



IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 264 OF 2020 (ASCJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF PREMIER ASSURANCE GROUP SPC LTD. (IN OFFICIAL LIQUIDATION)

Before: The Hon. Chief Justice Smellie QC

Heard: On the Papers

Representations: Rupert Bell, Chris Keefe, Daisy Boulter and Will Waldron of Walkers for the JOLs (Jeffrey Stower and Jason Robinson of KPMG)

Draft reasons Circulated: 31 August 2021

Reasons Delivered: 10 September 2021

HEADNOTE

Sanction application – Section 110(2)(b) of the Companies Act (2021 Revision) – proof of debt – alternative scheme for proving in the liquidation

REASONS FOR DECISION

Introduction

1. These are my reasons for granting the application dated 16 August 2021 (the "**Application**") made by Jeffrey Stower and Jason Robinson of KPMG, the joint official liquidators ("**JOLs**") of Premier Assurance Group SPC Ltd. (in Official Liquidation) (the "**Company**"). The Application sought the sanction of the Court of a proposed proving process to be adopted in respect of those participants who hold or have held insurance policies (the "**Participants**") referable to the Premier Assurance Segregated Portfolio ("**PASP**"), one of the segregated portfolios of the Company, pursuant to Section 110(2)(a) of the Companies Act (2021 Revision) (the "**Companies Act**").
2. The Application was supported by the Fourth Affidavit of Mr Stower sworn on 13 August 2021 ("**Stower 4**"). The Application also had the unanimous support of the liquidation committee formed in respect of PASP.



3. For the reasons set out below, I was satisfied that the JOLs' proposal in respect of the proving process for the Participants would be in the best interest of the creditors referable to PASP as a whole.

Relevant Factual Background

4. The Company is a segregated portfolio company ("**SPC**") which has two segregated portfolios, PASP and Global Assurance Segregated Portfolio ("**GASP**"). The Application relates solely to PASP.
5. Life insurance products were offered through PASP globally (with the exception of the United States) and sold to markets in the Latin American, Caribbean (except the Cayman Islands), European and Asian regions. A branch in Malaysia was operated as part of the business of PASP - Premier Assurance Group SPC Ltd., Labuan Branch (the "**Labuan Branch**").
6. At the commencement of the winding up, there were a total of 11,160 Participants with insurance policies referable to PASP (including those Participants with policies through the Labuan Branch). Those Participants included:
 - (a) 10,485 Participants with insurance policies governed by the law of the Cayman Islands (the "**PASP Participants**"); and
 - (b) 675 Participants with insurance policies governed by the law of Malaysia (the "**Labuan Participants**").
7. Information concerning the status of the insurance policies issued to Participants derives from the real-time databases of financial information of PASP known as Seriatim Valuation Reports ("**SVRs**") which support the Company's accounting software.
8. The SVRs list the life insurance policies referable to PASP from inception to date. They also record the personal details of the Participants, the type of insurance policies issued to the Participants (including their status) and the account value of each policy (including, *inter alia*, surrender charges, premiums paid, administration charges and fees incurred under the terms of the respective policies). An SVR can be produced in respect of the Participants at any particular point in time.
9. The financial information in the SVRs was used to determine actuarial reserve referable to PASP and to compile monthly management accounts referable to PASP. In addition, the financial information accessible by Participants in respect of their policies referable to PASP and their account values derived from the financial information recorded in the SVRs.



10. Accordingly, the JOLs are able to determine the account values of any Participant at any particular point in time based upon the financial information and data recorded in the SVRs. This strict determination of account values is essential to the proper administration and resolution of claims referable to any particular portfolio of a segregated portfolio company, in keeping with sections 216 and 217 of the Companies Act, and as was recently recognized by this court in *Re Skye Assets Fund SPC (in voluntary liquidation)* FSD 93 of 2021 (ASCJ), judgment delivered 30 June 2021; at [6] and [7].
11. Up until 30 April 2021,¹ the SVR financial information was provided to Participants through an online portal (the "**Portal**"). The Portal contained a variety of financial information, including account values, cash surrender values, premiums paid, administration charges and returns on investment. The information on the Portal reflected the balance on a Participant's account at any particular time. Participants were also able to download copies of relevant documents, such as account statements at month end.
12. The JOLs are satisfied as to the accuracy of the SVRs as compared to the information available to Participants via the Portal, having performed a comparison of the information contained in the statements sent to Participants, to the SVRs, noting no exceptions.

