



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

**CAUSE NO.: FSD NO. 70 OF 2021 (RPJ)**

**IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)**

**AND IN THE MATTER OF PERFORMANCE INSURANCE COMPANY SPC (IN OFFICIAL  
LIQUIDATION)**

**IN CHAMBERS**

**Appearances:** Mr Paul Kennedy and Ms Nienke Lillington of Campbells on  
behalf of the Applicants

Mr. Adam Crane of Baker & Partners on behalf of the JOLs

**Before:** The Hon. Justice Parker

**Heard:** 4 February 2022

**Draft Judgment  
Circulated:** 28 March 2022

**Judgment Delivered:** 6 April 2022

**HEADNOTE**

*Application to appoint additional joint liquidator over liquidation of segregated portfolios-ss 216, 219, 220, 221 and 223 Companies Act (2021 Revision)-ss 105 and 106 of the Act concerning the appointment of additional liquidators-competing interests between solvent and insolvent parts of the Company-conflict of JOL-liquidators ability to pay general liquidation expenses from segregated portfolios-jurisdiction and exercise of discretion.*

## JUDGMENT

### Introduction

1. These are the reasons for the Order made on 15 February 2022 appointing an additional joint official liquidator following a hearing on 4 February 2022.
2. By Summons dated 17 November 2021, filed on behalf of ABM Wappingers Inc (the sole shareholder of Bottini Insurance SP (“Bottini SP”)), and Paul Vargo, Mollie Rea, Patrick Gallagher, and Candice Comunale (together the shareholders of SSS Insurance SP (“SSS SP”)) apply for the appointment of Angela Barkhouse as additional joint official liquidator (“AJOL”) of Performance Insurance Company SPC (in Official Liquidation) (the “Company”), with sole and exclusive responsibility for the liquidation of segregated portfolios Bottini SP and SSS SP.
3. Both Bottini SP and SSS SP are segregated portfolios (“SPs”) of the Company. The shareholders of Bottini SP and SSS SP are referred to as the “Applicants”.

### **The Applicants’ case**

4. The Applicants consider that the appointment of an AJOL would be in the best interest of Bottini SP and SSS SP.
5. The Applicants are the owners of a fuel company in upstate New York (ABM Wappingers Inc) and a trucking company based in Pennsylvania (Messrs Vargo, Gallagher, Rea and Comunale).
6. They effectively self-insure certain liabilities, such as workers’ compensation, through a captive arrangement with a US insurance carrier and a segregated insurance cell owned by them in the Cayman Islands.
7. Kenneth Krys and Neil Dempsey were appointed as joint voluntary liquidators of the Company on 26 February 2021. The liquidation was apparently a result of an alleged fraud which related to certain of the SPs in the Company, although notably not Bottini SP and SSS SP. The voluntary liquidation was subsequently converted into an official liquidation, and the JOLs

were appointed. Throughout this process, the Applicants' businesses were and remained solvent, and have been operating normally (albeit Bottini SP was already in the process of transferring its captive business to a successor entity prior to the liquidation and has not taken on new insurance risk for around two years).

8. The Applicants have been caught up in the Cayman liquidation and they now face claims of hundreds of thousands of dollars from the liquidators in order to exit this structure.
9. It was the JOLs' stated intention to wind-up the Company and the (insolvent) SPs affected by the fraud, but to novate the unaffected SPs, including Bottini SP and SSS SP. Novation would result in the transfer of the unaffected (solvent) SPs (including Bottini SP and SSS SP) to new structures of their choosing.
10. However, it has become clear that the JOLs will not permit novation without first allocating a pro rata share of the general fees and expenses of the liquidation to portfolios such as SSS SP and Bottini SP, which the Applicants say is contrary to s. 219(6) and 223(1)(a) of the Companies Act (2022 Revision).
11. The Applicants seek the appointment of an AJOL because they consider that the JOLs are in a position of conflict between the competing interests of the solvent and insolvent parts of the Company, which conflict is having a detrimental effect on the Applicants' segregated portfolios. The conflicted position the JOLs are in, arises from the structure and set-up of the Company as an SPC.

#### **Cayman Island's SPC's (segregated portfolio companies).**

12. SPCs are Cayman Islands exempted companies which contain segregated cells (referred to as 'segregated portfolios' ("SPs")). These segregated portfolios are separately identifiable, but do not have a legal personality separate from the SPC of which they form part (s. 216(2) of the Companies Act (2022 Revision) (the "Act")).
13. The key feature of the SPC is that the assets and liabilities of each SP are separate and 'ring-fenced' from other SPs within the same SPC (s. 216(1) and 219 of the Act). As a result, a

creditor of one SP does not have recourse to the assets of another SP (s. 220 and 221 of the Act). This feature makes SPCs suited to captive insurance which is where the structure is commonly used.

