitely postponed.
48. In the circumstances, the Court accepts that the JOLs' decision to allocate an equal proportion of the fees incurred to SSS SP is not justified and contrary to the statutory framework (see paras. 187-189 of the Fee Allocation Report.) The Court also accepts that various entries have been identified which either relate to the Company (and should therefore only be allocated to the Company), or relate to the Kentucky Litigation.
49. The Court accepts that as a consequence US\$98.92 (of US\$674.51) can be properly allocated to SSS SP.
50. In relation to *Taxation (Allocated Time Costs)* it can be fairly said that although SSS SP has derived some benefit from this workstream, the Court accepts that a proper analysis of it shows that some entries have been wrongly included and been equally divided to SSS SP. It includes entries which relate to a specific (other) SP and to the Company.
51. The Court accepts the shareholders of SSS SP's position that excluding the misallocated entries, the balance properly allocated to SSS SP is US\$192.11 (of US\$203.22).
52. In relation to *Reporting (Allocated Time Costs)*, the Court accepts that a large part of the fees incurred in relation to this workstream relate to the retrospective reallocation of the JOLs fees and expenses.
53. The JOLs' did not specifically allocate time costs at the outset, as envisaged by the statutory framework. The Court adopts the approach proposed in the Fee Allocation Report that the JOLs be allowed to recover 50% of their fees, as divided between the SPs and the Company. As a consequence US\$2,001.77 (of US\$4,317.19) can be properly allocated to SSS SP.

54. The Court accepts that work undertaken in relation to D&O Policy (Allocated Time Costs) and External Funding (Allocated Time Costs) cannot properly be allocated to SSS SP (see above).
55. In relation to *Management and Supervision (Allocated Time Costs)*, the Court accepts that this includes work on engagement letters with attorneys which should not have been allocated to the SPs, but which should have formed part of the general expenses of the liquidation to the Company.
56. The Court accepts that Fees and expenses should also be disallowed insofar as they deal with invoices which relate to the Kentucky Litigation.
57. As a consequence the share of fees properly allocated to SSS SP is US\$263.38 (of US\$438.21).

Conclusion – Allocated Time Costs

58. In light of the above, US\$3,587.38 (of US\$7,649.10) can be said to have been properly allocated by the JOLs to SSS SP.

Specific Time Costs

59. The Specific Time Costs sought by the JOLs include US\$26,536.50 in fees relating to SSS SP's summons to have the AJOL appointed. These are the fees of the JOLs and exclude legal expenses.
60. The Court accepts that these fees should, as the Fee Allocation Report suggests, be excluded from the Amended Summons as the AJOL Appointment Order expressly provides that the costs of the hearing will be subject to written submissions by SSS SP and the JOLs and determined by the Court. The Court expects that the parties will seek to resolve these items before troubling the Court further.
61. In relation to *Novation (Specific Time Costs)* the Court accepts that the entries reviewed in relation to this have been found to relate to the novation of all of the SPs. Because SSS SP was one of the SPs seeking to novate, part of such fees could therefore have been properly allocated to SSS SP. The fees amount to US\$7,979.00.

62. In relation to *Statutory and Creditor Matters (Specific Time Costs)* the Court accepts that issues of Double-Division have been identified (see paragraphs 229-231 of the Fee Allocation Report). The Court accepts that fees allocated to this, but relating to the summons to appoint and AJOL, should be excluded.
63. The Court accepts that this results in an allocation of fees to SSS SP of US\$8,439.00 (of US\$32,559.00).
64. In relation to *Reporting* the Court accepts that the figures sought by the JOLs (US\$27,697.00 for SSS SP) is in addition to the figure sought for 'Reporting' on an 'Allocated Time Costs' basis.
65. The Court accepts Mr Kennedy's submission that assuming the JOLs used their method of equal apportionment, this means that the fees and expenses incurred by the JOLs for Reporting in the period from 4 August 2022 to 15 February 2022 alone are in the region of US\$415,000. The Court accepts SSS SP's analysis that the fees relating to this workstream show that they have been primarily incurred in relation to the preparation of the Amended Summons and the JOLs' Interim Report. They therefore reflect the fees incurred to support the JOLs' claim for their fees.
66. The Court accepts that *Reporting* should be reduced to deal with the Double-Division Issue and to exclude any sought fees and expenses in relation to the summons for the appointment of the AJOL, which may be the subject of separate written submissions for resolution by the Court.
67. The Court accepts the consequence is that this results in specifically allocated fees to SSS SP of US\$19,414.50 (of US\$27,697.00).
68. On *Cash Management* the Court accepts that the figure declared by the JOLs should be reduced to deal with the Double-Division Issues which is contrary to the statutory framework.
69. The Court also accepts that *Cash Management* also has to be reduced to exclude a minor entry which relates to the summons to appoint the AJOL. The consequence is that the remaining allocated fees in relation to SSS SP come to US\$1,780.00 (of US\$3,852.50).