The JOL's Proposal in respect of proof of debts

13. In the event that the JOLs are required to adjudicate each of the proof of claims filed by over 11,000 Participants, the JOLs submit that the cost to the Company referable to PASP is likely to be significant and cause delay. As explained in Stower 4, if the JOLs are required to separately consider and adjudicate each proof of debt filed by such a substantial number of Participants, this is likely to substantially increase the time it takes to adjudicate claims and, in turn, the costs of administering the estate.
14. Given that the SVRs contain a real-time database of the financial information of PASP (and, in particular, the account values of the policies of the Participants), the JOLs proposed a method to stream-line the process of proving and adjudicating claims in respect of the Participants in reliance on the information contained in the SVRs. In summary, the JOLs sought approval for the following:
 - (a) Firstly, for the JOLs to admit to proof the claims of the Participants in respect of the amounts recorded as due to them in the SVRs without requiring them to lodge proofs of debt. Effectively, this dispenses with the requirement that over 11,000 Participants submit a

¹ The JOLs shut down the Portal on 30 April 2021 for the purpose of reducing the Company's expenses.



separate proof of debt (together with supporting documentation) for separate adjudication by the JOLs.

- (b) Secondly, where the JOLs have admitted a Participant to proof without requiring him to submit a proof of debt, for the JOLs to send a Notice of Admission in the form (or substantially the same form) appended to the draft Order (the "**Draft Notice**") informing the Participant of this fact. This is intended to operate in a similar manner to the process applied in respect of depositors of licensed banks pursuant to O.16, r.7 of the Companies Winding Up Rules, 2018 ("**CWR**").
 - (c) Finally, in the event that a Participant disputes the amount admitted to proof, that such Participant may within 21 days of such notice submit a proof of debt form in the usual way pursuant to the CWR with all of the consequential rights of appeal. This is intended to alleviate any concerns held by Participants who have the option to submit their own proof of debt if they consider this necessary.
15. Broadly speaking, the JOLs estimated that the above method would achieve a cost saving to the PASP insolvent estate in the region of US\$2.6 million and enable the JOLs to complete the adjudication process of the claims of the Participants within a much shorter timescale.

Jurisdiction to sanction an alternative regime for the proving of debts

16. Pursuant to Section 110(2)(a) of the Companies Act, liquidators may, with the sanction of the Court, exercise any of the powers specified in Part I of Schedule 3, including "*Power to deal with all questions in any way relating to or affecting the assets or the winding up of the company...*" (paragraph 7). As explained below, this provision empowers the Court to sanction (among other matters) an alternative format for proof of debts or to dispense with proof of debts in their entirety.
17. In respect of proof of debts relating to insolvent companies, O.16, r.1(2) of the CWR provides that a person claiming to be a creditor of such a company and wishing to recover his debt must (subject to rule 7 relating to licensed banks) submit his claim in writing to the official liquidator.
18. Pursuant to O.16, r.2(1) and (2) of the CWR, the JOLs may prescribe their own form of proofs of debt and may prescribe different forms for different classes of creditor. O.16, r.2(1) and (2) of the CWR provide that:

"(1) A proof of debt shall be in CWR Form No 24 or such other form or forms as the official liquidator may prescribe having regard to the nature of the claims against the company.



(2) *The official liquidator may prescribe different forms of proof of debt for use by different classes of creditor" (emphasis added).*

19. In *Re Centaur Litigation SPC and its segregated portfolios* (unreported, Grand Court of the Cayman Islands, Mangatal J, 28 November 2017), Mangatal J sanctioned an alternative form of proofs of debt prescribed by the liquidators in respect of creditors and investors.

(a) Firstly, in respect of creditor claims, the liquidators proposed "*the use of an online portal for completion and submission of proof of debts which departs from the traditional approach under Cayman Islands Law*" (at [84]). It was intended that the online portal would "*require (or auto-complete) the statutorily prescribed creditor details set out in CWR O.16, r.2(3) and (4)*" (at [84(b)]). In sanctioning this form of proof of debts, Mangatal J held at [166] that this seemed to be "*an appropriate, efficient and cost-effective way of managing creditor claims*".

(b) Secondly, in respect of investor claims, the liquidators proposed to "*adopt a process akin to a 'proof of debt' "* in which they provided investors "*with a calculation of their interests having applied the [distribution²] model rather than impose on them the requirement to apply the model themselves*" (at [86]). By doing this, the liquidators contended that the investors could "*check their calculations and methodology and simply agree or disagree*" (at [86]). At [166], Mangatal J approved the liquidators' proposal in respect of investor claims "*given the complexities of the Distribution Model*".

