

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. Mr. Justice Ian R. Winder

Appearances: Simone Morgan-Gomez with Philisea Bethel for the Official Liquidator
Gail Lockhart-Charles QC with Lisa Esfakis for the Liquidation Committee
Gawaine Ward with Aramantha Hepburn for the Securities Commission
Krystal Rolle QC with Kendrea Demeritte for an interested party

RULING

WINDER J

These are the several applications of the Official Liquidator (OL), relative to costs and expenses arising from the liquidation. The three applications are brought by separate Summons, all dated 25 June 2021.

1. The three applications are the following:
 - (1) An application to pay out of the assets of PGA fees and disbursements as reflected in the statement of accounts of the OL and its agents and attorneys. ('the Fees Application')
 - (2) An application for the payment of 80% of the fees and disbursement of the OL and his agents ("the Payment Application").
 - (3) An application for the approval of the deduction from trust assets sums with respect to fees and expenses using an allocation formula advanced by the OL as follows:
 - (a) General Liquidation costs being allocated to the Trust Assets at 22% and a balance of 78% being allocated to the PGA propriety assets;
 - (b) Non Sub Fund (segregated accounts with Lyford Diversified Global Fund, SAC) liquidation costs being allocated to the Trust Assets in proportion to their holding value, and
 - (c) Global Opportunities EUR NX Sub Fund ("NX Sub Fund") liquidation costs being allocated to the NX Sub Fund Assets only.

Background

2. PGA is a Bahamian Company which was incorporated on 30 September 2011. PGA was registered and licensed by the Securities Commission of The Bahamas (SCB) from 2012 to 2014 to provide investment advisory services and discretionary investment management services to its clients. On 11 September 2015 the SCB issued to PGA a broker-dealer license and thereafter the principal activities offered to clients included,

the managing of securities, dealing as agent or principal, arranging deals in securities and advising on securities.

3. PGA, as investment manager and custodian on behalf of its clients, maintained bank accounts in PGA's name at various Custodian Banks ("Trust Accounts").

4. In 2015 PGA was introduced to a new trading platform by Deltec Bank & Trust Limited ("DBT") and Deltec Fund Services Limited which allowed PGA's clients to invest in various segregated accounts through the Lyford Fund, an open-ended investment fund incorporated in The Bahamas.

5. PGA was placed in voluntary liquidation on 2 October 2019. By Order of this Court dated 28 October 2019 the liquidation became supervised by the Court (with the commencement date of the liquidation set at 2 October 2019).

Fees Application

6. The OL has applied for the approval of the fees as indicated in the statements. The Liquidation Committee objects to the costs in a document titled "*points of dispute of the liquidation committee on the official liquidators' costs application*". They challenge the reasonableness of the fees incurred by the liquidator. They seem to suggest that the work of the liquidator ought to have been simply to return assets held in custody. They place primary emphasis on a 20 September 2019 letter of the former CEO of PGA written to the Securities Commission when seeking to wind up PGA. According to the CEO, the only remaining objective of PGA is to return assets held in custody to its clients.

7. Respectfully, the role of the OL could not be so limited to blindly following the directive of the PGA management which oversaw the demise of the company. The duties of the OL is set out in Section 205 of the Companies Act (as amended by the Companies Winding Up Amendment Act 2011). Section 205 provides:

205. Duties, functions and powers of official liquidators.

(1) The duties and functions of an official liquidator include-

- (a) collecting, realizing and distributing the assets of the company to its creditors and, if there is a surplus, to the persons entitled to such assets in accordance with this Act; and**
- (b) investigating and reporting to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up.**

(2) The liquidator shall, subject to this Act and the Rules, use his own discretion in undertaking his duties and a liquidator also has the other duties imposed by this Act and the Rules and such duties as may be imposed by the court.

(3) The official liquidator has the powers necessary to carry out the duties and functions of a liquidator under this Act and may-

- (a) with the sanction of the court, exercise any of the powers specified in Part I of the Fourth Schedule; and**
- (b) with or without that sanction, exercise any of the general powers specified in Part II of the Fourth Schedule.**

(4) The exercise by the liquidator of the powers conferred by this section is subject to the control of the court, and subject to subsection (6), any creditor or contributory may apply to the court with respect to the exercise or proposed exercise of such powers (hereinafter referred to as a "sanction application").

(5) In the case of-

- (a) a solvent company, a sanction application may only be made by a contributory and the creditors shall have no right to be heard;**
- (b) an insolvent company, a sanction application may only be made by a creditor and the contributories shall have no right to be heard; and**
- (c) a company whose solvency is doubtful, a sanction application may be made by both contributories and creditors and both contributories and creditors shall have a right to be heard.**

(6) For the purposes of this section and the Fourth Schedule, a person shall be treated as related to a company if-

- (a) he acted for the company as a professional service provider;**
- (b) he is or was a shareholder or director of the company or of any other company in the same group as the company;**
- (c) he has a direct or indirect beneficial interest in the shares of the company; or**
- (d) he is a creditor or debtor of the company.**

8. Section 204 provides for the remuneration of the OL as follows:

204. Remuneration of official liquidators

(1) The expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.

(2) There shall be paid to the official liquidator such remuneration, by way of percentage or otherwise, that the court may direct acting in accordance with Rules made under section 252; and if more liquidators than one are appointed such remuneration shall be distributed amongst them in such proportions as the court directs.

