IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 166 of 2019 (MRHJ)

IN THE MATTER OF THE COMPANIES ACT (2020 REVISION)
AND IN THE MATTER OF ONETRADEX LTD. (IN PROVISIONAL LIQUIDATION)

IN CHAMBERS via video link

Appearances:	**Mr. Graeme Halkerston instructed by Mr. Rupert Bell and Mr. Niall Hanna of Walkers for the Provisional Liquidators of the Company.** **Mr. Hector Robinson QC and with him, Mr. Christopher Harlow and the Mr. Laurence Aiolfi of Mourant for the Ad Hoc Committee of Clients and Creditors** **Mr. Menelik Miller and Ms Renee Caudeiron of CIMA for the Petitioners**
Before:	**Hon. Justice Margaret Ramsay-Hale**
Heard:	**18, 19 and 20 November 2020**
Draft Ruling Circulated:	**31 August 2021 and 7 June 2022**
Ruling Delivered:	**17 June 2022**

HEADNOTE

Application for approval of provisional liquidators' fees and expenses - Berkeley Applegate Order allowing recourse to trust assets - application opposed in part by Ad Hoc Committee on grounds costs not incurred for the benefit of the trust assets and disproportionate in any event - Principles to be applied

RULING ON PROVISIONAL LIQUIDATOR'S APPLICATION FOR REMUNERATION

Introduction

1. This is the decision on the application by Mr. Kenneth Krys, the Provisional Liquidator of OneTradex Limited (In Provisional Liquidation) (the "PL") (the "Company") by summons dated 29 April 2020 for the approval of his remuneration and expenses (more generally, costs) for the period from 18 July 2019 to 30 June 2020, including the costs incurred by the PL during the period of his appointment as a Joint Controller of the Company appointed by the Cayman Islands Monetary Authority ("CIMA").

Background

2. The background to the PL's appointment is fully rehearsed by the learned Chief Justice in his omnibus Reasons[1] for divers rulings made in this matter before it was assigned to me to hear and determine the application for payment of the PL's fees and expenses. The history of the matter is, however, relevant to the objections made by the Ad Hoc Committee (the "Committee") and other interested parties who have corresponded independently with the Court and the PL. I have endeavoured to set out below as brief a summary of the background to this application as necessary to put the Committee's objections in context, relying for the most part on the learned Chief Justice's survey of the earlier survey of the facts.

3. The Company, which was incorporated in the Cayman Islands on 19 September 2012, was granted a Securities Investment Business (Full Licence) pursuant to section 6 of the then **Securities Investment Business Law (2011 Revision)** ("SIBL") by CIMA on 4 December 2013 to conduct the activity of Broker/Dealer.

4. At the time of its licensing, the Company had informed CIMA that it was established to provide broker/dealer services to a wide range of clients. The Company's website, onetradex.com, stated that the Company was the Cayman Islands' only fully licensed broker/dealer offering online discount trading services to individual investors, traders, hedge fund managers and family offices.

5. The assets of the majority of the Company's clients were kept in accounts at Interactive Brokers LLC. ("IB"), a company headquartered in Greenwich, Connecticut which is regulated by a number of US regulatory agencies, including the U.S. Securities and Exchange Commission ("SEC") and other regulatory agencies around the world. IB, as part of its broker/dealer agency business, provided direct access trade execution and clearing services to the Company's clients via an online trading platform.

6. Others assets were held by the Company through various other custodians, namely Fidelity Bank (Cayman) Ltd ("Fidelity"), a number of UK based firms including Beaufort Securities Limited (in Liquidation) ("Beaufort"), Jarvis Investment Management Limited ("Jarvis"), Linear Investments Limited ("Linear"), Dolfin Financial UK Limited ("Dolfin") and Maybank Kim Eng Securities Pte. Ltd. ("Maybank"), a Singapore company.

7. CIMA's regulatory concerns arose from the Company's persistent failure to file audited financial statements ("AFS") as part of its annual returns to CIMA and on 30 January 2019, CIMA took

[1] 1 October 2020; 2020 (2) CILR Note 20

action. By a Decision Notice served on the Company on 1 February 2019, CIMA required the Company to submit, *inter alia,* its AFS for the financial years 2015, 2016, 2017 and 2018.

8. Immediately following the issuance of the Notice, CIMA conducted an on-site inspection of the Company during which numerous contraventions of the **Securities Investment Business Act** ("SIBA") the **Securities Investment Business (Conduct of Business) Regulations** 2003 ("SIB COB Regulations.") and the **Anti-Money Laundering Regulations** ("AMLRs") were identified.

9. On 7 March 2019, the Company's auditors advised CIMA that the Company was potentially in breach of regulation 40 of the **SIB COB Regulations**[2] as there was evidence to show that the Company had used a client's funds to facilitate stock loan transactions with other parties unrelated to the client whose funds were used and without the client's knowledge or approval. In these transactions, the client's funds were loaned to the other parties and stocks taken as collateral by the Company to secure the loans. The Company subsequently advised CIMA that it was unaware that the use of funds in its client account was a potential breach of the SIB COB Regulations.

10. Among other significant matters, the auditors noted that a potential dispute existed regarding the true legal and beneficial ownership of certain stocks held by the Company on behalf of a client. The auditors also advised that the Company lacked an adequate internal book-keeping and record keeping system which impeded the audits for the years ending 2016, 2017 and 2018.

11. The AFS for those years remained outstanding when CIMA decided to appoint controllers to assume control of the Company's affairs, having formed the view *inter alia* that the Company was carrying on business in a manner detrimental to the interests of its clients.

12. Mr. Kenneth Krys and Ms Angela Barkhouse of Krys Global were appointed as Joint Controllers of the Company on 18 July 2019 (the "Controllers"). On 30 July 2019, the Controllers reported on the several regulatory breaches which their investigations had uncovered to CIMA.

13. The PL states that it was immediately apparent to the Controllers that there had been long-term mismanagement of the Company and that basic record keeping and reconciliations as to client assets had not been kept and that the Company had failed to establish and maintain adequate records or internal controls in relation to their clients' or their own assets or liabilities. The Controllers reported to CIMA that client money had been paid into accounts which held both client and Company funds. They also reported on the improper share loan transactions uncovered

[2] *40.(1)Subject to regulation 42, a licensee shall ensure that client money is held at all times in a client bank account with one or more approved banks*."

by the auditors in which a client's funds had been used without the client's knowledge or permission which potentially exposed the Company to liability of $885,471.[3]

14. Having reviewed the Company's assets and liabilities, including the potential liabilities arising from the share loan transactions, the Controllers recommended that CIMA present a petition to wind up the Company and, in conjunction with the Controllers, apply for their appointment as Joint Provisional Liquidators to insulate the Company from possible claims by clients claiming to be creditors who would seek to sell all or part of the Company's business.

15. On 27 September 2019, the learned Chief Justice made the Order appointing the Controllers as Joint Provisional Liquidators ("JPLs") on the ground that it appeared from the evidence that the Company was likely to become unable to pay its debts as they fell due and that a provisional liquidation would best serve the interests of its creditors and the clients for whom the Company held assets in trust.

16. The Committee was subsequently formed to represent the interests of both clients and creditors.

The *Berkeley Applegate* Order

17. As is usual with companies of this nature, the Company's own assets were modest by comparison to the trust assets under its control which were approximately USD85 million and insufficient to meet the costs of the Controllership and the Provisional Liquidation.

18. Recognising that the Company's assets would be insufficient to meet the costs of the Controllership and the Provisional Liquidation which had already been incurred or any future costs, the JPLs sought resort to the trust assets to meet their expenses on the basis that most of the work performed by the Controllers and the JPLs had been "*carried out with and for the benefit of the Clients.*"[4]

19. The work done had involved unravelling the accounting and other recordkeeping systems of the Company to enable the resolution and settlement of proprietary claims and creditor claims as well as to understand the way in which clients' assets were held by the Company. Investigations had revealed that the majority of the clients' assets were held in individual accounts at IB but irregularities in relation to the assets of certain clients had been uncovered. Among those was an account at IB held by the Company on behalf of eleven clients in which the clients funds had been commingled such that IB itself had no visibility as to what assets belonged to which of the eleven

[3] All references are to US dollars

[4] Krys 4 para 7 (i)

clients. This account, referred to as the DAS System account (the "DAS Account") in the Controllers' Reports, was used for by the Company for certain clients that IB was not willing to onboard due to the failure of those clients to meet IB's compliance requirements. The commingling of assets within the account meant that clients with assets in the DAS Account (the "DAS Account Clients") could incur trade losses which would expose their own asset position, a risk to their assets of which the DAS Account Clients were unaware as each had been given a unique identified by the Company.

20. There was also an account with Linear Investments Limited ("Linear") (the "Linear Account") which was in the Company's name but the assets in the account included commingled client assets. Linear had provided certain financing to the Company for the purposes of funding the purchase of dividend rights in respect of shares in Dutch Companies for a client (a group of US Trusts) seeking to benefit from the tax refunds given by the Dutch Tax Authority in respect of dividends paid to foreign investors (the "Dutch Arbitrage").

21. The Dutch Tax Authority refused to pay dividends and Linear proposed to meet the losses on the account by recourse to cash and other assets of certain clients under its custody. These clients were Client X, since identified as a Mr. Vela, as well as those clients for whom the Company held certain cash balances with Linear.

22. As summarised in Krys 4 at para 7(h) :

> *"The liability of Linear (which exposes the cash and other assets of Client X[5] and the DAS [Account] Clients) … has contributed significantly to a net liability in the Company's name of EUR 3.329,329, the majority of which appears to be attributable to the US Trusts. This liability continues to grow and it includes legal fees paid by the Company … to the pursue claims against the Dutch tax authority. "*

23. The claim remained unresolved up to the date of this hearing.

24. Having reviewed the evidence on which the JPLs relied, the Chief Justice stated that:

> *"In light of that description of the problems with the DAS Account and Client X, and in recognition of the work then already done and anticipated to be done to unravel the commingled accounts and to resolve unresolved claim (which may be made against OTX itself but also in the form of proprietary claims against the assets of client…) the*

[5] Since identified as a Mr. Vela

arguments on behalf of the JPLs for setting a Reserve to enable return of assets to Confirmed Clients was based on established principle from the case law, which also explains the jurisdiction of the Court for making such orders."

25. In granting the JPLs' application for recourse to the trust assets for their fees, the Chief Justice made a *Berkeley Applegate* Order - named after the decision where it was held that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require, as a condition of giving effect to that equitable interest, that an allowance be made for costs incurred and for the skill and labour expended in connection with the administration of the property.

26. In *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] BCLC 28, Deputy Judge Nugee identified two factors which will operate in favour of the Court exercising a jurisdiction which is sparingly exercised. The first is whether the work, if not done by the office holder, would have had to be done either by the person claiming an equitable interest in the property, or by a receiver appointed by the Court, whose fees would have been borne by the trust property. Secondly, whether the work done by the office holder has been of substantial benefit to the trust property and to the persons claiming to be interested in the property in equity.

27. ***In Re Caledonian Securities Limited*** 2016 (1) CILR 309, an earlier case on similar facts involving the collapse of a custody business similar to the Company's, the learned Chief Justice accepted the ascription of the designation of '*agents of necessity*' to office holders who are entitled to resort to trust assets for the payment of their fees and expenses under the *Berkeley Applegate* jurisdiction.

