

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2019/COM/bnk/00077

IN THE MATTER of The Companies Act, 1992 Ch 308

AND

IN THE MATTER of the PACIFICO GLOBAL ADVISORS LTD.

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Simone Morgan-Gomez with Philisea Bethel for the Official Liquidator
Gail Lockhart-Charles KC for the Liquidation Committee

In attendance: Mark Munnings and Tiphaney Russell, Joint Official Liquidators,
Luca Lanciano and Alexander Maillis

31 May 2023, 20 July 2023, 20 August 2023 and 19 September 2023

RULING

WINDER, CJ

This is the application for the sanction and directions as to the conduct of the litigation by the JOLs of the Pacifico Global (the Company).

[1.] The application is made by Summons of the JOLs, which were filed 3 March 2023. The Summons is supported by the 6th Affidavit of Mark Munnings.

[2.] The Summons seeks the sanction of the court as follows:

1. An Order sanctioning the JOLs resolving the shortfall of USD92,552 (approximate figure due to daily currency fluctuations) as of 30th April 2022 in PGA's cash trust accounts from a portion of the monies received from the ALM Sub Fund ("ALM") when ALM paid off its negative cash balance.
2. An Order sanctioning the JOLs to pay to trust clients ("Clients") their trust assets held in PGA's name on behalf of the said Clients ("Trust Assets") in USD, in instances where PGA does not have sufficient cash in the currency owed to the Clients, using the conversion rate as the date of the order granting this application. The Trust Assets will be paid after applying all Court allowed deductions.
3. An Order sanctioning the payments by Clients of liquidation costs incurred in maintaining, transferring, selling, or eventually abandoning their portions of the Trust Assets ("Additional Costs") when such Clients require special attention to facilitate the transfer of their Trust Assets and/or have not submitted the documents ("Distribution Documents") mandated by paragraph 1 of the Order of this Honourable Court dated 07 October 2021 and filed herein 03 November 2021. The Additional Costs are not included in the first or second proposed indemnities referenced in paragraph 12 herein.
4. An Order that the JOLs may sell and/or transfer those Trust Assets for which Clients have not submitted any Distribution Documents on or before 7th March 2023. Further, an Order that in the event the JOLs are unable to sell and/or transfer those Trust Assets and it is deemed necessary to facilitate PGA's winding-up proceedings, then such Trust Assets will be transferred to an existing account held in PGA's name at a custodian/financial institution.
5. An Order that the JOLs may utilize Trust Assets valued at less than USD1,500, before or after the deduction of bank/closing/custody/safekeeping/maintenance charges ("Bank Charges"), to contribute to liquidation costs, as it is cost prohibitive to issue distributions to the Clients on whose behalf such Trust Assets are being held.
6. An Order sanctioning the percentage of costs incurred by the OL, to be paid from PGA's proprietary assets and the Trust Assets, The aforementioned costs include liquidation costs up to 15 June 2021, that were approved by this

Honourable Court in the 17 January 2022 Ruling in this action ("January 2022 Ruling"), and costs incurred for the periods of 15 June 2021 to 30 July 2022, prior to the OL demitting office, and 03 August 2021 to 14 October 2021, when the OL was assisting the JOLs, (constituting bills from the OLs, Intelisys Ltd., Quetelle Ferguson, and Callenders & Co.).

7. The JOLs are authorized to deduct third party charges (including but not limited to Bank Charges) and:
 - (a) fourteen percent (14%) of Trust Assets, except Global Opportunities EUR NX Sub Fund ("NX Sub Fund"), and twelve percent (12%) of the Trust Assets held on behalf of NX Sub Fund ("First Proposed Indemnity"), based on the information provided in Option 1 in the Sixth Affidavit of Mark Munnings; or
 - (b) fifteen and a half percent (15.50%) of Trust Assets, except NX Sub Fund, and thirteen and a half percent (13.50%) of the Trust Assets held on behalf of NX Sub Fund ("Second Proposed Indemnity"), based on the information provided in Option 2 in the Sixth Affidavit of Mark Munnings.

The Proposed Indemnity will be used to indemnify PGA for the costs directly attributable to the distribution of the Trust Assets and to contribute to the liquidation expenses which benefitted the Clients, which included NX Sub Fund.

[3.] The LC opposed the application but filed no evidence in support of their opposition. The grounds for the opposition is to be found at paragraphs 8 and 9 of their submissions

[8] It is respectfully submitted that, as we are dealing with trust assets, such assets ought not to be (or to have been) converted to USD. In the circumstances, it is respectfully submitted that the appropriate order would be for the Court to direct the JOLs to return the Client's assets in the currencies that they were held in at the commencement of the liquidation. It is further submitted that it would be appropriate for the Court in the exercise of its supervisory capacity to direct that the JOLs explain exactly what assets were converted from what currencies, and to the extent that it is determined that there is a loss due to the wrongful converting of trust assets, then the party responsible for wrongfully converting such assets be required to bear the costs of such loss.

