



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

CAUSE NO: FSD 309 OF 2023 (IKJ)

**IN THE MATTER OF THE COMPANIES ACT
AND IN THE MATTER OF HOLT FUND SPC
FOR AND ON BEHALF OF HOLT FUND INCOME SEGREGATED PORTFOLIO 02
FOR AND ON BEHALF OF HOLT TROPHY CRE SEGREGATED PORTOLIO 03**

IN COURT

Before: The Hon. Justice Kawaley

Appearances: Ms Jennifer Colegate, Ms Dawn Major and Ms Natalie Bell of Collas Crill,
on behalf of Holt Fund SPC (the “Petitioner”)

Heard: 22 November 2023

Date of decision: 19 December 2023

**Draft Reasons
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Petition to appoint restructuring officers in respect of two segregated portfolios-application of restructuring and winding-up regimes to segregated portfolio companies- Companies Act (2023 Revision) sections 91, 91A-91J, 92-93, 212-223

REASONS FOR DECISION

Background

1. This case appears to be the first occasion on which an application has been made to appoint restructuring officers in relation to some of the portfolios of a segregated portfolio company (“SPC”). The question which I raised at the beginning of the hearing and was not directly addressed by any authority was the following. Was it possible for an SPC to be wound-up based on the insolvency of one or more (but not all) of its segregated portfolios? My starting assumption was that the policy purpose of the SPC regime was to protect an SPC from being liable to be wound-up on insolvency grounds unless the company itself was insolvent having regard to its general assets and liabilities.
2. The Petitioner is an SPC. On 17 October 2023 the Petitioner presented a petition (the “Petition”) seeking the appointment of joint restructuring officers in relation to two segregated portfolios, Holt Fund Income Segregated Portfolio 02 (“SP02”) and Holt Trophy CRE Segregated Portfolio 03 (“SP03”) pursuant to section 91B of the Companies Act (2023 Revision) (the “Act”). The Petition was heard on 22 November 2023. I requested supplementary submissions to allay my initial concerns that the winding-up jurisdiction could not be invoked in relation to one or more of several segregated portfolios in circumstances where the SPC as a whole was not said to be insolvent. The restructuring officer regime only applies, as regards companies, to “*a company liable to be wound up*”. These concerns apart, the requirements for appointing restructuring officers were otherwise met.
3. The Petition was adjourned and judgment reserved. Supplementary submissions and evidence were filed on 6 December 2023. When I considered the Additional Skeleton Argument and further

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evidence about the Company's financial position, together with the authorities initially placed before the Court, it became quickly apparent that my initial concerns were misplaced. On 19 December 2023 I granted an Order appointing Mr David Griffin and Mr Iain Gow of FTI Consulting as "*Restructuring Officers of the Company for an on behalf of SP02 and SP03*". These are the reasons for that decision.

The relevant statutory provisions

Jurisdiction to appoint restructuring officers

4. I readily accepted Ms Colegate's submissions as to the relevant statutory jurisdictional test. Restructuring officers can be appointed in relation to, *inter alia*, any company which is liable to be wound-up. An SPC is a company which is liable to be wound-up.
5. Section 91B of the Act provides:

“(1) A company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company —

(a) is or is likely to become unable to pay its debts within the meaning of section 93; and

(b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Law, the law of a foreign country or by way of a consensual restructuring.”
6. Section 91A (a) provides that “*company*” means “*any company liable to be wound up under section 91*”. Section 91 confers jurisdiction on this Court to wind-up, *inter alia*, “*(b) a company incorporated and registered under this [Act]*”. Section 213 (1) of the Act provides that “*...any exempted company may apply to the Registrar to be registered as a segregated portfolio company*”.
7. Section 93 provides that “*a company shall be deemed to be unable to pay its debts if... (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.*”

Segregated portfolio companies and winding-up

8. It was uncontroversial that although an SPC was permitted to conduct business on behalf of segregated portfolios, the portfolios had no separate legal existence:

“Segregated portfolios

216. (1) A segregated portfolio company may create one or more segregated portfolios in order to segregate the assets and liabilities of the segregated portfolio company held within or on behalf of a segregated portfolio from the assets and liabilities of the segregated portfolio company held within or on behalf of any other segregated portfolio of the segregated portfolio company or the assets and liabilities of the segregated portfolio company which are not held within or on behalf of any segregated portfolio of the segregated portfolio company.

(2) A segregated portfolio company shall be a single legal entity and any segregated portfolio of or within a segregated portfolio company shall not constitute a legal entity separate from the segregated portfolio company.

(3) Each segregated portfolio shall be separately identified or designated and shall include in such identification or designation the words ‘Segregated Portfolio’ or ‘SP’ or ‘S.P.’.”

9. Under sections 219 of the Act, an SPC is required to designate assets as either “*general assets*” or “*segregated portfolio assets*”. Section 220 provides that segregated portfolio assets shall only be liable to meet liabilities to creditors of the relevant portfolio. Section 219 specifically provides:

“(6) 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.”

10. To my mind it was not obvious from these provisions, which clearly provide for an SPC to conduct business either in relation to segregated assets and liabilities separately from general assets and liabilities that the SPC itself could be viewed as unable to pay its debts if one or more of its segregated portfolios was insolvent. However, as Ms Colegate pointed out, there is no express modification of the standard insolvency test. How an SPC should be wound-up, once placed into liquidation, is modified by the following express terms:

“Winding-up of company

223. (1) 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.”

