



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

CAUSE NO. 70 OF 2021 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

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

Before: The Hon. Raj Parker

Heard: On the papers

Date of decision: 24 March 2023

Draft Judgment circulated: 14 March 2023

Judgment delivered: 24 March 2023

HEADNOTE

Costs of segregated portfolio to be paid by JOLs out of the assets of the company- whether to rank in priority to JOLs' remuneration in the liquidation- source of the assets -whether due from the company or any segregated portfolio-application of set off-interim payment.

COSTS JUDGMENT***Further costs ruling***

1. Judgment was given in this matter on 10 November 2022 and 29 December 2022.
2. SSS SP's costs of the AJOL summons were awarded to it, to be paid by the JOLs, and to be taxed on the standard basis if not agreed, and costs of the Amended Remuneration summons were awarded in the same way, save that those costs were to be taxed on the indemnity basis, if not agreed.
3. The Court was subsequently required to give further directions as to the resolution of additional costs issues which have not been resolved between the parties in extensive correspondence.
4. The Court has considered the written costs submissions made on behalf of Mollie Rea, Patrick Gallagher, and Candice Comunale, the shareholders of SSS Insurance SP (the "Shareholders") and the joint official liquidators of Performance Insurance Company (in Official Liquidation) (the "JOLs").
5. The JOLs contend that any entitlement of the Shareholders to the costs which they have incurred in opposing the JOLs' case lacks priority in the liquidation. They say that there is "no realistic prospect" of them ever recovering those costs.
6. In addition, they contend that the JOLs should be entitled to their remuneration from SSS Insurance SP ("SSS SP") in full without any account being taken of the costs which the JOLs have caused the Shareholders to incur.
7. The Court rejects both contentions for the following reasons.

Priority

8. The JOLs request that *"the Court direct that the costs awards in favour of the shareholders of SSS SP will only have priority under CWR O.20, r.1 in respect of the JOLs' remuneration that is assessed and payable out of the assets of Performance Insurance Company SPC (in Official Liquidation) (the "Company"), and there shall be no priority in respect of the JOLs' remuneration that is assessed and payable out of the assets of any of the segregated portfolios."*

9. §21 of the Judgment of 10 November 2022 states:

“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”.”

10. This Rule does not distinguish between the sources of the remuneration referred to. The JOLs have not pointed to any basis in the Companies Act or the Companies Winding Up Rules (as amended) (the “CWR”) to suggest that the liquidators should be separately remunerated in respect of each underlying portfolio.

11. The Court accepts the Shareholders’ case that whatever monies the JOLs have received or receive in the future from any source is received by them as official liquidators of the Company (as opposed to, for example, receivers of an individual segregated portfolio) and the order of priorities set out in CWR O.20, r.1 applies.

12. Monies which are ordered to be paid over by a segregated portfolio in respect of work done by a liquidator on its behalf become assets of the Company over which the liquidators are appointed, and the statutory waterfall applies.

13. This approach does not compromise the principle of segregation. Whether work is done “on behalf of” or “to the benefit of” a particular segregated portfolio (s. 218(1) of the Companies Act (2023 Revision) (the “Companies Act”)), and (if so) what remuneration an official liquidator would be entitled to for such work, is still to be considered in the same manner.

14. However, that remuneration is received by the official liquidator (and, in this case, the JOLs) as official liquidator of the Company. The JOLs have not been appointed as JOLs or receivers over each individual segregated portfolio.

15. The Court accepts the Shareholders’ submission that insofar as multiple segregated portfolios, creditors and/or contributories would have a claim against the assets of the Company, such claims would rank *pari passu* in the Company’s liquidation. This approach does not prejudice either the segregation principle or the individual segregated portfolios.

16. Moreover, the Court accepts the Shareholders’ submission that costs come within CWR O.20, r.1 (1)(h) being an “order for costs made by the Court in favour of any creditor or contributory in the winding up proceedings”. Pursuant to s. 222(1) of the Companies Act, those costs are to be paid out of the assets of the Company and rank ahead of the JOLs’ claim for remuneration against SSS SP.

17. Further at § 27-28 of the Judgment the Court stated:

“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 characterized 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.”

18. It would not be fair or just if the JOLs were to receive remuneration from the very party they have been adverse to and lost to, in priority to costs which they have been ordered to pay from the assets of the Company.

19. Costs should be paid to SSS SP out of the assets of the Company in priority to the JOLs’ remuneration in the Company’s liquidation whether the source is from the Company or any segregated portfolio.

Set Off

20. The JOLs also contend that no set off should apply because the Shareholders confused SSS SP (as a segregated portfolio) with their position as the shareholders of that portfolio. The JOLs request that a direction that the remuneration portion of their remuneration and expenses, which was assessed in the amount of \$101,350.39 and payable out of the assets of SSS SP, is not subject to a set-off, and is payable forthwith to the JOLs.