[9] It is respectfully submitted that an order as set out in item three above is premature and that details of the costs referred to and the accounts affected should be produced before the JOLs are permitted to "*charge and recover payment from Clients*" of such costs. Further the LC requests that the JOLs provide the LC with the details of any accounts that have not submitted documents so that the LC may assist as best it can in obtaining documentation or seeking the agreement of the

JOLS or directions from the Court as to alternative documents that may be tendered prior to any abandonment/disclaiming of assets.

[4.] The LC's opposition, based primarily on the alleged negligence of the OL is untenable without evidence. The mere assertion that a loss occurred does not ipso facto lead to a finding of negligence. The posture of the LC appears to be that the OL must demonstrate that its actions are not negligent, a shifting of the burden of sorts in the nature of a *res ipsa loquitur*. Having considered the submission and the evidence as to the circumstances of the foreign currency dealings by the OL, I am not satisfied that there is any shifting of the burden or that the allegations of negligence have been proven.

[5.] The LC requests that the JOLs provide them with the details of any accounts that have not submitted documents so that the LC may assist as best it can in obtaining documentation or seeking the agreement of the JOLS or directions from the Court as to alternative documents that may be tendered prior to any abandonment/disclaiming of assets. During the course of the arguments I provided the environment for the LC and the JOLs to share information as to the difficult accounts for which members of the LC may assist in reconciling, in as much as could occur having regard to privacy rights. I am not minded to micromanage the work of the JOLs as suggested by the LC and drive up liquidation costs in circumstances where the LC itself had bemoaned the costs of the liquidation.

[6.] In the circumstances in an effort to bring this liquidation to a close, I sanction the application of the JOLs as follows:

- (1) An order sanctioning the JOLs resolving the shortfall of USD92,552 (approximate figure due to daily currency fluctuations) as of 30th April 2022) in PGA's cash trust accounts from a portion of the monies received from the ALM Sub Fund ("ALM") when ALM paid off its negative cash balance.
- (2) An order sanctioning the JOLs to pay to trust clients ("Clients") their trust assets held in PGA's name on behalf of the said Clients ("Trust Assets") in USD, in instances where PGA does not have sufficient cash in the currency owed to the Clients, using the conversion rate as the date of this order. The Trust Assets to be paid after applying all Court allowed deductions.
- (3) An Order sanctioning the payments by Clients of liquidation costs incurred in maintaining, transferring, selling, or eventually abandoning their portions of the Trust Assets ("Additional Costs") when such Clients require special attention to facilitate the transfer of their Trust Assets and/or have not submitted the documents ("Distribution Documents") mandated by paragraph 1 of the Order dated 7th October 2021.
- (4) The JOLs may sell and/or transfer those Trust Assets for which Clients have not submitted any Distribution Documents on or before 7th March 2023,

instructing the JOLs to transfer their securities from PGA's portfolio to a new service provider, in order to reduce and or avoid costs associated with maintaining the said Trust Assets. Should the Clients do not submit the complete set of Distribution Documents prior to the close of the liquidation, the sales proceeds less allowed deductions shall be transferred to the Treasurer in accordance with Order 23 rule 6 of the Company Liquidation Rules. In the event it is deemed necessary to facilitate PGA's winding-up proceedings, then such Trust Assets which are unable to be sold may be transferred to an existing account held in PGA's name at a custodian/financial institution.

- (5) An Order that the JOLs may utilize Trust Assets valued at less than USD1,500, before or after the deduction of bank/closing/custody/safekeeping/maintenance charges, to contribute to liquidation costs, as it is cost prohibitive to issue distributions to the Clients on whose behalf such Trust Assets are being held.
- (6) In my 17 January 2022 ruling I ordered that the OL may not recover anything, by way of expenses from the NX Sub Fund other than the transfer costs. It is therefore expressly ordered that the NX Sub Fund does not contribute to the payment of the OL's Bills as at 15 June 2021 and that the other clients pay the sum of \$132,246.30 of the OL Bills as set out in the Munnings Affidavit.
- (7) The JOLs are authorized to deduct third party charges (including but not limited to Bank Charges) and Nine percent (9%) of Trust Assets, except the NX Sub Fund by way of an indemnity. The indemnity will be used to indemnify PGA for the costs directly attributable to the distribution of the Trust Assets and to contribute to the liquidation expenses which benefitted the Clients.

Dated this 15th day of December 2023



Sir Ian Winder

Chief Justice