20. The JOLs submitted that (as in *Centaur*) the Draft Notices constitute alternative forms of proofs of debt as prescribed by the JOLs. In accordance with O.16, r.2(3) of the CWR, it is intended that the Draft Notices contain the information required to be stated in a creditor's proof of debt (as in the case of *Centaur*), namely:

- (a) the creditor's name and address;
- (b) the total amount of his or her claim as at the date on which the Company went into liquidation;
- (c) whether or not the claim includes interest and, if so, the basis upon which the creditor claims to be entitled to interest; and
- (d) particulars of how and when the debt was incurred by the Company.³

² This was a distribution model that the JOLs formulated to allocate and distribute the assets of the three entities (see [3(a)]).

³ O.16, r.2(3)(e) also requires that the proof of debt states "*particulars of the security held by the creditor, the value which he puts on the security and the basis of his valuation*", which is inapplicable in respect of the Participants.



21. It was submitted on behalf of the JOLs that the Draft Notices effectively constitute pre-completed proofs of debt based on the pre-existing financial information contained in the SVRs (and, in turn the Portal which contained financial information accessible to Participants). This appears to share some similarities to the method proposed in *Centaur* given that (at least in respect of some of the creditors) the online portal was stated to "*auto-complete*" the statutorily prescribed creditor details.
22. Given that the JOLs seek to admit the sums specified in the Draft Notices, the requirement in O.16, r.2(4) of the CWR that copies of "*documents evidencing the existence and amount of the debt*" are annexed to the proof of debt is effectively rendered redundant. As explained above, the JOLs are satisfied as to the accuracy of the SVRs of PASP as compared to the information available to Participants via the Portal. It is only in circumstances where a Participant disputes the value of the sums to be admitted in a Draft Notice and wishes to submit a separate proof of debt that such Participant will be required to provide the JOLs with copies of documents evidencing the existence and amount of the debt which the Participant considers should have been admitted to proof.
23. I am satisfied that the proving process proposed by the JOLs will constitute a valid, cost-efficient and effective alternative format for proof of debts.
24. As an alternative, to the extent that the JOLs' proposal for the proving of debts constitutes an application for *sanction* for the dispensation of formal proofs of debt, the JOLs submitted that such sanction also falls within the Court's power to do so pursuant paragraph 7 of Part I of Schedule 3 of the Companies Act. Whilst there is no express power in the CWR to dispense with formal proofs in insolvent liquidations, the JOLs submitted that Kawaley J made it clear in *Re Herald Fund SPC (in Official Liquidation)* [2018(2) CILR 162] that such power fell within the ambit of the Court's jurisdiction in respect of both solvent and insolvent liquidations. In that case, Kawaley J stated at [24]:

"24. As the company is now being wound up on a solvent basis, there is no mandatory general or standard requirement under the CWR for the liquidators to require creditors to formally prove their debts. However in my judgment even in the absence of an express power in the CWR to dispense with formal proofs in insolvent liquidations, the court could sanction such a decision by a liquidator under para. 6 or more likely para. 7 of Part I of the Third Schedule to the Companies Law..." (emphasis added).

25. *Herald Fund* concerned a company that was to be treated as solvent for the purposes of s.110(4) of the Companies Act. In that case, the Court was asked to determine whether former shareholders who had redeemed their shares but not received the redemption moneys prior to the company's liquidation were entitled to statutory interest on their claims under s.149(2) of the Companies Act (2018 Revision). In doing so, the Court addressed the following two main issues:



- (a) First, whether or not as a matter of construction of s.149 of the Companies Act, deferred creditor claims asserted by past or present members qualify for statutory interest as a matter of general legal principle. In respect of this issue, the Court held that redemption creditors' claims were potentially eligible for statutory interest under s.149 of the Companies Act, assuming they met the requirement in sub-section (1) that their claims should be "*proved in the winding up*" (see [78]).
- (b) Second, assuming deferred claims do potentially qualify for statutory interest, whether s.149 of the Companies Act only envisages that such claims should actually qualify if formal proofs of debt have been filed (see [54]). This issue arose as it had been argued on behalf of the liquidators that s.149 of the Companies Act only created an entitlement to statutory interest in respect of debts which had been formally proved. In *Herald Fund*, formal proofs had been dispensed with in the case of the redemption creditors. The Court held that the redemption creditors' admitted claims had been proved for the purposes of s.149 of the Companies Act (notwithstanding that formal proofs had been dispensed with) (see [78]).