28. Notably for the purposes of resolving the issues before me, the Chief Justice observed that:

"37. Not only was the liquidator in Berkeley Applegate required to perform functions relative to the general liquidation of the company, he was also required to undertake time consuming, complicated and costly functions which were directly and exclusively referable to the administration of the trust assets, their investment and ultimate return to the investors. These included:

(i) preliminary investigations to anticipate the consequences of the liquidation which subsequently occurred, including a preliminary identification of potential claimants and the classes into which they fell;

(ii) dealing with inquiries from investors and borrowers (at peak involving up to 100 telephone calls and up to 50 letters per day);

(iii) ascertainment of assets, including matching the sums paid to the company by the investors with the sums advanced by the company to borrowers,

confirming the respective investments by reference to certificates of investment, reconciling the company's clients' accounts with associated records to confirm the respective interests in the clients' accounts, and so on; and

(iv) *management of the investments, including recoveries from delinquent mortgagors and reconciling loans which had in fact been repaid; in short, carrying on the company's mortgage business, although without lending money afresh pending winding up.*

That was all work which had to be carried out by the liquidator apart from a certain amount of work in relation to pure liquidation matters. That work incurred 250 man hours whereas about 3,300 man hours had been spent (by the time of the hearing before Deputy Judge Nugee) on the matters described above referable to the investors' trust claims." [6] (emphasis supplied)

29. The Chief Justice went on to say that:

"*43. The situation which had arisen in this case, particularly from the intervention of the SEC, presented CSL as trustee with … an unforeseen "emergency" … which fell to the JOLs to be dealt with as agents of CSL… once CSL's winding up commenced.*

"44. The work which [the JOL's] subsequently undertook, as described in detail by Ms. Loebell and as outlined above in this judgment, was both "necessarily required" as well as intended and indeed has redounded to the benefit of all the custody asset customers, albeit in varying degrees of benefit if viewed individually and separately….

….

"47. Their skill and labour may not have added directly to the respective value of the underlying custody assets of each trust but, taken as a whole, I am satisfied that they have doubtlessly added value to the custody assets in the sense that the work undertaken was as a whole necessary before any of the assets could be retrieved for the benefit of the custody asset customers.

"48. And as was also observed in Berkeley Applegate ([1989] Ch. at 50), if the liquidator (here the JOLs) had not done this work, it was inevitable that it, or at all events a great deal of it, would have had to have been done by someone else, most likely here a receiver, and at similar if not greater expense." [emphasis supplied]

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[66] At para 37

30. And finally, I refer to para 55 [of the Chief Justice's judgment] which, the PL contends, applies with equal force to the issues the Controllers and JPLs confronted at the Company:

> *"55. Although the JOLs were not in the same "impossible situation" as the liquidator found himself in Berkeley Applegate in having first to do extensive investigatory work before being able to identify just what assets belonged to each individual trust, the JOLs report that the record-keeping by CSL was "far from perfect" and significant investigatory work had to be done to identify and locate the respective custody assets, as described above. So too was the work necessarily done to secure the return of custody assets which were subject of the SEC complaint and TRO. Similarly, the work undertaken by the JOLs to recover the assets from those recalcitrant sub-custodians in New York who refused at first to release them in the absence of the JOLs having obtained court recognition there.*"

31. In his judgment granting the JPLS' application for *Berkeley Applegate* relief the Chief Justice recorded that:

> *"22. In the course of arguments today, it came to be accepted between the parties (and notwithstanding the Ad Hoc Committee's initial objections) that the Reserve could be applied to cover the JPL's reasonable costs and expenses of the provisional liquidation, as well as the earlier costs of the Controllership, as well as any future costs of the provisional liquidation, on the basis of the Berkeley Applegate principle, as that principle was applied recently by this court in Re Caledonian Securities Limited (In off Liq.)."*

32. Although the clients of the Company protested, and continue to protest, what they have referred to in divers documents before the Court as the *"expropriation"* of their monies, to pay for the liquidation of a company which was not insolvent and to pay for the return to them of their assets which were segregated and under their control, those who advise them accept that the Courts have the power to make *Berkeley Applegate* orders in the circumstances set out by Nugee QC and applied by the Chief Justice in *Re Caledonian.* There has been no appeal against the Order made by the Chief Justice in this case, nor could there be given the agreement recorded by the Chief Justice in his judgment.

The Remuneration Sought

33. The primary evidence of costs is found in the PL's fifth and eighth affidavits ("Krys 5" and "Krys 8"). The quantum of costs for which approval is sought by the PL is US$3,583,720.97, the sum of

US$120,883.67 having been reallocated to the Company's assets as costs falling outside the *Berekely Applegate* principle.

34. It is the PL's evidence that the Controllership fees were subject to a 20% fee discount and that work done by more senior staff was charged at the rates of more junior staff in order to reduce costs. He says further that substantial time incurred by him personally has not been charged at all and that legal fees of US$163,605.00 have been written off, a reduction representing a 10.9% discount of those costs. Taken together, these discounts, written off work and written down hours for the fees of the Controllers and JPLs amount to a total of US$421,115.10 which represents a discount of 19.1% of the costs incurred [in the period from the commencement of the Controllership to June 2020].

35. It is the PL's position that, as a consequence of the nature of the business of the Company, the overwhelming majority of the work undertaken by the Controllers and the JPLs was carried out in connection with the administration of the trust assets and the steps necessary to identify, preserve and permit the distribution of those assets and that his costs are payable out of the trust assets on the *Berkeley Applegate* principle.

36. In his supporting affidavit, the PL identifies 14 different categories of costs, explaining work done by the Controllers and the JPLs, the amount of costs incurred in respect of each category during the Controllership period and in the Provisional Liquidation up to June 2020 and the costs which have been allocated to the Company as payable out of the liquidation estate.

Investigation, Analysis and Reconciliation of Records of the Company	$53,125.50	$14,554.00	$1,581.50	-	$69,261.00
Determination of Client Trust Asset Status/Confirmation Process	$43,022.00	$83,016.00	$23,223.50	-	$149,261.50
Communications with Stakeholders	$29,907.50	$67,997.50	$160,029.50	$326,126.50	$584,061.00
Sale of Business	$52,068.00	$15,543.00	$4,782.00	-	$72,393.00
Communications with CIMA	$83,971.50	$4,021.00	$507.00	-	$88,499.50
Legal Matters	$20,980.00	$64,565.50	$2,744.50	$164,896.50	$253,186.50
Potential Litigation	$30,492.00	$62,770.50	$42,964.00		$136,226.50

Creditor and Client Meetings	Nil.	$38,644.00	Nil	$17,278.50	$55,922.50
Books and Records, Cash Management and Supervision	$45,802.50	$90,546.50	$155,993.50	$328,636.40	$620,978.90
Operational Costs	$13,315.50	$14,763.50	$13,085.50	Nil	$41,164.50
Recovery of Assets	-	-	-	$18,909.50	$18,909.50
Employee Matters	$2,419.00	$3,985.50	$4,791.50	Nil	$11,196.00
Legal Expenses	$204,953.9	$647,605.37	$202,438.04	$443,715.00	$1,498,712.31
Disbursements	$29,664.89	$24,865.87	$15.019.95	$45,217.02	$114,767.73
Total Costs as at 30 June '20					$3,705,537.54
Adjustment to reflect removal of non BA costs					(101,436.54)
TOTAL					$3,604,101

37. Mr. Halkerston, on behalf of the PL, defended the level of fees and their attribution to the trust assets in a liquidation which, he said, had raised complex issues. Mr. Halkerston made the point that the complexity had been compounded by the complete absence of proper (or any) books and records, the absence of statutorily required audited accounts, the commingling of client monies, the commingling of trust assets with Company assets, misleading asset statements provided to the clients, conflicting statements being made by the Directors to the JPLs and clients being exposed to losses incurred by other clients.

38. A review of the PL's evidence reveals that a great deal of the time spent by the Controllers and the JPLs was spent unravelling who the beneficial owners of the funds in the DAS Account were and investigating how it was that the assets of the DAS Account Clients, each of whom thought they held individual accounts, had ended up in a single account and been exposed to trading losses incurred by other clients trading in the account.

39. Additional complexity arose from the discovery that the DAS Account Clients and Mr. Vela (referred to as Mr. X in the omnibus decision of the Chief Justice) were exposed to losses in the Dutch Arbitrage through Linear and that cash in the sum of $1.69 million from the DAS account as well as cash in the sum of $2.41 million belonging to Mr. Vela, had been transferred by the Directors to the Company's Linear account to prop up trading exposures and costs in that account.

40. Mr. Halkerston submits, and I accept, that unwinding client investments proved challenging and labour intensive, through no fault of the PL or the clients.

41. Mr. Halkerston says further that the fact that the Company operated accounts in the United States and the United Kingdom raised separate regulatory issues and legal issues which required the Controllers and the JPLs to obtain legal advice, for which they incurred substantial legal fees. The challenges faced by the JPLs included having to seek Chapter 15 sanction because there were trust assets in US accounts which had to be returned to the clients. Additional costs were incurred as a result of a very cautious approach to asset transfer taken by IB, a caution which was understandable given that the assets held were the subject of parallel US litigation, the Company had failed to keep adequate KYC/AML documentation and the underlying clients of the Company were not clients of IB.

42. Mr. Halkerston also submits, and I accept, that the commingling of client assets required a formal process to be undertaken to resolve whether any of the clients would assert proprietary claims before the PL would be in a position to distribute the trust assets. It was this which prompted the application by the JPLs for an *MF Global* Order which was granted by the learned Chief Justice.

43. After the trust assets had been reconciled and the potential proprietary claims were dealt with, Mr. Halkerston says that the PL's efforts to return the trust assets to the clients ended up taking more time and being more costly than could have been anticipated because of the approach adopted by IB as described at length in Krys 5.[7] The central difficulty the JPLs encountered is summed up by the PL as follows:

> *"As a consequence of the entry by the Company into provisional liquidation…The JPLs were mindful of the necessity to understand and, to the extent feasible, accommodate any revised protocols put in place by IB's legal team. These discussions took longer than expect because IB needed time to consider what protocols it wanted to implement in circumstances where it was no longer dealing with 'business as usual' with the Company."*[8]

44. Mr. Halkerston submits that the costs are reasonable and proportionate to the tasks the Controllers and the JPLs were required to undertake in sorting out the clients' assets and returning their assets to them.

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[7] At paras 18 to 86
[8] At para 84

45. With respect to the Committee's challenge to the remuneration sought by the PL, Mr. Halkerston makes two points: the first is that the Controllership fees were already approved by CIMA which he submits should carry weight with the Court; and the second is that the way the Committee has approached the assessment exercise is contrary to the practice of these Courts as outlined by the Chief Justice in *Re Caledonian* and applied by Segal J in *Lea Lilly Perry v Lopag* (Unrep, 20 April 2020).

46. The established practice is for the officeholder to provide a narrative of the work done together with the evidence of the underlying costs by reference to time sheets, invoices etc., as the PL has done here. It is then for the objecting party to make specific objections to the work claimed by reference to the underlying supporting evidence and to specifically quantify the quantum of fees to which there is objection by reference to the supporting time sheet or invoice entries. The Court will then assess the challenges to the fees claimed on a structured and informed basis.

47. The objective is, as Mr. Justice Segal noted in *Lea Lilly Perry*, that an office-holder's remuneration be "*fixed and approved by a process which is consistent and predictable."*[9]

48. By contrast, the Committee has made broad objections to the fees and seeks substantial deductions without making the effort to challenge the costs on a line by line basis by reference to the work done or the time spent. While acknowledging that the PL did not first seek the Committee's approval before making application to the Court as anticipated by the Rules, Mr. Halkerston submits that the Committee had been in possession of Krys 5 and Krys 8 for some 7 months before the matter came on for hearing and had sufficient time to prepare a *"proper"* challenge to the fees application.

The Position of the Ad Hoc Committee

49. The Committee's objections to the fees and expenses incurred in the Controllership and the Provisional Liquidation are set out in the Committee's Report, the 5th Affidavit of Simon Ecclefield ("Ecclefield 5") and a Report commissioned by the Committee prepared by Theo Bullmore (the "Bullmore Report") all of which I have read and considered. The thrust of the Committee's objections have been effectively encapsulated in the submissions of Mr. Robinson QC on their behalf.