14. Any assets held by the SPC itself (and not held by an SP) are general assets (s. 222 of the Act). Maintaining the integrity of the segregated portfolio structure is crucial in order to make the SPC-structure work, and it is provided for in law.
15. In order to safeguard the separation of assets and liabilities of distinct SPs, s. 219(6) of the Act imposes the following duty on the directors of an SPC:

*“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*

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- (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.”*

16. Section 220 deals with the general principles of segregation of assets and liabilities:

*“Segregated portfolio assets-*

- (a) shall only be available and used to meet liabilities to the creditors of the segregated portfolio company and holders of segregated portfolio shares who are creditors or holders of segregated portfolio shares in respect of that segregated portfolio and who shall thereby be entitled to have recourse to the segregated portfolio assets attributable to that segregated portfolio for such purposes; and*

(b) *shall not be available or used to meet liabilities to, and shall be absolutely protected from, the creditors of the segregated portfolio company and holders of segregated portfolio shares who are not creditors or holders of segregated portfolio shares in respect of that segregated portfolio, and who accordingly shall not be entitled to have recourse to the segregated portfolio assets attributable to that segregated portfolio.”*

17. Section 223(1) of the Act provides that strict segregation must be maintained in a liquidation:

*“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.”*

18. Consequently, the Applicants argue that a liquidator’s ability to pay a company’s general liquidation expenses, including his or her own remuneration, out of the company’s assets does not automatically extend to segregated portfolios of the company in liquidation.

19. As liquidator of the Company, the Applicants argue that he must recognize and distinguish between general liabilities and expenses on the one hand and liabilities and expenses of individual portfolios on the other.

20. The Applicants contend that Section 223 of the Act is explicitly said to apply notwithstanding any rule of law and thus overrides any statutory or common law rule whereby liquidators might otherwise be able to charge expenses to assets under their control. An SPC is not a normal unitary company where there is a single aggregate set of assets and liabilities.

21. While trading, the assets of the segregated portfolios are not available to back stop or guarantee the general liabilities or expenses of the SPC and the position is explicitly provided not to be different in a liquidation. The Applicants contend that otherwise the whole statutory scheme

would be meaningless. They contend that the JOLs of the Company have adopted a different approach which is at odds with the statutory scheme and they have prioritized the need to fund the insolvent liquidation of the Company over the interests of the economic stakeholders in the solvent SPs.

22. The Applicants, through Mr Paul Kennedy, submit that there are three reasons why the Applicants are seeking the appointment of an AJOL to deal with Bottini SP and SSS SP separately from the remainder of the Company, and the other SPs in it, namely:
- a) There is a conflict between the interests of the economic shareholders of Bottini SP and SSS SP (their interest is simply to novate away from an insolvent entity which has been affected by a fraud) and the interests of the JOLs in operating an insolvent liquidation (which is costly) on behalf of creditors who have apparently suffered losses due to fraud.
  - b) That conflict has resulted in certain actions by the JOLs which the Applicants say can only be explained by the JOLs placing other interests over those of the Applicants:
    - i) Bottini SP and SSS SP have long sought novation of their portfolios, but the JOLs originally refused their request on the basis of obstacles which were easily surmounted
    - ii) as a condition precedent to progressing Bottini SP's and SSS SP's novation, the JOLs have required Bottini SP and SSS SP to make substantial payments (of hundreds of thousands of dollars) towards the JOLs' existing and future fees and expenses, which cannot properly be attributed to Bottini SP or SSS SP
    - iii) when the Applicants raised the conflict issues and applied for the appointment of an Additional Liquidator the JOLs purported to take a neutral stance but in fact refused to agree any proposed form of Order which might obviate the need for a contested hearing

- iv) the JOLs have refused, without providing reasons, to provide information about the JOLs' management of their portfolios such as a contract which the JOLs have apparently entered into with an insurance management entity on behalf of all SPs.
23. As a result, the Applicants have no trust or confidence that the current JOLs will act in their best interests or address the conflict which has arisen. The proposed solution is the appointment of a separate independent insolvency practitioner who would be appointed as a Liquidator of the Company itself, but with the sole remit of liquidation of the Applicants' portfolios. Such an appointee would have all of the duties and obligations to the Court of a liquidator but could focus solely on the solvent SPs and would not have any competing interests to contend with.