(3) Where in the course of the reasonable exercise of his functions as liquidator in relation to assets 'which the company in liquidation held upon a trust, expressed or otherwise, the liquidator—

- a) identifies or attempts to identify;
- b) recovers or attempts to recover;
- c) realizes or attempts to realize;
- d) protects or attempts to protect; or
- e) distributes such assets to the person or persons beneficially entitled,

the liquidator to the extent of such activities (or other activity in relation to such assets considered by the court to be beneficial to those entitled to them) shall be regarded as having acted in the administration of trust assets and the liquidator, subject to the approval of the court, shall be entitled to be indemnified out of those assets in respect of costs that are allocable to the said activities.

(4) Where the court, approves the indemnification of a liquidator out of trust assets pursuant to subsection (3), it shall be done on such equitable basis as against the relevant assets as the court may direct.

(5) For the avoidance of doubt, nothing in subsections (3) and (4) shall affect the principle of law that assets held by a company in trust for another person shall not be divisible in the liquidation of that company.

9. As requested by the Liquidation Committee I examined the work of the Official Liquidator, as reflected in his billing, to determine whether the work done was reasonably necessary for him to do and whether the charges or amounts of time allocated would be reasonably justifiable. Whilst I found some areas of concern I did not find that the allegation or suggestion that the Official Liquidator engaged in a scheme, dedicated to run up the costs, was made out. The work done was generally in keeping with the terms of the Companies Act.

10. My areas of concern, in addition to the unfortunate delays in the returning of client's funds, is the level of unnecessary and or duplicate expenses being incurred by

the OL and his lawyers. I should hasten to add that these expenses were nonetheless being incurred by the OL and his lawyers in the conduct of legitimate activities of the liquidation. In some cases the same work, being repeated, was being charged for several accounts. A simple example, which is symptomatic of the concern and the manner in which the liquidation was conducted is seen in the following: On 9 December 2021 Counsel for the OL issued 3 letters to remind the court of the outstanding decision in this matter with respect of the 3 Summonses. In each letter a copy of each Summons was attached. Each letter was separately emailed. One letter was reasonable, one email was reasonable and none of the Summons needed to have been copied and attached. There is likewise no reason why the Fees Application could not have been made alongside the Payment Application.

11. Having considered all of the submissions and reviewed the statements of accounts it seems appropriate that I fix the fees and expenses at a 35% reduction of the sums charged in the OL's bills.

12. The Payment application is also approved.

The Allocation Application:

13. On 9 March 2021, in a written decision in this action, I stated at paragraphs 17 and 18 of that written decision, as follows:

17. I am satisfied that the OL has demonstrated an entitlement to receive payment for services provided directly towards the benefit of the Trust Assets. To accept otherwise would be wholly inequitable. I therefore grant the first prayer in the Summons, with the caveat that the fees attributable must be in accord with the fees which PGA would have otherwise have levied had they not been placed in liquidation.

18. Insofar as the payment of general litigation expenses are concerned, whilst I accept that the state of the law permits the OL to receive a contribution from these trust assets towards the general liquidation costs, I accept that much of the complaints of the liquidation committee are valid. The amounts which are said to be attributed to the Trust Assets, not in receivership, have been inconsistently stated over the several applications made by the OL for payment of these fees. This application, at this stage, does not require me to assess what percentage will be allocated. If I were required to make such a determination at this stage, in my view it could not exceed 10%, but I reserve my determination until such an

application is brought. These are Trust Assets but cannot be burdened with the general liquidation costs for PGA, when the assets are merely in PGA's custody merely as custodian. In the circumstances I see no need to consider the prayer in paragraphs 2, 3 or 4 of the Summons at this stage.

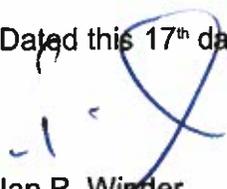
14. I have considered the evidence placed before me and the submissions made by Counsel. I am satisfied that the appropriate percentage of the general liquidation expenses to be assessed to the Trust Assets is 11% of the whole. The expenses ought to be allocated in proportion to their holding value.

15. In respect of the NX Sub-Fund, it was argued on behalf of the Fund that: a trust relationship did not exist; that the OL did not perform the specific functions enumerated in Section 204(3)(a) through (e); and in any event it would be inequitable to exercise its discretion in favor of the OL.

16. I have carefully considered the submissions of the parties. The assets are in the custody and control of the OL but they do not own them beneficially. By default therefore they hold them as trust assets, at the very least as bare trustees. In any event, on the facts, I am satisfied that a trust relationship arose and existed notwithstanding that the business relationship between the NX Sub-Fund and PGA may have ended prior to the liquidation. These assets however, remained in PGA at the time of the liquidation and as such the OL was nonetheless required to investigate its status or otherwise obligated to preserve them. The work of the OL was necessary and had to be engaged notwithstanding any prior business agreement, between PGA and the Fund, limiting PGA's fees to those incurred to the end of the business relationship. In my view, the liquidation having now ensued, this prior business arrangement could not automatically absolve the Fund from having to contribute to general liquidation expenses under section 204 or the *Berkley Applegate* principles. The Court nonetheless retains a discretion as to whether the NX Sub-Fund ought to be made, on equitable grounds, to contribute to the general liquidation expenses of PGA. In the circumstances of this case, as described in the Winder Affidavit, I am not satisfied that it would be just and equitable that the NX Sub-Fund be made to so contribute. Its contribution ought to be limited to the costs associated with the return of its assets.

17. I order costs incurred in these applications by all parties be costs in the liquidation.

Dated this 17th day of January 2022



Ian R. Winder
Justice