50. The objections have at their root the fact that, although the Company was placed in Provisional Liquidation because the Company was at risk of becoming insolvent, the majority of the clients' trust assets had been properly segregated and were, therefore, protected against any claims.

[9] At para 23(g)

51. This fact has engendered in the clients the belief that the fees charged for identifying and returning the trust assets by Mr. Krys are excessive. The Committee asserts that the client's accounts were readily identifiable and their funds even more readily transferrable. In his oral submissions on behalf of the Committee, Mr. Robinson charged that the PL had overstated the complexity of unravelling the misuse of clients' funds by the Company. He noted that the problems with the accounts affected only a small number of clients and had been identified before the JPLs were appointed. These were the unauthorised stock loan transaction which affected one client only and which had been identified by the auditors before the Controllers were appointed, the lack of visibility of the 11 clients in the DAS Account and clients whose funds were held in non-IB accounts and that assets in the DAS Account and Mr. Vela's assets had been used to shore up positions taken by Linear with respect to the Dutch Arbitrage.

52. Mr. Robinson says that the PL exaggerated the problems with the result that the solutions became *'major cost centres'* for the PL and his staff. One major cost centre was the process which the JPLs adopted to return of the trust assets to the clients, which the Committee contends should have been a simple process, achieved at far less cost to the clients and which it would have been if JPLs had secured the assistance of the Directors or the Committee in engaging with IB or effecting the transfer of clients' accounts.

53. That the clients feel very strongly about this is clear from the Committee's Report, the submissions made on the Committee's behalf by Mr. Robinson and the numerous letters and emails written to the Court by individual clients of the Company, with the most recent of such out of Court communications protesting what was described as *"the predatory behaviour of Krys Global"* who had hijacked the client's assets. [10]

54. The weight of the Committee's objections relates to the attribution of certain costs to the trust assets by the PL. The Committee contends that, properly analysed, certain of the costs were not incurred either in administering trust assets or in returning trust property to the client beneficiaries and do not fall to be paid by recourse to the trust assets under the principle in *Berkeley Applegate*.

55. The Committee's specific objections are set out in greater detail below but, in summary, the Committee contends that the PL is not entitled to be remunerated, *inter alia,* for:

    (i) the costs incurred during the Controllership period, on the ground that the Controllers were not required to take any steps to protect the trust assets;

[10] Email from Client dated 6 May 2021.

(ii) the costs incurred by the Controllers in reporting to CIMA, on the ground that the work done was an inevitable consequence of the Controllership;

(iii) the costs of placing the Company into Provisional Liquidation, on the ground that those costs are properly payable by the Company;

(iv) the costs of the Chapter 15 application, on the ground that it was not work done for the benefit of the trust estate;

(v) the costs of the effort to sell the business, on the ground that it was undertaken solely for the benefit of the Company; and

(vi) the costs arising from what the Committee describes as work done by the JPLs in *"actively soliciting clients to make proprietorship claims"* on the ground that the JPLs' were acting contrary to the interest of the clients and/or the trust estate.

56. The other area of dispute is proportionality, that is to say, the amount of time and effort spent in proportion to the value of the exercise undertaken by the Controllers and the JPL's in identifying the trust assets and returning them to the clients. The Committee contends that the fees sought by the PL were disproportionate to the value of the work necessary to ascertain, preserve and recover the trust assets for the benefit of the clients.

57. In response to Mr. Halkerston's submission that the costs of US$3,583,720.97 represent only some 4.2% of the total value of the trust assets and were to that extent reasonable, Mr. Robinson's colourful retort was that this liquidation was *"a $5 million problem,"* a reference to the fact that the investigations of the Company had revealed fact that the liabilities to which the trust assets were exposed amounted to approximately US$5 million.

58. With respect to the approach adopted by the Committee, Mr. Robinson accepts that it is not the conventional challenge to line items of expense as exemplified by the decision of Segal J in *Lea Lilly Perry* v *Lopag Trust*[11] but rather a challenge to broad categories of fees charged.

59. Mr. Robinson defends this approach on two grounds. Firstly, on the ground that the PL himself adopted the same approach, applying a discount to the fees and legal costs charged without specifying which particular line costs were being discounted and, in response to the Committee's objections, reallocating costs to the Company without specifying which line of costs he now considered to be non-*Berkeley Applegate* costs.

60. Secondly, Mr. Robinson contends that the PL failed to distinguish between *Berkeley Applegate* costs and the usual Controllership and Provisional Liquidation costs, in fact treating almost all the costs been as falling within the *Berkeley Applegate* principle. As the PL failed to identify, within

[11] Unrep. 20 April 2020

the categories of costs, the time spent on work done in respect of the trust estate as opposed to work done in the Controllership and/or the Provisional Liquidation, it was impossible for the Committee to determine whether the costs, legal fees and expenses charged were properly charged to the trust estate and whether, if so, they were necessarily incurred, reasonable and proportionate. Had the costs been properly allocated, the Committee would have been able to raise the sort of line by line challenge to particular lines of costs as contemplated by the decision in *Lea Lilly Perry.*

61. Mr. Robinson says further, that although the PL had identified 14 categories of costs and divided the work done into a number of sub-categories, the 500 pages of line items which were produced for the Committee's consideration did not correspond to those categories and sub-categories. As result, the Committee was unable to understand to what work the particular time costs related, much less challenge them.

62. Given the way the PL proceeded, the Committee was unable to raise a conventional challenge and had been constrained to seek to have a percentage of the costs reallocated to the Company as not being recoverable on the *Berkeley Applegate* basis and to propose that a percentage of the fees be discounted on the ground that they were unreasonable, unnecessary or disproportionate to the task of identifying and returning the trust assets to the clients.

The Issues

63. The issues raised by the Committee in its challenge to the remuneration sought by the PL are:
(1) the scope of *Berkeley Applegate* principle and

(2) the test to be applied when considering the reasonableness and proportionality of the work done.

The Legal Submissions
The scope of the *Berekely Applegate* principle

64. What costs are properly recoverable under the *Berkeley Applegate* principle is at the heart of what has been a highly acrimonious remuneration application.

65. In his submissions on behalf of the Committee, Mr. Robinson canvassed a number of authorities to illustrate the limit of the Court's equitable jurisdiction to allow an office holder to resort to trust assets on the *Berkeley Applegate* principle. He makes the point that although neither the decision of Deputy Judge Nugee in *Berkeley Applegate* or that of the Chief Justice in *Re Caledonian* establishes a clear guide as to the categories of fees and expenses which will fall within the *Berkeley Applegate* jurisdiction as neither Court was required to determine the office holders'

remuneration. In *Berkeley Applegate (No 2*), Judge Nugee had declared, as appears from p. 84 of the judgment, that:

> "*the liquidator is entitled to be paid his proper expenses and remuneration out of the trust assets if the assets of the company are insufficient,*"

but he made it clear that he was not deciding how the expenses and remuneration should be borne as between the company's assets and the trust assets.

66. That task fell to Peter Gibson J in *Berkeley Applegate (No 3)* [1989] 5 BCC 803. The decision establishes the need for a clear demarcation between *Berkeley Applegate* costs and costs incurred in the winding up. Peter Gibson J rejected the contention that any part of the expenses and remuneration which the liquidator could be awarded by the Court in respect of work done in administering the trust property which the company held as trustee could be payable out of the company's assets pursuant to s 115 of the **Insolvency Act** 1986. This section, which is in *pari materia* with section 109(1) of our **Companies Act**, provides:

> *"All 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."*

67. The Deputy Judge stated at pp 805 to 806:-

> *"The point is to my mind a short one, and largely one of first impression. Looking at sec. 115, for my part I have no doubt that the remuneration of the liquidator for administering trust assets which are not the assets of the company and the costs and expenses incurred by the liquidator, again not in getting in or paying out or distributing the assets of the company, but in administering trust assets, are outside the wording of the section. To my mind, it is clear that the section is simply dealing with the winding up of the company, involving as it does the getting in of the assets of the company, ascertaining its creditors, paying its liabilities in accordance with the statutory provisions and distributing any surplus. I do not think that on an ordinary reading "expenses properly incurred in the winding up, including the remuneration of the liquidator" would include expenses and remuneration which the liquidator has incurred and has been awarded by the court in respect of the work he has done administering the trust property held by the company as trustee, and in my judgment the section must be construed as limited to the liquidator's expenses in, and remuneration for, dealing with assets of the company. Take the reference to the remuneration of the liquidator. There is no doubt to my mind that does not include what the court in its inherent jurisdiction has awarded to the liquidator in respect of the work he has been doing not as liquidator but as trustee in administering the trust assets."*

68. The corollary of that principle is that fees and expenses incurred in the winding up of the company are not recoverable out of trust assets as stated by the Deputy Judge at page 805:

> *"Similarly the other expenses that are referred to as being incurred in the winding up cannot be expenses in relation to what are not the assets of the company."*

69. Mr. Robinson submits that the principle was expressly confirmed by the learned Chief Justice in *Re Caledonian Securities* who stated at para 17 of the judgment that:

> "*The distinction between the costs of the JOLs incurred in relation to the liquidation of CSL and the fees and expenditures of the JOLs relative to their work done in relation to the custody assets must therefore be strictly observed.*"

70. And at para 62:

> "*…while it is accepted that costs and expenses strictly referable to the winding up if the a company including the liquidators' remuneration) are payable out of the company's own assets and not out of the assets it holds on trust, Berkeley Applegate (4) is now established authority for the principle that the trust assets will be available for fees, costs and expenses incurred in sorting out what is trust property and in continuing to manage or administer that property, as opposed to the costs of the winding up of the corporate trustee.*"

71. Mr. Robinson submits further that where an office holder carries out work which is inevitable in the administration of the estate for which the office holder is appointed, such as the costs that would inevitably arise in the winding up process, the office holder is not entitled to recover the costs of doing that work from the trust assets even if the work done happened to confer *some* benefit on the beneficial owners of the trust assets.

72. In support of that submission, he relies on the principle to be derived from the decision of *Tom Wise Ltd. v Fillimore*, where the Court refused the officeholder's application to be paid out of fund held in trust, in respect of work done in renegotiating a contract under which monies recovered were payable to Tom Wise Ltd. The Court stated:

> *"It may well be that the work done by the administrators …produced a benefit to Tom Wise Ltd as a person entitled to some of the moneys due under the contract It is clear from the evidence of the administrators that, understandably, they did that work because they regarded the [] contract and its preservation and completion as being vital to the hopeful*

continuation of the company bin business. That work, it seems to me on the evidence, would have been done anyway, irrespective of any interest of Tom Wise Ltd …"

73. Support for that proposition is also found in *Berkeley Applegate (2)* where Deputy Judge Nugee limited the costs recoverable from the trust assets to those incurred in doing work which had been of *"substantial benefit" to* the beneficiaries of the funds[12].

74. Mr. Robinson submits another limitation on the exercise of the jurisdiction to award costs out of the assets held on trust was set out in the case of *Bell Birchall* [13] in which the Court held that that no costs should be allowed for work for which the beneficial owner does not need the court's assistance. In that case, a trustee in bankruptcy appointed over the estate of a bankrupt solicitor, sought to charge to the trust assets held in a solicitors' account: the costs of securing a large number of non-current files and of reconciling the solicitor's bank accounts. The Judge held that since the solicitor, even after being declared bankrupt, continued to have the obligation to manage funds held in his client accounts at no charge to the client, the clients had no need for the assistance of the trustee in bankruptcy. He accordingly refused the trustee's application.