### **The JOLs' position**

24. Mr Adam Crane made clear that he remained essentially neutral on behalf of the JOLs. He asked the court to consider whether the applicants have standing. The JOLs have also determined that the Company is insolvent and he referred to Krys 4 §§ 16-28 to suggest that both segregated portfolios were also insolvent. I note in passing that Mr Kennedy was able to point the Court to new evidence which showed that the figures referred to in the affidavit evidence were at least out of date and could not be relied upon. I did not understand Mr Crane to contest this.
25. He then asked the Court to consider whether there was sufficient benefit to appointing an additional JOL, against the cost of doing so. He also made various submissions answering what he described as 'inaccurate and mischaracterised' criticisms of the JOLs which it is not necessary to repeat here.

### **The Law**

26. Pursuant to s. 105(1) of the Act the Court can appoint one or more than one person to position of official liquidator(s) for the purpose of conducting the winding up of a company:

*“For the purpose of conducting the proceedings in winding up a company and assisting the Court therein, there may be appointed one or more than one*

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*person to be called an official liquidator or official liquidators; and the Court may appoint to such office such person as it thinks fit, and if more persons than one are appointed to such office, the Court shall declare whether any act hereby required or authorised to be done by the official liquidator is to be done by all or any of such persons.”*

27. Section 106 of the Act reads as follows:

*“When two or more persons are appointed to the office of liquidator, either provisionally or as official liquidators, they shall be authorised to act jointly and severally, unless their powers are expressly limited by order of the Court.”*

28. It follows from s. 106 of the Act that more than two individuals can be appointed as official liquidators of a company. It also follows that the Court can limit the powers of each of the appointees as it sees fit.

29. In *In re Asia Private Credit Fund Limited [2020] (1) CILR 134*, the Court considered its jurisdiction to order a voluntary solvent liquidation to continue under the Court’s supervision, but it also considered whose interests should be considered and prioritised when appointing office holders.

30. Justice Kawaley quoted Chief Justice Smellie’s judgment in *In re Bay Capital Asia Fund LP* at § 55:

*“The proposition that liquidation proceedings, whether insolvent or solvent, should be conducted in the interest of those persons who are financially interested in the liquidation process may be viewed as the golden thread which runs through liquidation law in those parts of the world whose statutory winding-up concepts have been transplanted from British legal soil. Accordingly, when one is considering what is likely to be a more ‘effective, economic or expeditious’ liquidation of a company, in any particular case that broad concept must be moulded like clay to fit the shape of the particular stakeholders interests which hold sway in the case before the Court. (...) the Court should be slow to second-guess the stakeholders as to how efficacy and/or economy is likely best to be achieved. The Court’s evaluative function is likely to be enhanced where stakeholders have different views or their views are not clearly known or easily ascertainable. The rigour of Court’s evaluative function is likely to be properly diminished where all stakeholders speak with the same voice.”*(emphasis added)

31. Similarly, in *In re Alpha Re Limited, FSD No. 15 of 2018, 2 March 2018 (unreported)*, Chief Justice Smellie said, at §90, that:

*“While the wishes of the creditors are not necessarily determinative of an issue like the present, they must be given proper weight and consideration. **Going forward, it will be of crucial importance that the JOLs enjoy the full confidence and support of those having the real economic interest in the outcome of the liquidation.**”* (emphasis added)

32. In *Re Comet Group Ltd (in Liquidation)* [2018] EWHC 1378 (Ch), Sir Nicholas Warren provided a summary of the considerations to be taken into account by the Court where there are allegations of conflicts of interest on the part of insolvency professionals acting as administrators of a company. The application was made by the liquidators for directions as to how to deal with a particular debenture in circumstances where the accountants’ regulatory body in the UK had raised questions over the level of independence of the administrators in deciding to make payments under the debenture without conducting a full investigation, given that the administrators’ own accountancy firm had also been engaged by the company pre-administration.

33. At §18 Warren J said this:

*“There is no application before me to appoint an additional independent conflict liquidator, still less any application to replace the Liquidators themselves. It may be, as the Liquidators suggest, that the ICAEW itself has no standing to make such an application although I think it is strongly arguable that they do. I do not need to decide that point because what is clear is that I have jurisdiction to direct the Liquidators to apply for the appointment of an additional liquidator, and to make other directions, since the Liquidators themselves have brought the matter to court. However, I cannot decide, on this application, whether the Liquidators are compromised in the way suggested. But what I can decide is whether there is a perception that that might be so. There is an analogy here with bias, the paradigm being judicial bias. It is, I hope, a rarity that a judge in our courts is actually biased. But sometimes judges are put in a position where, however objective they actually are, the circumstances give rise to a perception of bias, in which case the judge will normally recuse himself or herself. In the present case, if I were to be satisfied that a reasonable person could have serious concerns about the objectivity of the Liquidators, it would be open to me to take a number of different courses, including at one end of the spectrum of possible and reasonable courses of action, to achieve the appointment of an additional independent conflict liquidator. I do not need to decide that the Liquidators in fact lack objectivity or that an independent liquidator would be likely to reach a different decision on whether to proceed with the Protective Claim from the course which the Liquidators wish to adopt; and nor do I thereby need to reach decisions which might touch upon the disciplinary proceedings. What I have to bring about is*