26. In the course of determining the second issue, Kawaley J conducted an analysis of the practical function of the proof of debt process at [81]-[86]. At [81], the learned judge accepted the submission that "*insolvency law has always adopted a practical approach*" and that it "*made no sense to construe s.149 of the Companies Law as requiring formal proof of undisputed debts in order to qualify for statutory interest, where such proof would serve no useful commercial purpose*". Kawaley J continued at [82] as follows:

"82. As a Cayman Islands insolvency law initiate, I draw succour from the fact that the local insolvency code is at its heart derived from now ancient English statutory insolvency law principles, principles which are recognized across the common law world. A fundamental goal of the statutory code, as noted above, is to minimize the costs of the liquidation process and maximize the returns to creditors and (if possible) shareholders as well. There is in substance no difference between an "admitted" debt and a "proved" debt..." (emphasis added).

27. After referring to authorities suggesting that the terms "*admitted*" and "*proved*" were synonymous in the context of English and Cayman Islands insolvency provisions conferring a right to statutory interest on "*proved debts*", Kawaley J continued by considering what proven or admitted debt meant in a wider context.

"84. A debt may be proved or admitted (or indeed established) in a variety of ways, only one of which is through a formal proof of debt. Another way is through litigation resulting in a judgment or a compromise, if the litigation stay is lifted (typically likely only in relation to



proprietary claims). Yet another way is where it is clear on the face of the company's own records that valid claims exist which cannot sensibly be disputed and which accordingly require no formal proof. In a solvent liquidation, the CWR expressly contemplate that a liquidator has the discretion as to whether or not to require formal proofs (O.16, r.1(1) of the CWR). That rule, somewhat narrowly expressed, perhaps primarily contemplates a standard solvent voluntary liquidation because it speaks of the payment of debts in the "ordinary course." The present liquidation was clearly not (to that extent) entirely an O.16, r.1(1) CWR case.

85. The Companies Law, which the CWR only purport to give effect to, not to supersede, is a flexible and practical beast. Even in an insolvent liquidation, or in a solvent liquidation where debts are not paid in the ordinary course of business, it must be possible for this court to sanction the decision of liquidators to dispense with proofs of debt on the grounds of economy. As noted above, liquidators are empowered by Schedule 3 to the Companies Law "to deal with all questions in any way relating to or affecting the assets or the winding up of the company," with this court's sanction. Pursuant to this statutory power the liquidators in the present case dispensed with the requirement for proofs of debt to be filed. This was done, to my mind (Jones, J. having granted the dispensation), on the express basis that the debts had been sufficiently proved so that formal proofs were not required. (emphasis added).

28. Equally, in the circumstances presented here, I am satisfied that their decision to dispense with the formal proofs of debt is one of the vested powers of the liquidators and that it is within the jurisdiction of the Court to grant sanction to their exercise of this power.

Sanction

29. The legal principles applying to the exercise of sanction of a liquidators' powers were summarised in *Re DD Growth Premium 2X Fund* [2013(2) CILR 361] at [30] as follows:
- (a) The decision whether to sanction the exercise of a power falling within Part I of the Third Schedule to the Law is a decision for the Court (see *Re Greenhaven Motors Ltd.* [1999] 1 BCLC at 642).
 - (b) In exercising its discretion as to sanction, the Court must consider all the relevant evidence (see *In re Universal & Surety Co.Ltd.* [1992–93 CILR 149] at 152).
 - (c) The Court must consider whether the proposed transaction is in the commercial best interests of the company, reflected *prima facie* by the commercial judgment of the liquidator (see *Re Edennote Ltd.*(No. 2) [1997] 2 BCLC 89).



- (d) The Court should give the liquidators' views considerable weight unless the evidence reveals substantial reasons for not doing so (*Re Edenote Ltd.*(No. 2) [1997] 2 BCLC 89 at 92).
- (e) The liquidator is usually in the best position to take an informed and objective view (see *Re Greenhaven Motors Ltd.* [1999] 1 BCLC 635 at 643).
30. The principles on which the Court decides sanction applications were also considered in *Re Trident Microsystems (Far East) Ltd* [2012 (1) CILR 424] in which it was held at [18(c)] (citing *Re Universal Surety and Co Ltd*) that the decision whether to sanction the exercise of a power under Part 1 of Schedule 3 to the Companies Act was a decision for the Court, which must consider the correctness, or otherwise, of the liquidator's decision having regard to all the evidence, in particular:
- (a) the financial consequences of the decision for stakeholders;
- (b) the wishes of the stakeholders; and
- (c) whether the interests of stakeholders are best served by permitting the company to enter into the particular transaction.
31. In the case of *Re Saad Investments Company Ltd (in Official Liquidation)* (unreported, Grand Court of the Cayman Islands, Smellie CJ, 1 October 2019)⁴ I referred to the legal principles in *Re DD Growth Premium 2X Fund* and *Re Trident Microsystems (Far East) Ltd* set out above before concluding that the net effect of these decisions was as follows:
- "39. The net effect of these decisions, taken together as I accept they should be taken, is that the Court should ordinarily respect the commercial judgment of the liquidator and grant sanction, unless the course of action proposed by the liquidator is regarded by the Court as so unreasonable or untenable that no reasonable liquidator would take it or, in the more strident words of the English Court of Appeal in Re Edenote Ltd [1996] 2 BCLC 389 "so utterly unreasonable and absurd that no reasonable person would have done it" (emphasis added).*
32. Applying these principles to the Application, I accepted the JOLs' submissions that the proposal in respect of the proving process for Participants should be sanctioned for the following reasons:
- (a) The JOLs' view is that their proposal is the most cost-effective way to manage the adjudication of claims by Participants. The JOLs' proposal circumvents the requirement for