75. Mr. Robinson also submits that the Court may disallow an office holder's costs where they have been incurred without the beneficial owner's consent or the Court's approval. He submits that office holders have no right to the benefit of the doubt or the Court's reliance on their commercial judgment where they *"barge ahead"* and carry out work the costs of which are only recoverable on the *Berkeley Applegate* principle where the office holder fails or refuses to seek the consent of those entitled to the trust property or carries out the work in the face of opposition from them and more so where the costs of the work to be undertaken are likely to be disproportionate to the benefit which may accrue to the beneficial owners of the trust property.

76. He relies on the view was expressed by Segal J in *Lea Lilly Perry* where the learned Judge said this at para 5 of the judgment:

"I would expect that if the receivers are unclear as to what course to take they would apply to the Court for directions and do so before embarking on any investigation or action plan that would involve incurring substantial expense."

77. Mr. Robinson says that this guidance is instructive and based on sound principle and reinforces the submission of the Committee that office holders are not at large and cannot simply undertake work and then come to the Court and say "*I have done it and there might have been some benefit so I should be paid for it".* So, for instance, the Controllers ought to have consulted with and

[12] At page 48
[13] [2016] 4 All ER 766

obtained the consent of CIMA and/or sought Court sanction or direction for their proposed actions given the Company's incipient insolvency and what were the expanding costs of the Controllership, which had already exceeded both the Controller's estimate of costs and the Company's assets before the Company was put into provisional liquidation. Had the Controllers, as they then were, alerted CIMA to the costs issue, CIMA may have opted to take some other regulatory measure.

78. I need not deal with *Gillan v HEC Enterprises Ltd (in Administration)*[14] on which Mr. Robinson relies to support the proposition that the costs of advancing an interest adverse to the beneficial owners may not be recovered out of the beneficiaries' estate. I do not dispute that such costs may be disallowed but for reasons which I hope will become clear, when I come to consider the specific challenges made by the Committee, the issue is not one that arises for my consideration.

Reasonableness and the procedure for assessing quantum

79. Once the Court is satisfied that the costs are recoverable out of the trust estate, the next step is to determine whether the remuneration and costs claimed are reasonable and proportionate to the end to be achieved.

80. In *Re Caledonian,* the learned Chief Justice confirmed that the approach to be taken for determination of reasonableness is the same as that adopted by the Court when assessing a liquidator's claim for remuneration and expenses pursuant to the Insolvency Practitioners' Regulations ("IPR"), as applied in *Re SphinX Group.* The test of reasonableness applied in *Re SphinX Group* is set out in the following passage taken from the judgment of Ferris J in *Mirror Group Newspapers Plc v Maxwell and Others (No 2*) [1998] 1 BCLC 638:

> *"… [T]he test of whether office-holders have acted properly in undertaking particular tasks at a particular cost in expenses or time spent must be whether a reasonably prudent man faced with the same circumstances in relation to his own affairs, would lay out or hazard his own money on doing what the office-holders have done. It is not sufficient, in my view, for office-holders to say that what they have done is within the scope of the duties or powers conferred upon them. They are expected to deploy commercial judgment not to act regardless of expense."*

81. In the *Mirror Group* Ferris J explained the rationale for the Court's approach:

> "*The essential point which requires constantly to be borne in mind is that office-holders are fiduciaries charged with the duty of protecting, getting in, realising and ultimately passing on to others assets and property which belong not to themselves but to creditors or*

[14] [2016] EWHC 3179 (Ch)

beneficiaries of one kind or another. They are appointed because of their professional skills and experience and they are expected to exercise proper commercial judgment in the carrying out of their duties. Their fundamental obligation is, however, a duty to account, both for the way in which they exercise their powers and for the property with which they deal with.

Office-holders are nowadays not normally expected to act gratuitously. It is salutary to remember, however, that the rule that a trustee must not profit from his trust is a rule which applies to all kinds of persons who are in a fiduciary position (Snell's Principles of Equity (28th Edn. Sweet and Maxwell) pp. 249-252). The allowance of remuneration in particular cases represents an exception to this rule, but it inevitably involves a conflict between the interests of the fiduciary who is to receive such remuneration and the interests of those to whom the fiduciary duties are owed who will bear whatever remuneration is allowed. A consequence of this is that it must be for the office-holder who seeks to be remunerated at a particular level to justify his claim. As I see it, it is simply one aspect of his obligation to account. What he retains for himself out of the property which comes into his hands as office-holder is not available for those towards whom he is a fiduciary. He cannot therefore account for it by paying it over. The only way in which he can account for it is by showing that he ought to be allowed to retain it for himself. But this is necessarily a matter for him to establish."

82. As for the factors generally to be taken into account when determining the reasonableness of any item of remuneration or cost claimed by a liquidator, in *Re Caledonian* the Chief Justice adopted the five factors applied in *Re SphinX Group*, being:

(1) the time properly given by the liquidator and his staff in attending to the company's affairs;
(2) the complexity (or otherwise) of the case;
(3) any respects in which, in connection with the company's affairs, there falls on the liquidator any responsibility of an exceptional degree or kind;
(4) the effectiveness with which the liquidator appears to be carrying out, or to have carried out, his duties; and
(5) the value and nature of the property with which he has had to deal.

83. With respect to the Committee's broad brush approach to the costs application which has been criticised by the PL and those who represent him, Mr. Robinson finds some support in the judgment of Segal J in *Lea Lilly Perry* at para 22 where the learned Judge said this:

"22. In disposing of the JR's application, I need to deal not only with those elements of their fees to which the Plaintiffs objects but with the whole claim since before approving any

part of the JR's claim, the Court must be satisfied that the fees are fair and reasonable in the circumstances."

84. Mr. Robinson submits that before the Court embarks upon a line by line consideration of fees charged, as undertaken by Segal J in *Lea Lilly Perry,* the Court needs to stand back and make an assessment as to whether the fees are reasonable and proportional in the circumstances and, presumably, apply a discount if they are not. Mr. Robinson says the issue is particularly stark in this case given what the Committee contends was the actual scope of the work that required the intervention of the Controllers and the JPL's which it says was very narrow, given that only some 30 of the over 300 accounts managed by the Company required *'unravelling.'*

85. Mr. Robinson reminds the Court that there is no burden on the Committee to provide evidence to demonstrate that the costs are not reasonable; that burden is on the PL, despite the suggestion by the PL and his attorney to the contrary. This principle is also to be gleaned from *Lea Lilly Perry* where the learned Judge recited part of the UK Practice Direction as follows:

> *(h). Paragraph 21.2.3 of the UKPD set out a number of guiding principles by reference to which remuneration applications should be considered by the court. These include: (1) "Justification" (namely that it is for the appointee to justify his claim and be prepared to provide full particulars of it); (2) "the benefit of the doubt" (namely that the corollary of (1) was that if the court is left in any doubt as to the appropriateness, fairness or reasonableness of the remuneration, it should be resolved against the appointee); and (3) "proportionality of remuneration" (namely that the amount of remuneration should be proportionate to the nature, complexity and extent of the work done by the appointee, and to the value and nature of the assets and liabilities).*

86. Mr. Robinson concluded his submissions on the proper approach to this assessment exercise, by asserting that the PL's failure to make proper separation between the costs related to the identification and return of the client assets and the costs incurred in the Controllership and the Provisional Liquidation, which are properly costs to be borne by the creditors and not the clients, may make it difficult for the Court to assess the claim for remuneration out of the trust assets. He submits that in the circumstances, it is open to the Court to require the PL to restate the costs relating to any specific categories which the Court considers to be inadequately stated or insufficiently supported for the Court's consideration and approval.

87. I will add a postscript to Mr. Robinson's submissions by way of emphasis, as I am at pains to correct the impression the members of the Committee ostensibly have - which other clients may share notwithstanding the advice of their attorney to the contrary - which is expressed at para 15 of the Committee's Report in the following terms:

> "*15.The PL's application is* ***not*** *a liquidation fee approval application. It is an application under a very specific rule that overrides property rights and allows the expropriation of private property for a very limited purpose.* ***These considerations are not present in a standard liquidation fee approval application,*** *where the company's creditors do not own the assets that will be used to own the liquidator's fees. [emphasis supplied]*
>
> *16. Accordingly,* ***the usual approach to a fee sanction application to a liquidation*** *where (1) the test is simply whether the fees are reasonable and properly incurred, (2) it will be assumed that the fees are reasonable unless it is shown otherwise and (3) considerable weight is given to the professional judgment of the liquidator,* ***simply does not apply****. The Court here is deciding whether the assets of clients of the Company may be expropriated…the present application invokes a wholly different test ….*" *[emphasis supplied]*

88. There is no separate test for reasonableness when assessing the fees which an officeholder seeks to recover under a *Berkeley Applegate* Order, as the Chief Justice made clear in *Re Sphinx* in those passages to which Mr. Robinson referred the Court. If the fees are payable out of the trust assets as being properly incurred for the purpose of identifying, protecting and distributing those assets, then the Court will assess the reasonableness of those fees in the usual way.

Discussion

89. Mr. Robinsons' submissions on the scope of the *Berkeley Applegate* principle are generally correct.

90. With respect to the approach adopted by the Committee, Mr. Halkerston on behalf of the PL suggests that the challenge to the PL's fees should be rejected in the absence of the sort of line by line scrutiny of the bills of costs which was endorsed in *Lea Lilly Perry.* The PL's opposition to this approach seems to be that any such adjustment would be arbitrary and contrary to the objective of the remuneration exercise enunciated in *Lea Lilly Perry* which is to ensure that that an office-holder's remuneration *"is fixed and approved by a process which is consistent and predictable."*

91. The fact is that the PL's bill of costs runs to over 500 pages. It does sets out in appropriate detail the time spent on 14 categories of work and the PL has provided, as required, a full description work done within those categories and, in his evidence, a full explanation for why the work done was required to be done. The detail he has provided is commensurate with the complexity of the task and I make no criticism of him in that regard.

92. The way the costs have been set out, however, have made it quite impossible for the Committee to discern what time was spent on the particular work steams to which they object. It is for that

reason the Committee invites the Court to reallocate a percentage of the costs to the Company on the ground that they fall outside the scope of the *Berkeley Applegate* principle.

93. In reaching my decision, I have accepted certain objections made by the Committee to the fees and reallocated them to the Company but have directed that the PL ascertain those costs rather than reallocating an arbitrary amount of the costs to the Company, notwithstanding this was the approach adopted by the PL himself who reallocated certain costs to the Company without stipulating which of the costs he had contended should be borne by the trust assets should now be borne by the Company.

94. That deals with the Committee's objection to the costs which they contend fall outwith the scope of the *Berkeley Applegate* principle.

95. The Committee also contends that the Court may discount a percentage of the fees if it finds the costs are disproportionate to the tasks the Controllers and/or JPLs were required to undertake. I see nothing wrong in principle with that proposition. If the Court is satisfied that the costs of the work done, when looked at in the round, are disproportionate to the value of the work to the clients or the trust estate, the Court may adjust the fees by disallowing a percentage of the costs. As Ferris J said in *Mirror Group "remuneration should be fixed so as to reward value, not so as to indemnify against cost."*

96. I cannot, however, make such an assessment until the costs which are to be reallocated to the Company are ascertained in line with the judgment and I know the quantum of fees which the PL is now properly seeking to recover from the trust assets.

The Committee's Specific Objections

97. I turn now to consider the specific objections of the Committee to divers categories of fees on the basis that the costs which do not fall within the *Berkeley Applegate* jurisdiction.

98. The Committee's original position was that none of the costs of the Controllership should be borne by the trust assets on the grounds, *inter alia,* that:

(i) CIMA had no legal authority to authorise, and the Controllers no authority to incur, *Berkeley Applegate* costs despite the decision of the Chief Justice to the contrary;
(ii) the work undertaken by the Controllers did not involve or necessitate taking any steps to protect the trust assets, that is to say nothing needed to be done for the preservation of the trust assets beyond appointing the Controllers; and
(iii) the costs incurred by the Controllers were an inevitable consequence of the controllership and could not be recouped from the trust assets.