*a situation where the interests of unsecured creditors are most effectively vindicated. The ICAEW contend, in effect, that those interests can only be effectively vindicated by a proper investigation by officeholders who are independent of the Liquidators. If that is right then, in considering how that can best be achieved I will have to take into account, of course, the cost involved and how it is to be borne.”*

34. In *Re Omni Securities Limited* [1996 CILR 202] the applicant liquidators sought the striking out of the respondent’s (the company’s former auditor being sued for negligence by the liquidators) summons for the restraint or removal of the liquidators. The respondent alleged that the liquidators were acting under a conflict of interest.

35. Smellie J went on to confirm the Grand Court’s power to appoint additional liquidators in respect of the substantive removal/restraint application:

*“The court will then have a discretion as to the appropriate order, if any, which it might make. This was a rather important factor to my way of thinking. For instance, an additional liquidator could be appointed to take over conduct of the litigation against D&T if there is merit to its complaint or if the court finds its officers, the liquidators, to be faced with an unacceptable conflict between their own interests (being for present purposes, and again on the assumed evidence, equated with that of the Cayman practice’s sister firm C&L (U.K.)) and their duties.”*

36. That approach was apparently followed in *In Herald Fund SPC liquidation*. Certain shareholders complained about a perceived conflict on the part of the JOLs in respect of the treatment of redemption creditors. Mr Justice Jones appointed an “Additional Liquidator” solely for the purposes of dealing with the treatment of redemption creditors and related distribution issues. The liquidation was therefore divided, based on the prescribed remit of the Additional Liquidator, with the balance of the responsibilities falling to the JOLs as envisaged by Smellie J in *Re Omni*. Mr Justice Jones did not issue a ruling on the issue but he apparently considered that such a split appointment was possible. The Court notes Mr Kennedy’s submission that that that liquidation has operated for many years and is the subject of various other reported decisions.

## Decision

37. I accept Mr Kennedy's submissions. While trading, the assets of the segregated portfolios are not available to back stop or guarantee the general liabilities or expenses of the SPC and the position is explicitly provided not to be different in a liquidation. There is at least the reasonable perception of a conflict of interest with the JOLs.
38. The Applicants clearly have standing as the parties with the sole economic stake holdings of Bottini SP and SSS SP. They own the trading companies which are the policy holders. The Court looks at the parties with the economic interests to determine their own best outcomes. The Applicants have clearly considered, on a cost benefit analysis, the commercial sense of the application. The costs of the proposed appointment will be borne entirely by the Applicants so there is no prejudice to any other stakeholder of the Company or the other SPs. The overall cost burden on the estate will be reduced as the official liquidators should have less to do.
39. Following the judgments of Kawaley J in *In re Asia Private Credit Fund Limited* and of Chief Justice Smellie in *In re Alpha Re Limited*, it is their interests which are of primary concern in considering whether an AJOL should be appointed.
40. The Court will grant the appointment of the AJOL pursuant to s. 105(1) of the Act, with the AJOL's and JOLs' powers to be limited by the Court, pursuant to s. 106 of the Act. Generally speaking<sup>1</sup>, the limitations will be as follows:
- a) the JOLs will no longer be empowered to act in respect of Bottini SP and SSS SP;
  - b) the AJOL will have sole and exclusive responsibility for the liquidation of Bottini SP and SSS SP, and shall have no authority to act on behalf of the Company or any other segregated portfolios of the Company;
  - c) from the date of the Order appointing the AJOL, the fees and expenses of the JOLs shall not be allocated to Bottini SP and SSS SP, and Bottini SP and SSS SP shall solely be responsible for the fees and expenses of the AJOL.

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<sup>1</sup> See Order of 15 February 2022 for full terms.

41. In circumstances where it is clear that the JOLs are reasonably perceived to be conflicted, and that such conflict is causing difficulties in respect of the allocation of their fees and expenses as between the insolvent SPs and solvent SPs in the Company, it is necessary and appropriate that the AJOL should be appointed. The Court will so exercise its discretion.
42. The Court will grant the application to appoint Ms Barkhouse as AJOL to deal with Bottini SP and SSS SP so that the economic stakeholders of those SPs may have confidence that their assets and liabilities are dealt with appropriately and in the best interests of Bottini SP and SSS SP.

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**THE HON. JUSTICE PARKER**  
**JUDGE OF THE GRAND COURT**