11. This confirms that an SPC may be wound-up and that, where this occurs, respect must be given by the liquidator to the statutory separation of assets and liabilities linked to segregated portfolios. The Act also provides for the appointment of receivers to wind-up segregated accounts with a view to closing down the business of an account and distributing its assets. The primary ground for such a receivership are defined in section 224 (1) as follows:

“(a) that the segregated portfolio assets attributable to a particular segregated portfolio of the company (when account is taken of the company’s general assets, unless there are no creditors in respect of that segregated portfolio entitled to have recourse to the

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company's general assets) are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio..."

12. Is the receivership regime the exclusive mechanism for winding-up the business of an insolvent segregated account? To my mind these provisions arguably supported the view that winding-up an SPC was a remedy reserved for circumstances where the company was insolvent having regard to its general business. Again, Ms Colegate pointed out in the course of argument that no express provision to this effect was contained in the statutory scheme.

Findings

13. The Petitioner's Additional Skeleton Argument directly addressed the specific jurisdictional issue I raised in the course of the hearing. In the course of argument, I acknowledged that my initial views of the Caymanian SPC regime may have been coloured by my previous experience of the corresponding Bermudian statutory framework. Ms Colegate distinguished the Segregated Accounts Companies Act 2000 (Bermuda) which expressly modifies the insolvency test applicable to segregated account companies for the purposes of petitions to wind-up in the following terms:

“Winding up of segregated accounts companies

(1) Subject to this section, a segregated accounts company shall be wound up in accordance with the provisions of this Act, the Companies Act 1981 or the Limited Liability Company Act 2016 (as the case may be) and any other Act or rules which apply to the winding up of a company, save that in the event of any conflict, the provisions of this Act shall prevail.

(1A) For the purposes of determining whether a segregated accounts company may be wound up on the ground of insolvency—

(a) the test of insolvency which applies under section 162 of the Companies Act 1981 or section 109 of the Limited Liability Company Act 2016 (as the case may be) and (in the case of an insurance company) section 33 of the Insurance Act 1978 shall apply; and

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(b) assets and liabilities linked to segregated accounts shall not be taken into account....”

14. This contrasting legislative approach reinforced the Petitioner’s counsel’s contention that in the absence of express statutory language in the Act modifying the insolvency test applicable to winding-up petitions in relation to SPCs, there were no grounds for inferring any such legislative intent.
15. As regards case law, reference was made to Sir John Chadwick P.’s observation that “*Plainly, the court does have jurisdiction to wind up a segregated portfolio company ‘as a whole’*”: *ABC Company (SPC)-v-J and Company Limited* [2012 (1) CILR 300] (at paragraph 38). This case concerned a shareholder petition on the just an equitable ground which explicitly relied on the status of the SPC as a whole. The Court of Appeal declined to express any view as to whether a single segregated portfolio could be wound-up otherwise than pursuant to the receivership regime.
16. More pertinently reliance was placed on the recent decision of Doyle J in *Re Coinful*, FSD 86/2023, Judgment dated 5 July 2023 (unreported) where an SPC was wound-up. This case had been referred to at the hearing and is distinguishable to the extent that the petitioner was a redemption creditor of the company’s sole segregated portfolio. No need to consider the distinction between the insolvency of the “*company as a whole*” and one its segregated portfolios directly arose. Nonetheless, I accept that this decision does provide a precedent for the proposition that insolvency as a ground for winding of an SPC may be established by reference to the assets and liabilities of a segregated account.
17. More pertinently still, reliance was placed on Parker J’s decision in *Performance Insurance Company SPC (in Official Liquidation)*, FSD 70/2021, Judgment dated 6 April 2022 (unreported). Although the relevant judgment concerned the appointment of an additional liquidator, the procedural history makes it clear that the company had been placed in liquidation under this Court’s supervision based on the insolvency of some (but not all) of its segregated accounts. It was submitted that this demonstrated that Parker J had no difficulty with the notion that:

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- (a) the insolvency of one or more of several segregated accounts could be attributed to an SPC for the purposes of exercising the Court's winding-up jurisdiction under the Act; and
- (b) that official liquidators could be appointed to deal with assets and liabilities of specific segregated accounts.
18. These were powerful submissions which I was bound to accept. These legal arguments were fortified by reference to supplementary evidence which suggested that the fundamental legal contention that the Petitioner as the sole entity with legal personality was liable for the debts of its segregated portfolios was consistent with commercial reality in the circumstances of this particular case.
19. I ultimately was satisfied, for the purposes of what was after all an unopposed application, that this Court has jurisdiction to wind-up an SPC on the insolvency ground in relation to one or more of its segregated portfolios. It followed that restructuring officers could be appointed in relation to some but not all of such a company's segregated portfolios without undermining the integrity of the statutory regime applicable to segregated portfolio companies. This conclusion illustrates the flexibility of the SPC regime compared with both 'traditional' companies and corresponding segregated portfolio regimes elsewhere.

Conclusion

20. For these reasons on 19 December 2023, I appointed JROs on the Petitioner's application in relation to SP02 and SP03.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT