IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 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
Appearances:	
	Mr Paul Kennedy and Ms Yuan Wen of Campbells LLP Cayman for Star Boxing Inc ("the Appellant")
	Mr Adam Crane, Ms Nicosia Lawson, and Ms Nia Statham of Baker and Partners (Cayman) Limited for the Official Liquidator
Heard:	Determination on the papers and written submissions
Date of decision:	20 August 2024
Draft Ruling circulated:	20 August 2024
Ruling delivered:	2 September 2024

Liquidator valuing contingent claims-appeal of proof of debt determination-burden and standard of proof-CWR Order 16-reserving in full as an estimate-protecting rights of creditors-contrasting approach in England and Wales-appointing independent assessor.

JUDGMENT

1. The Appellant (Star Boxing) appeals against the 'partial admission and partial rejection' of its proof of debt in the liquidation of Goldenstar Holdings Company SP (Goldenstar) a segregated portfolio of Performance Insurance Company SPC (in official liquidation) (the Company).

2. The Appellant applies for an order that the Official Liquidator's (OL) determination be set aside and that its proof of debt be admitted in full. It also applies for its costs of the appeal as an expense of the liquidation.

3. The OL says that the Appellant has not proven on the balance of probabilities, as it must, that the proof should be admitted as a real debt[1].

4. The OL also argues that it is entitled to proceed to a distribution having estimated the value of the Appellant's claim in accordance with the Companies Winding Up Rules (CWR).

5. The claim arises from a boxing match in which a contestant alleges he sustained a serious traumatic brain injury (the Judah proceedings). The Appellant says it has provided such information as it can about the claim.

6. The claim, begun in the New York Courts, has been stayed as a result of this liquidation and the Chapter 15 recognition proceedings. It is therefore at an early stage. However, even at this stage the Appellant has a defence costs budget of over US$80,000[2] to defend the claim.

7. An assessment of the Appellant's liability, which it is accepted by the OL is covered by Goldenstar as insurer, both as to damages for the injuries sustained and the costs of defending the claim, is therefore contingent. No legal liability has yet been established and the costs of defence are as yet minimal.

8. The OL, at paragraph 41 of his evidence[3], states that he adjudicated the Appellant's proof of debt in the sum of US$15,800 upon advice from Chartwell Law, Goldenstar SP's former insurance agent, the contents of which advice the OL claims is privileged.

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[1] *McCarthy v Tann [2015] EWHC 2049 (Ch).*
[2] DeGuardia 1 §11
[3] Krys -10

9. At paragraph 42, the OL also says, "*based on the supporting documentation provided by Star Boxing, I did not perceive there to be a viable claim against Star Boxing, and therefore determined that the $15,000 was an adequate amount to resolve the claim between Star Boxing and Mr Judah".* The US$800 was in respect of legal fees invoiced to date.

Determination

10. The appeal to this court is governed by CWR O.16, r.18 (5):

> *"An appeal under this Rule shall be treated as a de novo adjudication of the creditor's proof and the creditor may rely upon additional evidence in support of the creditor's claim, notwithstanding that the creditor failed to make such evidence available to the official liquidator".*

Has the appellant met the burden and standard of proof?

11. Having reviewed the evidence, the court is of the view that there is sufficient evidence supporting the existence of the debt under CWR O.16, r 6. The Appellant has met the burden and standard of proof on liability and has provided sufficient information to establish a contingent claim, which is yet to be quantified.

12. In all the circumstances, with regard to the mandatory stay of the litigation in New York, it is unsurprising that the Appellant has been unable to provide further information as to the likely amount of the claim.

13. The Appellant says the OL failed to follow the correct procedure in the CWR[4] as to his reasons for rejecting the whole or part of the claim and the creditor's right to apply to the court for the decision to be reversed or varied. The OL simply stated:

> *"TAKE NOTICE that the Official Liquidator adjudicated upon your proof of debt dated 3 February 2022 and in respect of the Zabdiel Judah matter (Claim 1) is admitting such claim for US$15,800 being US$15,000 for indemnity costs and US$800 for defence costs".*

14. The court agrees with the OL that this is a matter which may be cured and he has now provided the explanation for his determination in Krys-10. However, this reveals an erroneous approach.

[4] CWR O.16, r.16

Was the OL entitled to estimate the claim as he did?

15. CWR O.16, r.16 provides as follows:

> *'Contingent claims*
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> *16. (1) The official liquidator shall estimate the value of any debt which, by reason of its being subject to any contingency or for any other reason, does not bear a certain value.*
>
> *(2) The official liquidator may revise any estimate previously made, if the official liquidator thinks fit by reference to any change of circumstances or to information becoming available to the official liquidator.*
> *(3) Where the official liquidator has put an estimate upon a contingent claim or a debt the amount of which is subject to a contingency, the official liquidator shall notify the creditor of this fact in CWR Form No 29, stating —*
> *(a) the basis upon which this estimate has been made;*
> *(b) the fact that the creditor may submit a varied proof of debt, having regard to changed circumstances;*
> *(c) the fact that the official liquidator may vary the official liquidator's estimate, having regard to changed circumstances; and*
> *(d) the official liquidator's agreement to extend generally the creditor's time for applying to the Court pursuant to Rule 18.'*

16. The Rule refers, logically in the context of contingent claims, to estimates of a debt of uncertain value which may be subject to change.