Conclusion – Specific Time Costs

70. The Court accepts the Fee Allocation Report's conclusion that the properly allocated fees for 'Specific Time Costs' amount to US\$37,612.50 (of US\$72,087.50).

Allocated Legal Expenses

71. The Court accepts that the Allocated Legal Expenses should, based on the invoices, be recorded as US\$2,684.07 (rather than US\$2,827.28). The Court also accepts that a detailed analysis of the narratives on the invoices confirms that not all fees and expenses can be properly allocated to SSS SP.

- a. *HSM (Allocated Legal Expenses)*. The Court accepts that this includes work in connection with the Company's D&O Policy, potential claims of the Company and possible third party funding. This should be excluded.
- b. The Court accepts that the same applies to work in connection with the creditors' meeting. The Court accepts that the meeting did not relate to SSS SP and concerned the Company. In such circumstances the statutory framework requires that such liabilities fall to be satisfied from the general assets of the Company.
- c. The Court also accepts that excluding fees incurred in relation to the transfer of instructions from HSM to Baker and Partners, results in a proper allocation of fees to the amount of US\$852.69 (of US\$2,218.85).
- d. *Kynect (Allocated Legal Expenses)*. The Court accepts that the invoices of Kynect appear to have been properly allocated, except for work undertaken in relation to the D&O Policy. This results in an appropriate fee allocation of US\$150.00 to SSS SP.
- e. *Sequor Law (Allocated Legal Expenses)*. The Court accepts that these invoices do not appear to relate to SSS SP and should, therefore, not be allocated to it.

Conclusion – Allocated Legal Expenses

72. Consequently, the ‘Allocated Legal Expenses’ properly allocated to SSS SP amount to US\$1,002.69 (of US\$2,684.07).

Specific Legal Expenses

73. The Court accepts that the invoices provided by the JOLs in support of their claim against SSS SP amount to US\$33,660.00, rather than the US\$31,185.00 claimed.
74. In addition, the Court accepts that the *Baker and Partners (Specific Legal Expenses)* includes work done in relation to the summons to appoint the AJOL (at US\$5,985.00). The Court accepts that the remaining US\$10,695.00 (of US\$16,680.00) appears to have been properly allocated.
75. With regard to *HSM (Specific Legal Expenses)* the parties agree that US\$2,385.00 has been properly allocated.
76. With regard to *BDO (Specific Legal Expenses)* SSS SP could not obtain access to these, but on the proviso that the work incurred related to the preparation of tax returns for SSS SP, accept that the work can be properly allocated to it. The Court is content with that outcome.
77. With regard to *Kynect (Specific Legal Expenses)* it is agreed that US\$120.00 has been properly allocated to SSS SP.

Conclusion – Specific Legal Expenses

78. In light of the above, US\$20,100.00 (of US\$33,660) have been properly allocated by the JOLs to SSS SP for ‘*Specific Legal Expenses*’.
79. The shareholders of SSS SP say that this sum includes significant costs which relate to this application. That will be a matter for submission once the Court has determined the costs order arising on this application.

Allocated Disbursements

80. The allocation of disbursements to SSS SP should not include fees for data hosting in relation to a discovery exercise in the Kentucky Litigation for the reasons given above. The Court accepts that the proper figures for allocated disbursements (in respect of SSS SP) should be US\$586.06 (of US\$1,381.44)

Specific disbursements

81. The Court accepts that there should be a reduction as the disbursements claimed in this regard appear to consist predominantly of general fees such as bank charges, telephone, photocopying, etc.

Conclusion – Fees and Expenses from 1 August 2021 to 15 February 2022

82. The analysis which the Court has accepted is that, of the fees incurred in the period from 1 August 2021 to the AJOL's appointment, US\$63,339.13 (of US\$116,031.31) has been properly allocated to SSS SP, in a manner which is consistent with the statutory requirement of segregation.

Overall Conclusion

83. The fees and expenses claimed by the JOLs as against SSS SP total US\$216,078.58 are:
- (i) US\$100,047.27 incurred from 26 February 2021 to 31 July 2021; and
 - (ii) US\$116,031.31 incurred from 1 August 2021 to 15 February 2022.

84. The Court has given detailed consideration to the fees and expenses in relation to each period as analysed in the Fee Allocation Report and by the JOLs' affidavit evidence covering: (i) the period from 26 February 2021 to 31 July 2021, and (ii) the period from 1 August 2021 to 15 February 2022.

85. For the detailed reasons give above and having considered the competing submissions and evidence the Court finds that US\$101,350.39 (of US\$216,078.58) can be properly allocated to SSS SP.

The final question which arises is whether the fees were reasonable.