99. This position has shifted somewhat in that the Committee now recognises that some of the work done in the Controllership was aimed at protecting, preserving and/or returning client assets. The Committee had originally objected to all the costs under the category of **Investigations, Analysis and Reconciliation of the Company** on the ground that they were costs of the Controllership and not *Berkeley Applegate* costs. This objection has now been withdrawn which I take to mean that the Committee is satisfied that not only that the costs are reasonable, but that the majority of the work done under this head redounded to the benefit of the clients. Mr. Robinson stated that he would have maintained his objection to the fees on the bases that he set out, but would yield in the circumstances where the Committee had signalled their willingness to have these costs paid out of the trust assets.

Determination of Client Trust Asset Status and Confirmation Process

100. The amount claimed in this category is $149,261.50. There are 13 sub-categories of work set under this head. The Committee objects to all the work done during the period of the Controllership which is set out at para 99 (a)(b)(c)(d)(e)(f)(l) and (m).

101. The description of the work undertaken by the Controllers to which the Committee objects appears in Krys 5 as set out below:

> *"99. Various sub-custodians hold the Trust Assets. As at the date of appointment as Controllers, the records of the Company were incomplete and it was therefore essential for the Controllers, and subsequently, the JPLs to:*
>
> *(a)* engage with the sub-custodians to determine what assets they held, on what basis and for whom as noted at paragraph 96(e) above;
>
> *(b)* undertake the 'Confirmation Process' by which Clients were able to assist the JPLs' preliminary reconciliation of the Company's records regarding each Client's asset position as against each Client's own records (this process is more fully described at paragraph 7(a) of Krys 4);
>
> *(c)* perform a reconciliation of the information provided by the custodians against the information provided by Clients, sub-custodians and the Directors; and
>
> *(d)* review up to date statements of current asset holdings at IB and Non-IB Custodians reflecting changes in asset values since beginning of the Controllership,
>
> *and in doing so, the Controllers / JPLs have taken steps to:(e) correspond with IB and Non-IB Custodians regarding the Trust Assets held by them as noted at paragraph 96(e) above;*

(e) review brokerage agreements and events of default provisions in order to determine the potential impact of provisional liquidation and the revocation of the Company's license;

…

(l) conduct a reconciliation of the confirmed Trust Assets, including their composition; and

(m) communicate on an ongoing basis with the Directors on cash reconciliations.

102. The primary submission on behalf of the Committee is that the costs of the work done in these categories during the Controllership period ($43,022) are not recoverable as the work was an inevitable consequence was the Controllership. In making this challenge, Mr. Robinson places emphasis on CIMA's letter of appointment dated the 18 July 2019 which required the Controllers to '*take all necessary actions to administer the affairs of the Company*' and to:

(a) assume control of, collect and get in all necessary property or assets of whatever nature to which the Company is or appears to be entitled;

(b) safeguard the interests of the Company's clients, investors and creditors and to provide an inventory of assets and liabilities as necessary;

(c) take possession or make copies of the books and records and other documents pertaining to the affairs of the Company to enable a proper accounting of the current financial position of the Company;

(d) with the approval of the Authority appoint an agent to do any business which the Controllers are unable to do themselves or which can more conveniently be done by an agent;

(e) enter into discussions and negotiations with any person in the Cayman Islands or elsewhere as necessary to arrive at a prompt and orderly resolution of the Company's financial problems; and

(f) promptly refer all matters of a legal and supervisory nature to the Authority.

103. Mr. Robinson submits that everything the Controllers did during the Controllership period was a necessary and inevitable consequence of the functions they were required to perform in

accordance with the terms of their appointment and were undertaken at the expense of the licensee.

104. Notwithstanding the terms under which the Controllers were appointed, the Chief Justice's Order of November 2019 extended to any work which was done for the benefit of the trust estate, consistent with the principle that officeholders "*are not to be expected to undertake work done for the benefit of the custody asset customers at their own expense.*" [15]

105. The PL says, and I accept [16], that:

> "*It was clear that this work had to be done as a primary step to identify the extent to which the statements of Client assets provided by the Company could form some basis to identify assets in fact held on trust."*

106. With the exception of 99 (m), it is plain that the workstreams to which the Committee objects were pursued in an effort to identify the trust assets, determine how the assets were held by the disparate custodians and confirm the trust assets so they could be returned to the clients. This is work done that falls squarely within the *Berkeley Applegate* principle.

107. I construe the work at 99 (m) to be a reference to the cash reconciliations that the Company was required to perform pursuant to section 7 of the Financial Requirements Regulations made under the SIBL, and not undertaken for the benefit of the trust estate. The time spent on that exercise is not recoverable from the trust assets and are reallocated to the Company. The costs associated with 99 (m) are to be ascertained by the PL.

108. The Committee also challenges the costs on the grounds that they are disproportionate and unreasonable.

109. The Committee contends that the Controllers/JPLs pursued a costlier and more labour intensive route - created *"a major costs centre"* - than was necessary in order to confirm what assets were held by each client in the circumstances where the majority of the assets were held in segregated accounts and the state of those accounts were known the clients.

110. More particularly , the Committee asserts in its Report that:

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[15] *Re Caledonian* at para 63
[16] Krys 5 para

"115. Since for all the U account and DAS clients the company's data and the client's data all derived from the IB platform, any difference would have been surprising. The Directors indicated that they could assist in the process which could and should have been very straightforward. Clients could at any time log into their accounts from the IB platform to see their statement at any time in history and easily confirm their balance as at July 18, 2019. In the event the confirmation process was not completed in a sensible and/or cost effective manner. Instead of asking clients to login and confirm balances on a certain date for accuracy, the Controllers sent all clients a "cut and paste" statement generated in Microsoft Excel. The Directors explained to the Controllers the difficulties the Clients would have with this but the Controllers refused to take their advice. This resulted in a significant increase in costs in the confirmation process, significant delays in receiving confirmations, and substantial client distress. By the time of the November hearing 92% of the clients had confirmed their agreement to the stated balance. Accordingly, this seems an extremely large amount to charge for a simple process."

111. How the Controllers/JPLs went about ascertaining whether the assets in each account belonged to the client in question or whether the Company's records showing what assets were held for clients at the various sub-custodians was correct, essentially called for the exercise of commercial judgment. Given the record keeping chaos which obtained, I cannot fault the JPLs for the course taken in tracing the flow of funds from the Fidelity account in which Company and client assets were commingled, to the clients' accounts.

112. I also accept the PL's evidence that confirming the funds which the Company said were to be held in the clients' accounts at IB wasn't just a matter of asking the clients to log on to their account and advise the Controllers what assets they had on hand, as the Committee suggests. Rather, there had to be a reconciliation of the records held by the Company and the clients' understanding of their position - referred to by the PL as the Confirmation Process - and, until the Confirmation Process was carried out, there was a risk that the clients' understanding of their trust asset position did not accord with the Company' records.

113. The Committee seized upon a comparison to Madoff made by the PL which, the Committee argues, informed the JPLs' persistent refusal to accept the Directors' offer of assistance in confirming clients' assets which would have enabled tasks to be completed more economically. The comparison to Madoff suggests to me that the PL was concerned that the statements produced by the Company were incorrect, or even fictitious, or that clients' accounts were being credited with other clients' monies to conceal losses and that the comparison was informed by the JPL 's determination that the:

"Directors had in numerous instances simply created documents or provided verbal explanations inconsistent with the scant evidence in the Company's books and records."

114. Having considered the particular objection made by the Committee, I confess that I do not understand how *the process* chosen by the JPLs caused increased costs. The PL states that he produced a statement of each client's trust assets as at 18 July 2019 in excel format *"reflecting the ordinary approach adopted in the audit of bank and /or security balances."* [17] That, it seems to me, was a reasonable approach. Further, it should have been, as the PL says, a simple matter for the U Account clients to log into their accounts and confirm the balances shown in the spreadsheets. It is not really explained in the Report or by Mr. Ecclefield why the clients found it difficult to do so.

115. In addition, the *clients'* difficulty in complying might have delayed the process and might have caused them to experience significant distress, but it's hard to see how that delay or their distress increased the costs of work done by the JPLs in preparing and producing the excel sheets for the clients to use. Properly analysed, the costs incurred by the JPLs, in reviewing those sheets or assisting those clients who had difficulty reconciling their positions, were not incurred or increased because the excel format was employed but rather because of the mismanagement of the Company and the Directors' failure to keep any or any proper books and records. It is plain to me and, I think, accepted by the Committee, that *some* document would have to be created which confirmed each clients' trust asset position, independent of whatever records the Company held.

116. I am satisfied and find that the work was necessary and the costs associated with that work were reasonable having regard to all the circumstances.

117. With respect to the legal expenses for Duane Morris, the PL asserts that they engaged external counsel to assist the JPLs in determining which entity was IB's client and that it was appropriate to do so given that the Company's contractual agreements with IB are governed by Connecticut law.

118. The JPLs also instructed Duane Morris in relation to certain statements made by the Directors regarding Securities Investor insurance for clients and the *"vetting"* of the Company by divers financial agencies in the US, statements which Duane Morris had ultimately determined were either *"false or misleading."'*

119. I am satisfied and find that the decision to engage Duane Morris for the purpose of identifying which entity was IB's client was reasonable and rational and the costs incurred with respect thereto are payable out of the trust assets.

120. I am of the view, however, that the fees incurred with respect to the misstatements made by the Company, were incurred in relation to the Company's regulatory breaches and are outwith the *Berkeley Applegate* principle.

121. I, therefore, reallocate half the costs of incurred in instructing Duane Morris to the Company's assets.

Communications with Directors

122. The Committee objects to half of the costs for which the PL seeks remuneration under this head which is in the sum of $79,967.

123. More particularly, the Committee objects to the items set out at para 102 (a) (b) (c) and (d)(i) to (v) of Krys 5 which states as follows:

> *"102. The Controllers and subsequently the JPLs have conducted discussions and correspondence with the Directors and management of the Company. These discussions have been necessary, inter alia, in order to:*
>
> *(a) ensure the Controllers / JPLs had continued access to the offices, books and records of the Company;*
>
> *(b) further understand the bases upon which the Company held assets on behalf of Clients (including any issues / matters identified following an initial reconciliation process and the Confirmation Process, and the discrepancies identified between the Company's records and Client account statements) (as noted above at paragraphs 96(h), 99(c) and 99(i)); and*
>
> *(c) further understand the background to and details of the transactions in relation to which the Company appeared to have used Trust Assets without instruction or permission,*
>
> *and in doing so, the Controllers / JPLs have taken steps to*
>
> *(d) correspond with the Directors, including their legal counsel where applicable, in respect of:*
>
> *(i)* continued access to the offices and books and records of the Company and Clients;
>
> *(ii)* updating contact details for Clients;

(iii) previously unidentified factors impacting the valuation of the IB book of business including historical/projected revenue, segregation of Client accounts, and accounts to be included in the potential sale of the IB book of business;

(iv) obtaining information to be included in presentations regarding the potential sale of the IB books of business;

(v) providing details of the potential purchasers of the IB book of business including summary of bids received and ultimate successful bid;"

124. Again, the primary submission is that none of the work done during the period of the Controllership can be paid out of the trust assets as the work was an inevitable consequence of the Controllership or the Provisional Liquidation.

125. The costs in the work steams identified - with the exception of communications with respect to the potential sale of the business - appear to me to have been incurred by the Controllers seeking to determine how the monies received from clients had been dealt with by the Company and not in investigating the regulatory breaches which had already been flagged by the accountants, nor ascertaining who the Company's creditors were. I am satisfied and find that the work done was undertaken primarily with a view to understanding how the clients' assets were held and how certain of those assets came to be exposed to losses. It is work which was undertaken to identify and return the trust assets to the clients and the costs are recoverable out of the trust estate.