⁴ Recently applied in *Re Pacific Harbor Asia Fund I Ltd (in Official Liquidation)* (unreported, Grand Court of the Cayman Islands, 6 May 2020, McMillan J) at [39].



the JOLs to consider over 11,000 separate proofs of debt (together with supporting documentation) in respect of valid claims which cannot sensibly be disputed. It also minimises the risk of addressing significant queries by Participants in correspondence. As outlined above, the JOLs estimate that their revised proposal for proof of debts in respect of Participants could potentially reduce costs to the estate in the region of US\$2.6 million. In turn, this is likely to maximise the funds available to the creditors referable to PASP as a whole.

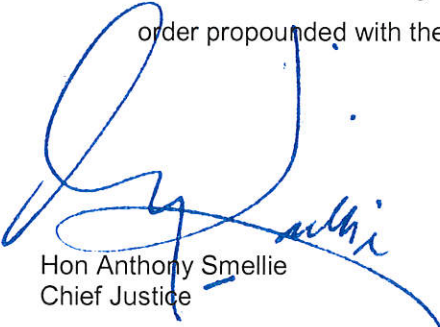
- (b) If the JOLs are required to consider around 11,160 separate proofs of debt in CWR Form No 24 by the each of the Participants (together with their supporting documentation), then this is likely to be a very time-consuming process. On the other hand, the Draft Notices provide a much more stream-lined adjudication process which ought to enable the JOLs to declare and pay an interim dividend within a much shorter period.
- (c) The JOLs are satisfied as to the accuracy of the SVRs as compared to the information available to Participants via the Portal, having performed a comparison of the information contained on the statements sent to Participants, to the SVRs, noting no exceptions. As such, the proposal by the JOLs is not merely pragmatic, but also applies similar safeguards to those imposed by O.16, r.7(2) of the CWR in respect of licenced banks in which the official liquidator may rely on periodic statements of account "*unless the official liquidator has reason to believe that the company's deposit taking records are unreliable*".
- (d) The JOLs' proposal is a reasonable approach to the adjudication of claims in circumstances where the significant majority of claims are likely to be below US\$20,000. The average amount of the claims by the PASP Participants and the Labuan Participants are around US\$24,160.27 and US\$9,937.15 respectively.
- (e) Given that many of the Participants speak only Spanish, may not have their records immediately to hand or may not understand the ordinary proof of debt process, the JOLs' proposal that they provide Participants with the calculation of their claims is also an equitable one. Where Participants are less sophisticated with claims that are modest in value, there is a risk that some Participants may otherwise undervalue their claims, submit a proof of debt in an incorrect form or, in the worst case, fail to submit a proof of debt.
- (f) There is little (if any) risk of the Participants being prejudiced by the JOLs' adjudication of their claims based upon the Company's records given that all Participants retain the right to submit a proof in the event that they disagree with the calculation of the value of their claim. Furthermore, all Participants remain able to check the value of their claims in the Draft Notice with reference to their own documentation and records. The final Order

provides for a procedure in which the Participants can effectively "agree or disagree" (as with the investors' claims in *Centaur*). In particular:

- (i) To the extent that any Participants disagree with the value admitted by the JOLs in the Draft Notice, they retain the ability within 21 days of the date of the Draft Notice to disagree with such figure and, if necessary, submit a proof of debt and further supporting documentation.
- (ii) In the event that any such proof of debt is rejected (in whole or in part) by the JOLs, the relevant Participant retains the right to appeal that decision to the Court within 21 days in the ordinary way.

Conclusion

33. Accordingly, for all the reasons set out above, I am satisfied that the JOLs' proposal in respect of the proof of debt process for Participants is in the best interests of the creditors referable to PASP as a whole. I therefore granted the application and made orders on the terms set out in the draft order propounded with the Application.



Hon Anthony Smellie
Chief Justice

10 September 2021