Legal Principles Applicable to an Assessment of Reasonableness

Burden of Proof

86. In *Re Sphinx* (FSD 16 of 2009) Chief Justice Smellie said that “*the JOLs bear the burden of proving that the remuneration sought is reasonable and justified*” (at para. 10).
87. In this regard the Chief Justice quoted from the well-known judgment of Ferris J in *MGN v Maxwell* (at 333-334) where he said that:

“Office-holders are nowadays not normally expected to act gratuitously. It is salutary to remember, however, that the rule that a trustee must not profit from his trust is a rule that [applies] to all kinds of persons who are in a fiduciary position (See Snell’s Principles of Equity (28th Edn. Sweet and Maxwell) pp. 249-252). The allowance for remuneration in particular cases represents an exception to this rule, but it inevitably involves a conflict between the interests of the fiduciary who is to receive such remuneration and the interests of those whom the fiduciary duties are owed, who will bear whatever remuneration is allowed. A consequence of this is that it must be for the office-holder who seeks to be remunerated at a particular level to justify his claim. As I see it, it is simply one aspect of his obligation to account. What he retains for himself out of the property which comes into his hands as office-holder is not available for those towards whom he is a fiduciary. He cannot therefore account for it by paying it over. The only way in which he can account for it is by showing that he ought to be allowed to retain it for himself. But this is necessarily a matter for him to establish.” (At para. 17.)

Reasonableness

88. In assessing the reasonableness of the fees and expenses sought by the JOLs it is important to keep in mind the further statement of Ferris J in *MGN v Maxwell* (at 333) that:

“The essential point which requires constantly to be borne in mind is that office-holders are fiduciaries charged with the duty of protecting, getting in, realising and ultimately passing on to others assets and property which belong not to themselves but to creditors or beneficiaries of one kind or another. They are appointed because of their professional skills and experience and they are expected to exercise proper commercial judgment in the carrying out of their duties. Their fundamental obligation is, however, a duty to account, both for the way in which they exercise their powers and for the property which they deal with.”

And at (at 332):

“[T]he test of whether officeholders have acted properly in undertaking particular tasks at a particular cost in expenses or time spent must be whether a reasonably prudent man faced with the same circumstances in relation to his own affairs, would layout or hazard his own money on doing what the office-holders have done. It is not sufficient, in my view, for officeholders to say that what they have done is in the scope of the duties or powers conferred upon them. They are expected to deploy commercial judgment, not to act regardless of expense.”

89. He also went on to list three factors which he considered relevant to considerations of reasonableness (at para. 336-337), which were later cited with approval by the Court of Appeal in *Brook v Reed* [2012] 1 WLR 419:

“In my judgment it is vital to recognise three things in this field. First time spent represents a measure not of the value of the service rendered but of the cost of rendering it. Remuneration should be fixed so as to reward value, not so as to indemnify against cost.

Secondly, time spent is only one of a number of relevant factors, the others being, as I have said, those which find expression in IR, r. 2.47 and similar rules. The giving of proper weight to these factors is an essential part of the process of assessing the value, as distinct from the cost, of what has been done. Thirdly, it follows from the first two points

that, as the task is to assess value rather than cost, the tribunal which fixes remuneration needs to be supplied with full information on all the factors which I have mentioned.”

90. In *Re Sphinx* the Chief Justice also remarked that the issue of proportionality must be kept in mind (§§19-21):

“It is important to emphasise the need both for proportionality and for the provision of sufficient evidence to justify the liquidator’s charges. What is needed (and thus required by the principles of proportionality) is the provision of sufficient information to enable creditors, investors or the court to have a clear view of what the office holder has done or intends to do and of the value he has achieved or protected for the creditors or investors.”

91. The Court has taken account of Mr Kennedy’s submission that the costs of this liquidation (both overall and in respect of at least SSS SP) are disproportionate. He submits that within a year the JOLs appear to have been able to spend over US\$3.1million. He points out that in relation to SSS SP, whose net equity upon novation was in the region of US\$250k, the JOLs’ claimed fees and expenses of US\$216k are by definition disproportionate particularly when he says they did not achieve any useful purpose for SSS SP. Indeed, SSS SP only wished to be novated to a new structure.
92. Mr Kennedy submits that this should have been relatively straightforward. Indeed, he points out what the AJOL has been able to achieve at a cost of approximately US\$40k in a period of just over two months as opposed to the hundreds of thousands in fees (and months of delay) caused by the JOLs.
93. I do not accept his submission that the costs should be further reduced because they have not been shown to be reasonable by the JOLs. The Court is not prepared to take the view that the fees incurred do not represent value being provided by the JOLs in respect of specific work done.

Costs

94. The Court has been informed that the parties have agreed that the following fees and expenses should be addressed separately:

- the JOLs' fees, costs and expenses of the summons to appoint the additional joint official liquidator (heard on 4 February 2022); and
- the JOLs' fees, costs and expenses claimed in respect of the Fee Approval work stream in relation to the Amended Summons and the Specific Time Costs incurred in the Reporting work-stream.

95. The Court takes the view that a disproportionate amount of time and cost has been taken up in resolving this matter and encourages the parties in the light of the comments made above concerning proportionality and the Overriding Objective to agree costs. If this cannot be achieved the Court will determine the matters which remain in dispute on the basis of written submissions to be filed within 28 days (maximum length 10 pages each).



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