126. For reasons set out below (at para 170 et seq) where I deal more substantively with the PL's application for remuneration for work done to sell the Company's book of business, I hold that the communications with the Directors with respect to the sale of the Company's business are outside the scope of the *Berekely Applegate* principle.

127. The costs incurred for the work set out in Krys 5 para 102 (d) (iii) - (iv) to the Company are reallocated to the Company.

128. The PL's bill of costs suggests that approximately 100 hours was spent communicating with Directors. The Committee challenges this assertion on the ground that the Controllers and JPL's had little contact with the Directors, who had been largely excluded from the process of confirming the clients' assets.

129. The fact that the Company had over 300 clients, and books and records on which the Controllers/JPLs felt unable to rely, plainly necessitated contact with Directors to sort out how the clients assets were held, how it came to be that the assets of certain clients had been exposed to losses and used without their knowledge and consent.

130. The PL says, and I accept, that he conservatively estimates that 2000 emails were received from, or sent to, the Directors over the course of the Controllership and the Provisional Liquidation of the Company and that he personally received 780 emails from Directors. His evidence, which is uncontroverted, demonstrates that communications with the Directors were extensive and I give no weight on the Committee's unsupported assertion that the Controllers and JPLs had little contact with the Directors.

131. Given the absence of proper books and records, I consider that the time spent in communication with the Directors was necessary and the costs reasonable and proportionate to the task of unravelling how Client assets were held.

Communications with Stakeholders

132. The amount claimed under this head is $584,061. The Committee objects to $350,437. The work streams to which the Committee objects are set out in para 105 of Krys 5, as follows:

> *"105. It has been important to keep Clients up to date by way of regular notifications (directly and through the Ad Hoc Committee) and updates via the liquidation website. The Controllers, and subsequently, the JPLs have engaged in correspondence with Clients and, in certain circumstances, their legal counsel. In doing so, the Controllers/JPLs have taken steps to:*
>
> *(a) prepare and distribute notices of appointment to Clients and custodians;*
>
> *(b) prepare and distribute update circulars and FAQ updates to Clients;*
>
> *(c) arrange and operate a liquidation website to provide timely information to Clients;*
>
> *(d) correspond with Clients, including at times their legal counsel, regarding the conduct of the Controllership and liquidation proceedings particularly in respect of their ongoing rights, obligations and in order to provide assistance;*
>
> *(e) confirm valuation and composition of Reserve contributions per Client;*

(f) liaise with Clients on the process for early release/transfer of Trust Assets;

(g) liaise with Clients and their legal counsel regarding requests for information required by them to submit Proprietary Claim;

(h) liaise with Clients regarding KYC requirements for the transfer of Trust Assets; and

(i) correspond with Custodians to agree a protocol for early release/transfer of Trust Assets and continued communication to instruct and facilitate such transfers."

133. The costs incurred up to March 2020 for the work detailed in para 105 was in the sum of US$257,934.50.

134. The costs grew exponentially by an additional $326,126.50 in the period 1 April 2020 to 30 June 2020. The PL explains the work done in this period in Krys 8 as set out below:

"*It has been important to keep Clients up to date by way of regular notifications (directly and through the Ad Hoc Committee) and updates via the liquidation website. My staff and I have engaged in correspondence with Clients and, in certain circumstances, their legal counsel. In doing so, in the period from 1 April 2020 to 30 June 2020, we have taken steps to:*

(a) correspond with Clients, including at times their legal counsel, regarding the conduct of the liquidation proceedings, particularly in respect of their ongoing rights, obligations and in order to provide assistance;

(b) liaise with Clients (and IB and Fidelity where applicable) on the release/transfer of Trust Assets, including KYC requirements in order to effect such release/transfer;

(c) liaise with Clients and their legal counsel regarding their Proprietary Claims (if any), including my final adjudication in respect of such Proprietary Claims;

(d) liaise with certain Clients regarding potential claims arising under the Company's Directors & Officer and Professional Liability insurance policies (prior to expiry of the relevant policy periods), and progressing matters related thereto;

(e) *liaise with DAS Account Clients regarding the amount and allocation of the DAS Account Loss between the DAS Account Clients and the margins to be paid prior to any distribution of Trust Assets to the DAS Account Clients."*

135. The first objection to the fees is with respect to the Controllership period. Mr. Robinson submits that communication with stakeholders is an ordinary incident of the Controllers' statutory obligations and cannot be paid out of the trust assets. I accept that proposition.

136. To the extent that the work set out in para 105 (a) and (b) was done in the Controllership period, the costs should be paid out of the assets of the Company and I reallocate all those costs to be paid out of the Company's assets.

137. I also accept the submissions that the costs of establishing of establishing a website as set out in 105 (c) are costs in the Provisional Liquidation which fall to be paid out of the Company's assets and those costs are also reallocated.

138. The Committee also contends that the costs incurred in communicating with stakeholders during the 'Confirmation Process' were unreasonably incurred in the circumstances where the majority of the client assets were in segregated accounts.

139. The Committee's position is that these costs were unnecessarily inflated by the JPLs' lack of experience of the brokerage business who adopted an approach which added unnecessary complexity to the process of confirming the clients' assets which led in turn to prolonged engagement with clients during that process and again during process of transferring assets.

140. The Committee contends that the JPLs refusal to accept the assistance of the Directors, which would have made both the 'Confirmation Process' and the process of transferring the assets to the clients simpler and less costly, should not be rewarded by allowing the PL to recover the costs of confirming and returning the assets in full.

141. I have already held that the JOLs decision to conduct the 'Confirmation Process' in the manner they did was reasonable given the absence of books and records. It follows that I find the time spent communicating with clients during this 'Confirmation Process' was time properly spent.

142. The time spent returning the assets to the 'vanilla' IB U Account holders pursuant to the November 2019 Order appears, on the face of it unreasonable, given what should have been a relatively easy task once the accounts had been confirmed. The PL explains the delay at length in Krys 5. [18] From his narrative, it appears that the delay and the attendant costs resulted from the

[18] Paras 18 – 86.

stance IB took in response to the JPLs request for the transfer of the assets, rather than the JPLs ignorance.

143. As the PL explains, the process of returning the assets was controlled by IB and its lawyers and complicated by the fact that IB regarded the Company as IB's client and not the U Account holders. The JPLs cannot be faulted for not accepting the Directors' assistance to transfer the trust assets in the circumstances where IB had explicitly indicated that it was only prepared to communicate with the JPLs in regard to the transfer of trust assets.

144. In any event, the Committee and the clients were fully informed at every stage about the JPL's negotiations with IB for the return of the clients' cash and securities and it is more than a little disingenuous for the Committee to suggest that the process should have been simpler and quicker in the circumstances where they were well aware of IB's demands.

145. I am satisfied that the costs were properly incurred and recoverable from the trust assets.

146. Finally, the Committee objects to the costs incurred by the JPLs in respect of the KYC/AML on the ground that the work was unnecessary as compliance issues were a matter for the new brokerages to which the clients' accounts were to be transferred.

147. The PL explains, however, that CIMA required that the JPLs bring the customer due diligence into an acceptable state before transferring the trust assets to clients. In addition, his firm is subject to anti-money laundering laws and regulations and was required to ensure that the clients met all KYC/AML requirements applicable to the Company before it could execute any client instructions to effect the transfer of trust assets. I accept the PL's explanation. The work had to be done before the trust assets could be returned to the clients and the costs are for payable out of the trust estate.

148. The Committee suggests these costs were disproportionate to the value of the work done to the trust estate and were inflated by the "*combination of"* the JPLs' "*ignorance of the way the business worked and the aggressive and unpleasant tone of some of the correspondence with clients* [which] *created a vicious circle of more correspondence and thus the incurring of further fees."* Needless to say, the PL doesn't accept these criticisms and, quite properly, objects to the *ad hominem* attacks which are unnecessary to raise a challenge to the scope and necessity of the work objected to. They are also egregious in light of the composition of the Committee.

149. The simple fact is that the clients hadn't appreciated that there was a time cost involved in corresponding with the JPLs in order to express their displeasure with the JPLs and their conduct of the Provisional Liquidation. It was the weight of this correspondence, which the JPLs had to consider and respond to, that drove up the costs. According to the PL, the correspondence was

extensive and increased costs to the extent that he put a notice on the website advising the clients of the costs implications of corresponding directly with the JPLs.

150. In the absence of any challenge to any particular line item of cost, the sums claimed under this head are approved as being reasonably incurred and proportionate in all the circumstances and, save as set out above, they are recoverable from the trust assets.

151. The costs which I have reallocated to the Company are to be ascertained by the PL.

Books, Records, Cash Management and Supervision

152. The costs set out in para 125 to 127 of Krys 5 and at para 31(a)(d)(e)(f)(g) and (k) of Krys 8 are objected to by the Committee. The costs claimed are $620,978.90. The Committee invites the Court to reallocate 50% of the costs to the Company.

153. The costs and the explanation for allocating these costs to the trust estate are set out by the PL as follows:

> *"125. Costs have been incurred in connection with the reconstruction of the books and records of the Company and ongoing operation of the Company's business. The Controllers / JPLs have taken steps to:*
>
> *(a) image the electronic records of the Company;*
>
> *(b) correspond with Custodians and Clients in relation to returning Trust Assets;*
>
> *(c) monitor progress of the Controllership and provisional liquidation and directing activities as appropriate;*
>
> *(d) attend meetings, conference calls and general correspondence with legal counsel, the Directors and CIMA with regard to matters arising out of the Controllership and provisional liquidation;*
>
> *(e) access and preserve the Company's server and associate records from the Company's offices;*
>
> *(f) retrieve historic KYC information from the Company's servers, analysis of same to determine validity and relevance;*
>
> *(g) maintain updated KYC information for Clients who elect to undertake transfers or early releases;*

(h) *oversee transfer and early release process with Custodians; and*

(i) *retrieve historic account reporting and correspondence by the Company to Clients.*

126. *Such Costs were necessarily incurred by the Controllers and the JPLs in order to identify, inter alia, Clients and the Trust Assets belonging to each Client. As a result of the mismanagement of the Company and the total absence of any proper and/or accurate records of the Company, such fundamental steps were taken by the Controllers and the JPLs, without which Clients would not be able to locate and/or identify the Trust Assets belonging to them."*

154. The Committee contends that the time was spent on work which was an inevitable consequence of the Controllership and/or the Provisional Liquidation. Having considered the PL's explanation for the work done, it appears to me that the Committee's objection is made out in respect of the work streams at para 125 (a) (c) (d) (e) (f) and (i) as it was work which the Controllers and/or the Provisional Liquidators were required to undertake as part of their remit to investigate the extent of the Company's non-compliance with the laws and regulations relevant to a broker/dealer agency and pursuant to their obligation to preserve the Company's books and records, among other things. Those costs are reallocated to the Company's assets.

155. The Committee also objects to the following costs set out in Krys 8:

"31. In the period from 1 April 2020 to 30 June 2020, my staff and I have taken steps to:

(a) *monitor progress of the provisional liquidation and directing activities as appropriate;*

..

(d) *comply with data protection and tax reporting requirements;*

(e) *file the notice of resignation of Richard Ellison as Director, and certain related correspondence;*

(f) *file the Company's annual return with the Registrar of Companies;*

(g) *correspond with the Company's insurance broker and/or insurer regarding the Company's insurance coverage pursuant to the Company's Directors & Officers and Professional Liability insurance policies, including reviewing and considering the insurers preliminary coverage views relating to, amongst other things, the circumstances leading to the appointment of the Controllers and the matters discovered during the Controllers and JPLs' investigations;*

...

(k) *analyse receipts and payments in the Company's operating account with Fidelity."*

156. The matters set out in Krys 8 para 31(a) (d) (e) (f) (g) and (k) are not payable out of the trust assets for the reason that they are properly expenses in the Provisional Liquidation.