17. In the court's view the OL was wrong to deal with the contingent claim in this case in the way that he did, treating it as a fixed amount to satisfy the Appellant's liability which would then allow him to distribute to shareholders. He made no reference in his notification to the matters in CWR Form No 29 as set out at CWR O.16, r.16 (3).

18. In addition, he was wrong to set a figure which took no account of future costs of defence and the court is not persuaded that it was just or reasonable to ascribe a value of US$15,000 for the nature

of the injury sustained in the absence of medical records and further developments in the litigation. No regard seems to have been had to the potential change in circumstances identified in the CWR.

19. It would be manifestly unfair to the Appellant if the OL proceeds to apply to dissolve the Company and leaves the Appellant with only US$15,000 in respect of a serious personal injury claim in the New York courts and a relatively small sum for costs incurred to date.

20. Moreover, notwithstanding the OL's submissions to the contrary to justify his approach, *Re Sphinx [2010] (1) CILR 234 (Smellie CJ)* is still good authority for the proposition that in Cayman law, because of the inherent uncertainties in predicting the ultimate value of contingent claims, the court needs to be highly sensitive to the risk of irremediable prejudice to claimants who are to be viewed as ranking in priority to others, such as shareholders or investors in the company[5].

21. In *Sphinx* Smellie CJ indicated that the court should set a reserve which satisfied it to a high degree of assurance, not just on a balance of probabilities, that would be sufficient to satisfy the maximum sum that might reasonably incurred by the claimants. Having reviewed the relevant authorities, including the English authorities, the learned CJ said:

> *'The principle that full provision must be made for the contingent liabilities of companies in liquidation is well established also in the local case law (see In re Transnational Ins. Co. Ltd. and In re Bristol Fund Ltd.)"*

22. The court confirms that a Cayman Islands liquidator is not entitled to fix the contingent property rights of creditors at less than a maximum sum that might reasonably be incurred for the sake of expediting the process of liquidation.

23. The approach to this issue in England and Wales has taken a different course[6]. The Appellant says this is because liquidators have been vested with the power to disclaim onerous property in the

[5] Ibid §34

[6] *McPherson & Keay, The Law of Company Liquidation, 5th ed, Sweet & Maxwell (2021, London): "At one time it was regarded as impossible to estimate the value of such claims for the purpose of proof in winding up, and the practice in the case of solvent companies was to require the liquidator, before making any distribution to the members to set aside, out of the assets, a fund capable of providing for liabilities which might arise in the future. The cases in which it was directed that this be done were, however, all decided before the liquidator was invested with a power to disclaim, and the practice of setting aside a fund will not happen now as either the liquidator or the court must value the claim".*

UK[7], unlike in the Cayman Islands[8]. As a result, allowance seems to have been given to Liquidators to proceed with distributions without recourse from creditors even where the rights of claimants with contingent liabilities which were not fully provided for were compromised[9].

24. Apart from the power to disclaim onerous property, the Appellant also points to Rule 14.14 of the UK Insolvency Rules 2016 which provides in sub-paragraph (4):

> *"Where the value of a debt is estimated under this rule or by the court under section 168(3) or (5), the amount provable in the case of that debt is that of the estimate for the time being."*

25. There is no equivalent deeming provision under the CWR, which the Appellant says supports the proposition that the position remains unchanged in the Cayman Islands.

26. It is not necessary for this court to reach a view on the reasons for the differences in the way the jurisprudence has developed in England and Wales.

27. The court is satisfied that the legal position in the Cayman Islands remains as set out in *Sphinx*, which the court is not persuaded is plainly wrong by reference to the subsequent English authorities.

28. The court confirms that the right approach in this case is that the OL is to estimate a figure for a contingent liability on a full indemnity basis for the purposes of setting a reserve.

Timing

29. The court notes that the OL says that it *"is important for the Court to understand that the Judah Claim is the last proof of debt to be considered and adjudicated on, after which I can proceed with steps to close Goldenstar SP… closure of it will bring the liquidation proceedings one step closer to a conclusion."*

30. However, balancing the desirability of proceeding to a conclusion in the liquidation against the prejudice likely to be suffered by the Appellant as a result of the OL's approach leads the court to the clear conclusion that the appeal must be allowed.

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[7] See s.178 UK Insolvency Act 1986
[8] *Lung Ming Mining [2020 (2) CILR 632] § 82*
[9] *Re Danka Business Systems Plc (in Liquidation) [2013] EWCA Civ 92*

31. The proof of debt should be admitted and the OL should estimate and reserve fully against it.

32. As a practical way forward, a mechanism needs to be found to provide the setting of a monetary reserve which properly reflects the contingencies in the claim and provide for them in light of the OL's stated desire to proceed to a distribution.

33. Given the unfortunately litigious history of this liquidation, an independent valuation is appropriate. The parties are however reminded (again) of the Overriding Objective in seeking to agree an appropriate reserve which would save further time and expense.

34. The court will direct that Goldenstar appoints a suitably qualified firm to be an independent assessor in the US to recommend to the OL and the court an appropriate reserve to reflect the full potential liability arising from the Judah Proceedings. The firm is to engage with the parties (and a suitably qualified independent medical expert) in order to compile its recommendation.

35. The firm's fees are to be paid by Goldenstar. The instructions to the firm are to be in a form agreed by the OL and Star Boxing.

36. The Court is of the provisional view that the Appellant is to have its costs of this appeal out of the assets of Goldenstar as an expense of the liquidation. If the OL objects, he may file written submissions within 14 days of no more than 5 pages in length and the court will finally determine the costs.

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