21. They also argue that the JOLs’ remuneration assessed by the Court to be payable by and out of any other segregated portfolio is likewise not subject to the *Cherry v Boulton* set-off.

22. The Shareholders costs submissions of 8 December 2022 (the “Costs Submissions”),¹ made clear they were concerned with a set off in relation to the Shareholders’ “*entitlement to the costs of their successful application[s] to be set off against any liabilities owed to the JOLs*”.

23. The former deals with the costs award in favour of the Shareholders, whereas the latter deals with the JOLs’ entitlement to remuneration (as the JOLs have no entitlement to costs from either SSS SP or the Shareholders).

¹ §41.

24. The Judgment followed that line of reasoning in order to achieve a just outcome², i.e. the JOLs' remuneration and expenses assessed against SSS SP in the amount of \$101,350.39 should be set off against the costs awards in favour of the shareholders of SSS SP.
25. There is a distinction to be drawn between the Shareholders and SSS SP (as a segregated portfolio of the Company) and the Company itself which is insolvent and unlikely to be able to satisfy a costs order against it.
26. The Judgment provides for a fair outcome in that "*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.*"
27. The Court accepts the Shareholders case that the Rule in *Cherry v Boulton* (the "Rule") is a rule of equity which is concerned with the fairness of allowing a party to participate in a fund. As Derham states³, it has been "*expressly distinguished from the right of set-off*"; "*the courts have emphasized that Cherry v Boulton has a wider application than set-off, and that it rests upon quite different principles*" and "*[i]t is an illustration of a more fundamental principle of equity, that he who seeks equity must do equity*".
28. SSS SP is not a legal person and therefore no insolvency set-off could arise as between it and the JOLs or the Company. However, in accordance with the Rule, the Court accepts the Shareholders case that the JOLs should be prevented from accessing the fund until the liabilities which they incurred in "*the interests of the SPC and/or other stakeholders in the liquidation*" have been set off.
29. The Court has decided that the costs of the AJOL Summons and the Amended Remuneration Summons are payable by the JOLs. To accept the JOLs' submissions would result in a perverse result and unfairness. Not only may any costs order in favour of the Shareholders never be satisfied, but the Shareholders would not receive credit for having successfully challenged the JOLs on a number of key issues.
30. In all the circumstances the Court will make an Order in the form substantially proposed by the Shareholders. There should be liberty to apply generally.
31. This will make clear that the Shareholders' entitlement to costs takes priority over the JOLs' entitlement to remuneration in respect of the Company's liquidation (as a whole).

² §§31-33.

³ Derham, *The Law of Set Off*, 4th Ed. at 14.01 and 14.02.

32. It will also make clear that the set-off as set out in §§ 31 to 33 of the Judgment of 10 December 2022 applies as between: the Company and its liability in respect of costs and the JOLs and their entitlement to remuneration on the one hand; and the Shareholders and their entitlement costs and SSS SP and its liability in respect of the JOLs' remuneration, on the other.

Interim order

33. The Court has considered its discretion to make an interim payment on the basis of the principles laid out in *Scully (CICA)*⁴. It has decided that an interim order for the Shareholders costs will be made in accordance with GCR O.62, r.4.
34. The Shareholders costs in respect of the AJOL Summons are said to be US\$116,787.50 and in respect of the Amended Remuneration Summons are said to be US\$203,906.25.
35. The Shareholders will be awarded an interim costs order to the value of US\$200,000, consisting of US\$50,000 in respect of costs in relation to the AJOL Summons, and US\$150,000 in respect of costs in relation to the Amended Remuneration Summons.
36. This seems to the Court to be a reasonable and fair amount. US\$50,000 represents less than 50% of the costs claimed of the AJOL Summons which may be awarded on taxation on the standard basis (if not agreed), and US\$150,000 represents just below 75% of the costs claimed of the Amended Remuneration Summons which may be recovered in a taxation on the indemnity basis.

Bottini SP

37. The Court has considered whether the Order should include an assessment of the JOLs' remuneration and expenses in respect of the segregated portfolio, Bottini SP. The JOLs' request that the remuneration and expenses in respect of and allocated to Bottini SP for the time period of 26 February 2021 to 15 February 2022 are assessed and approved in the amount of \$137,246.78 and are to be payable forthwith out of the segregated assets of Bottini SP.
38. The Court notes that Campbells have ceased to act for the shareholder of Bottini SP, ABM Wappingers Inc, who are in the process of instructing another law firm.
39. For the time being the Court makes an order in respect of matters which are solely between the Shareholders, SSS SP, the Company and the JOLs which have provided written submissions. Any order in respect of Bottini SP will be dealt with separately.

⁴ *Scully Royalty v Raiffeisen Bank CICA* (Civil) Appeal 21 of 2020 (Unreported, 8 April 2022).

40. The fairest course is for Bottini SP to have 21 days from the date of this ruling to respond to §§11-15 of the JOLs' written submissions of 3 March 2023.



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