157. I note with respect to Krys 8 para 37(g), that the PL suggests in his evidence that the Company's Directors and Professional Liability Insurance, and the claims made under it, was no business of the Committee's[19], which begs the question why it was included in the costs which the clients were being asked to bear.

158. These costs are reallocated to the Company's assets.

Reporting to CIMA

159. The amount claimed for reporting to CIMA is $88,499.50. The PL's evidence is that he has deducted $17,699.90 from that sum representing costs which do not fall within the scope of *Berkeley Applegate*.[20]

160. The Committee objects to the entirety of the balance of $77, 899.60. The PL has offered to allocate a further $36, 196.50 to the Company's assets.

161. The work done is set out in Krys 5 as follows:

"114. The Controllers and the JPLs have been obliged to prepare reports (and other updates) to CIMA regarding the Company. These reports have covered, inter alia, the unauthorised use of Trust Assets, the identification and protection of Trust Assets and the financial position of the Company. In doing so, the Controllers / JPLs have taken steps to:

(a) *prepare and deliver, in accordance with CIMA's instructions, the first and second interim report of the Controllers pursuant to Section 17(5) of the SIBL to CIMA, addressing, inter alia:*

(i) *the segregation of Trust Assets;*

[19] Krys 12 para 83 (c)

[20] Krys5 para 33; Krys 12 page 46 footnote 2

(ii) the investigation of unauthorised use of Trust Assets by the Company;

(iii) the potential sale of the IB book of business;

(iv) the risks of potential exposure to Clients and the possibility of liability accruing to the Company;

(v) the financial condition of the Company;

(vi) the recommended steps to be taken to protect Trust Assets and the assets of the Company; and

(b) prepare summaries of the tasks performed by the Controllers and their staff.

*115. The majority of these Costs were incurred by the Controllers as a consequence of their irreducible statutory obligations and their obligations to report to CIMA. The appointment of the Controllers was inevitable following serious, sustained regulatory non-compliance by the Company and the investigations undertaken by the Controllers uncovered misconduct which, if left unchecked, could have had far more disastrous consequences for Clients and Trust Assets. The majority of this work would have had to be done regardless of the statutory regime, and that work was necessary and for the benefit of the Clients. Following the commencement of liquidation proceedings in respect of the Company, the JPLs have engaged less regularly with CIMA and these Costs have therefore significantly fallen away.***"**

162. In his evidence, [21] the PL wrongly frames the Committee's objection to the costs *as not* recoverable from the trust assets because *"the work done did not afford the Clients any benefit".* The Committee's objection is that the costs were general expenses of the Controllership - were indeed, as the PL said, *"the irreducible statutory obligations of the Controllers*" - and for that reason not recoverable out of the trust assets, even if *some* benefit derived to the clients.

163. I accept the Committee's submissions that these are costs incurred for doing work which was an inevitable consequence of the Controllership and did not derive from any activity directly related to administering and returning the trust assets to the clients. Just because the Controllers ultimately reported to CIMA that the Company's mismanagement extended to the trust assets under its control and recommended that steps be taken to protect the trust assets does not mean the costs incurred in reporting to CIMA are payable out of the trust assets. They are strictly referable to the Controllership.

[21] Krys 12

164. The costs of Reporting to CIMA are to be paid out of the Company's assets.

The Provisional Liquidation

165. The Committee also objects to the costs associated with putting the Company into Provisional Liquidation and more particularly the items set out at below which appear in Krys 5 under **Communication with the Directors** at para 102 (d) (xi)

> *"102. The Controllers and subsequently the JPLs have conducted discussions and correspondence with the Directors and management of the Company. These discussions have been necessary, inter alia, in order to …*
>
> *(d) correspond with the Directors, including their legal counsel where applicable, in respect of:*
>
> *(xi) the preparation of the winding up petition in respect of the Company, the application for provisional liquidation, and the seeking of Chapter 15 recognition under the US Bankruptcy Code."*

166. They also object to the costs for the work done as set out in listed in Kyrs 5 para 117 (c)(d) (e) (f) (g) under the heading **Legal Matters:**

> *"117. Costs have also been incurred in dealing with legal matters, namely the commencement of winding up proceedings in relation to the Company and obtaining Chapter 15 recognition, and certain matters necessarily arising therefrom. In summary, the Controllers and the JPLs have taken steps to:*
>
> *…*
>
> *(c) liaise with Cayman Islands counsel in respect of steps and timeline for winding up and legal issues relating to the Company arising during the course of the Controllership and the provisional liquidation;*
>
> *(d) consider how to fund the provisional liquidation and prepare an application to the Grand Court in respect of the same, and liaise and consult with the Ad Hoc Committee, including keeping the Ad Hoc Committee apprised in respect of the work being done in respect of the same;*

(e) *liaise with Cayman Islands counsel regarding the preparation of the provisional liquidation application;"*

(f) *review, amend and complete the provisional liquidation application documents including supporting affidavits, final position statements and skeleton argument;*

(g) *attend the provisional liquidation application;"*

167. The Committee also objects to all the unparticularised legal costs incurred by the PL in relation to this work.

168. Mr. Robinson submits that no benefit was ever to accrue to the clients from placing the Company into provisional liquidation and no benefit has been derived. He also contends that a provisional liquidation was never required in order to preserve or protect the client's assets, which were always segregated and self- protected.

169. Mr Robinsons submits further that the PL has not in fact asserted that any interest of the clients which have been advanced by putting the company into provisional liquidation and that the grounds on which the Court was invited to appoint the provisional liquidators were intended to advance the interests of the Company.

170. Mr. Robinson recounts that the Controllers recommended provisional liquidation in their First Report to CIMA, less than two weeks following their appointment on 18 July 2019, before they had acquired a full understanding of the Company's business, even while accepting that no grounds existed for presenting an application to appoint provisional liquidators under s104(2) of the **Companies Act**.

171. The Controllers instead proposed to CIMA that the application be brought pursuant to s 104(3) of the **Companies Act** which provides that provisional liquidators may be appointed if it is demonstrated that the company is or is likely to become unable to pay its debts within the meaning of s 93 of the Companies Act and the company intends to present a compromise or arrangement to its creditors.

172. Mr. Robinson submits that this ground could only have been valid if the Controllers were satisfied that there existed a class or classes of creditors to whom such a compromise or arrangement would apply and would be beneficial. He states that the most favourable conclusion which could be drawn from the proposal is that the Controllers had no proper understanding of the nature of the assets under their control and were proposing to treat the clients as creditors and the trust assets as Company assets which could somehow be the source of funding a compromise or scheme of arrangement.

173. It is common ground that the Controllers had no scheme of compromise or arrangement which they wished to propose to 'creditors' but intended to rely on previous decisions of the Court which held that provisional liquidators could be appointed before the company was able to articulate a specific plan to the creditors. Mr. Robinson states that there were no creditors to whom any such scheme was capable of being applicable and that proposed restructuring by the sale of the business was likely to derive little, if any, benefit to the Company, once the "freeze" on the clients' accounts was lifted and no benefit at all to the clients who had no interest in the Company's book of business.

174. Mr Robinson submits that, in any event, the costs of making an application for provisional liquidation are, by s 109(1) of the **Companies Act,** expenses in the winding up of the Company. It was decided in *Re Berkeley Applegate* and *Re Caledonian* such expenses cannot be met from the trust assets.

175. I accept the submission made on behalf of the Committee that the costs of putting the Company into Provisional Liquidation should be paid out of the Company's assets. These costs including the attendant legal costs which should be readily ascertainable by the PL and those who advise him are reallocated to the Company.

Sale of the Company's Book of Business

176. The Committee objects to all costs incurred by the PL, including legal costs, in exploring the sale of the Company's book of business as set out in Krys 5 at para 108 to 113 and at para 117(z):

> *"108 Costs have been incurred in dealing with the potential sale of part of the Company's book of business (being limited to Client Accounts held with IB (other than the DAS Account)) to Tradeview. In pursuing this outcome, the Controllers and the JPLs have taken steps to:*
>
> *(a) identify accounts held with IB with zero or negative account balances and balances that are too small to be included in the portfolio to be sold, or had prohibitive risks associated with them;*
>
> *(b) prepare finalized database of accounts to be included in the sale portfolio;*
>
> *(c) identify prospective purchasers of the IB business and prepare non-disclosure agreements to be executed by prospective purchasers;*

(d) correspond initially with nine prospective purchasers, of which eight signed non-disclosure agreements;

(e) prepare and distribute a sale proposal to the seven prospective purchasers who had expressed interest after initial correspondence;

*(f) create a proprietary financial model that enabled the various offers received by prospective purchasers to be compared (the "**Model**") and agree an internal protocol to review offers;*

(g) evaluate four offers received by the initial bid deadline of 16 August 2019 and two final offers received by the extended bid deadline of 22 August 2019 by utilising the Model;

(h) consider and correspond with IB on the impact on the sale of the IB book of business following the revocation by CIMA of the Company's license and/or appointment of liquidators;

*(i) select a winning bid, draft sale and purchase agreement ("**SPA**") and correspond with the winning bidder in respect of terms and conditions to be included, the mechanics of court sanction, and the on-boarding of Clients following any sale; and*

(j) progress the drafting SPA and a form of consent agreement to enable Clients to transfer to Tradeview."

177. The PL made the further comment that:

"109. Regrettably, the sale of the book of business to Tradeview ultimately fell away, principally as a result of the request of the Ad Hoc Committee at the hearing of the October 2019 Summons for the immediate return of Trust Assets.

110. Notwithstanding this, since 20 January 2020 (being the date of the Order was filed and made available to Clients), the JPLs have assisted in the transfer of 56 Clients' Trust Assets (subject to the retention of the relevant contribution to the Reserve) from IB U-Accounts (i.e. Client Accounts held with IB other than the DAS Account), of which

14 transfers were to Tradeview.[22] It is the JPLs' view that the transfer of Trust Assets from IB to Tradeview is clearly the 'preferred' mechanism by which IB Clients' Trust Assets are transferred 'out' of the Company – being both simpler and less likely to result in the rejection of Trust Asset transfer requests (e.g. than via partial ACATS).

111. The JPLs' view is that the subject Costs were incurred because the JPLs viewed a sale of the IB book of business as a neat and cost-effective way to enable subject Clients to continue to trade their Trust Assets held in such accounts with minimal disruption, and of course if successful, would have resulted in reduced fee exposures for Clients and creditors, and also would have resulted in income to the estate and a significant reduction in the Costs incurred following its completion given that the remaining amount of Clients would have been reduced to approximately 72.

112. As a result of the Order, Tradeview took the position that, as Clients are free to move the remaining assets as they see fit, there was no further need for an SPA. As such, no income for a sale of the Company's book of business is expected to be received into the Company's estate."

178. Mr. Robinson submits that the costs related to the aborted attempt to sell the Company's book of business, which the Controllers used to justify appointing the JPLs, should be disallowed on the same basis as the costs of the Provisional Liquidation. He contends that no benefit was ever to be derived by the clients from such a proposed sale and the clients had no interest in the business which was to be sold.

179. The Committee in its Report asserts that the sale of the Company's book of business was an idea which was "always constrained by the fact that the Company's business consisted of simply providing a platform to segregated account-holders who could have been able to transfer their accounts to another broker without reference to the Company."

180. It was also constrained, as the Chief Justice pointed out during the hearing to put the Company into provisional liquidation, by the fact that for such a sale to take place the JPLs would need the consent of the clients and that the clients might, if asked, say, *"Let us have our money."*

181. It is difficult to conceive that the sale of the business was being considered for the benefit of the clients with whom the Controllers were as yet unable to speak in order to ascertain their wishes. There was no ready response on behalf of the Controllers at the September hearing to the question posed by the Chief Justice on how the sale of the business going to be funded and for whose benefit. In any event, the PL states quite plainly at paragraph 29 of Krys 2 that,

"…it was considered that a sale of some or all of the business would be in the best interest of the Company."

182. Mr. Halkerston, in his submissions on behalf of the PL, says it was the Directors who proposed the sale of the business and that it was hoped that the sale would provide funds to offset the costs of the appointment and liabilities of the Company. Neither assertion supports the contention that these costs fall with the scope of the *Berekely Appelgate* Order.

183. The PL's evidence now is that the Controllers had hoped that the sale would provide *"a source of funding"* to mitigate costs exposures for clients and provide a relatively seamless transition of their investments out of the Company."[23] I'm not sure how the sale was intended to mitigate costs exposures for the clients, as the assets of the Company are realised for the benefit of creditors.

184. That evidence of the PL is consistent with the purpose of a presenting a scheme to creditors is to rescue the Company. Any funds obtained in such a sale of the Company's business would become part of the liquidation estate, available to pay the liquidation expenses and creditors. The sums so realised would not be payable to the clients and the costs of exploring the sale of the Company's business should not, in my judgment, be borne by them.

185. Mr. Halkerston reminds me that in *Re Caldeonian* the learned Chief Justice found that the work undertaken by the JOLs, which included efforts to sell its securities business, was *"both necessarily required as well as intended and indeed has redounded to the benefit of all the custody asset customers…"*[24].

186. While there are similarities between the two cases, the nature of the business carried on by Caledonian Securities Limited ("CSL") does not seem to me, from what I can glean from the various reports, to be the same as the business carried on by the Company which merely provided the clients a platform from which to carry on direct trading through their IB accounts. The clients could have simply moved their assets to another broker, without any intervention by the Company, once permitted by the PL to do so.

187. The sale of the business, which was intended to include IB U Accounts only, was not necessary to "*enable subject Clients to continue to trade their Trust Assets"* as they were able to continue trading throughout the period of the Controllership and the Provisional Liquidation.

188. In any event, I do not understand the Chief Justice in *Re Caledonian* to be saying that in every case where such an attempt is made the Court should find that it was work done for the benefit of the beneficiaries of the funds held on trust.

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[23] Krys 12 para 51
[24] At para 44

189. The costs of exploring the sale of the business are properly costs in the liquidation and the costs in this category are reallocated to the Company's assets including the legal expenses incurred, if any, and any other related costs such including the correspondence with the Directors as noted above at para 126, relevant time costs for supervision, time spent on "Legal Matters" related to the sale of the business and so on, all of which should be readily ascertainable by the PL and his team.

The US Chapter 15 Application

190. The Committee contends that all the costs in relation to the application for recognition of the provisional liquidators pursuant to Chapter 15 of the US Bankruptcy Code should be disallowed to include all time spent by the PL and his team on matters relating to the application, the legal fees of its US Counsel, Foley & Lardner in the sum of $184,032, and any time spent by its Cayman counsel assisting with the application.

191. The Committee asserts that the application for Chapter 15 relief was *"unnecessary overkill*", and *"wasteful and extravagant"* in the circumstances where the assets in the US were held in segregated client accounts and not amenable to attachment by anyone commencing proceedings in the US.

192. The PL obviously disagrees with the Committee's assessment and maintains that the Chapter 15 process was necessary not least because it prevented the risk of litigation in the US which could have impeded the progress of the liquidation and exposed the trust assets to the extra costs. He refers to it as a *"prudent and customary step in this sort of appointment".*

193. In the Executive Summary to his First Interim Report to CIMA he highlighted the risk:

> "*The Controllers have identified a number of instances, in particular involving certain clients, where they have indicated they are engaging legal counsel to advise them on obtaining their assets. In the circumstances, the Controllers consider that there is a real and imminent risk of a client bringing a claim against the Company whether in the Cayman Islands or in the United states to have its investments returned to it or petitioning in either jurisdiction for the appointment of a liquidator/trustee. There is a risk that the clients could claim to be creditors of the Company with standing to wind up the Company or bring claims for return of funds….*"[25]

[25]Para 48(a)(i)

194. Having regard to the foregoing, it seems to me that the application for recognition was not necessary to preserve the trust estate and was not undertaken for the benefit of the trust assets but intended to protect the Company from litigation which, on any view, posed no risk to the trust assets themselves.

195. In Krys 12 para 45(a) the PL asserts that Chapter 15 recognition was necessary and intended to and did protect the trust assets. In his evidence he states that:

> *"'My decision to obtain Chapter 15 recognition enabled me to deal with IB on a level-footed basis. I also instructed my US attorneys to write to IB noting that if the IB insisted upon the use of a significantly more burdensome procedure for the transfer of Trust Assets then I would be forced to apply to the US Bankruptcy Court to compel their co-operation. The leverage given by the existence of Chapter 15 recognition was successful and has avoided the imposition by IB of further barriers to certain Clients transferring their Trust Assets*."

196. This is not evidence that IB required the JPLs to first obtain Chapter 15 recognition in order to transfer the trust assets to the clients. It was plainly sufficient for the JPLs to threaten an application to the Bankruptcy Court to compel IB's co-operation. If IB remained intransigent and the application became necessary to procure the transfer of the assets, the fees would have been properly incurred for the benefit of the trust estate and the costs to be paid from the trust assets.

197. The experience of the JOLs in *Re Caledonian* which is to be gleaned from the judgment of the Chief Justice, demonstrates that the mere threat to seek the assistance of the Bankruptcy Court would be enough to prompt the custodians of clients' assets to disgorge them. This is the inference to be drawn from para 55 of the judgment where the Chief Justice noted the work undertaken by the JOLs:

> *" to recover the assets from those recalcitrant sub-custodians in New York who refused at first to release them in the absence of the JOLs having obtained court recognition there."* [emphasis mine]

198. In fact, that is precisely what the happened here as stated by the PL and already noted above:

> *"I… instructed my US attorneys to write to IB noting that if IB insisted on the use of a significantly more burdensome procedure for the Transfer of Assets then I would be forced to apply to the US Bankruptcy Court to compel their co-operation."*

199. The potency of that threat was not made greater by the fact that the JPLs were already recognised by the US Bankruptcy Court. That recognition could have been sought at any time if IB's intransigence persisted.

200. I am satisfied and find that the application for Chapter 15 was made because it was considered by the JPL to be an ordinary incident of a provisional liquidation and for the purpose of protecting the Company from claims. It was neither intended nor necessary not to preserve the trust assets which were not susceptible to claims by creditors.

201. I, therefore, direct that the costs of the Chapter 15 application be reallocated to the Company as well as all related legal expenses incurred in Cayman and all disbursements as well as time spent by the JPLs and their team in preparation for the Chapter 15 application including time costs for supervision and so on.

Application with respect to Costs incurred in instructing attorneys

202. The PL sets out the costs for the time he and his team spent dealing with lawyers in two separate categories in Krys 5: Legal Matters and Potential Litigation. In Krys 8, Legal Matters and Potential Litigation are combined. The total sum the PL seeks to recover for these categories of work is $398,051.50.

Legal Matters

203. The amount claimed under this head is $253,186.50. It includes work done by the Controllers and JPLs' in connection with the winding up proceedings and the Chapter 15 recognition (see Krys 4) which I have already considered and disposed of above as not recoverable out of the trust assets.

204. An *MF Global* Order was sought and granted to resolve potential proprietary claims which the PL might arise from the manner in which clients' monies and assets had been custodied by the Company. It is the PLs' evidence that he believed there was a real risk of there being competing claims to the trust assets as a result.

205. The Committee contends that the risk was fanciful and that the JPLs raised the *'spectre'* of those claims in order to "*artificially inflate"* the reserve placed over clients assets and deny the clients access to their funds. The Committee also charges that the JPLs acted in a manner adverse to the interest of the clients by actively soliciting clients to make proprietary claims.

206. There is nothing in this challenge. The application for the *MF Global* order was granted by the Chief Justice after a full hearing. The work was done for the benefit of clients. Once the process was completed the path was paved for the trust assets to be returned to clients. The work done falls squarely within the *Berkeley Applegate* principle and the costs are recoverable from the trust assets.

Potential Litigation

207. The PL seeks to recover costs incurred for time spent on Potential Litigation. The work is set of in Krys 5 and Krys 8.

208. Some of the sub-categories fall within the Committee's already articulated objections to the costs of exploring the sale of the business which I have already considered and disposed of.

209. With respect to the other categories of work, I make the following observations. With respect to para 120 (a), the PL plainly required the assistance of US Counsel to negotiate the transfer of the trust assets out of IB.

210. Some of the work set out in para 120 (b) seems to be concerned with litigation which might be brought against the Company or seeking to determine the best way forward for the Company, and not matters undertaken for the benefit of the trust assets. This would include the advice taken on the unauthorised use of clients' funds, the implications of the revocation of the Company's license, the appointment of liquidators and considering advice from the Directors' legal counsel.

211. In my view, these are costs in the Controllership and/or the Provisional Liquidation which are not recoverable out of the trust assets and they are reallocated to the Company.

Legal Expenses

212. The only articulated objection is to certain fees charged by Ogier. The Committee objects to Ogier's fees on the ground that the JPLs' decision to change legal advisers necessarily involved a duplication of fees. I accept the PL's evidence that there was no duplication and dismiss the Committee's objection to these costs.

213. The Committee's other objection is to the legal expenses incurred during the Controllership on the premise that the costs of the Controllership should not be borne by the trust assets. The objections to the work done by the Controllers and, therefore, to the legal expenses incurred in pursuing particular categories of work, have already been considered and disposed of.

214. I should make clear that the costs which I have directed must be reallocated to be paid out of the liquidation estate are in addition to the costs designated by the PL as *Non-BA* costs in Krys 12 in the sum of $101,436.90.

The Re-Allocation Exercise

215. The Draft Judgment was circulated with the request that the PL undertake the reallocation of costs to the Company directed by the Court. The PL asserts that he and his team his team reviewed

each entry in the heads of costs where the Court indicated that there should be a reallocation in whole or in part.

216. In his 15th Affidavit sworn in these proceedings ("Krys 15"), the PL states that he instructed his team to review the timesheets of his staff and contemporaneous correspondence, where it may have been difficult to ascertain the work to which a given time entry related.

217. The purpose of this exercise was to enable a spreadsheet to be created which would, upon the best and reasonable efforts of the PL and his team, and in a cost-efficient manner identify those time entries that correlated to the work-streams identified in the Draft Judgment as requiring allocation as Non-BA Costs, rather than BA Costs and allocate those time entries as Non-BA Costs.

218. The PL states that he and his team took the following approach to the directions given by the Court:

(i) where the Draft Judgment identified a work stream or parts of a work stream to be allocated to Non-BA Costs related to a specific category, they reviewed the time entries in that category and identified those as requiring allocation as Non-BA Costs;

(ii) where the narrative for a given time entry described tasks that straddled more than one work stream, and one of those was a work stream identified in the Draft Judgment as needing to be allocated as Non-BA Costs, the tasks identified were reviewed by the PL and, if the majority of the tasks (i.e. greater than 50%) related to Non-BA Costs, the entirety of that work stream was allocated to Non-BA Costs. If it was less than 50%, I did not allocate it to Non-BA Costs.

219. The PL explains that his rationale for doing so was that it would have required significantly more time to break individual time entries into sub-components, and to then analyse and allocate those sub-components according to the Draft Judgment. He states that, even then, it would have been a matter of judgment to make the assessment and still open to dispute. He states, however, that the alternative would have been unjustifiably expensive and therefore disproportionate. He also did not consider that this approach resulted in any net additional payment being treated as BA Costs, and it resulted in a saving on costs of the review process.

220. Where the Draft Judgment concluded that the time incurred was allocated as BA Costs, he and his team did not conduct any further review in that category.

221. In concluding his evidence on the proposed allocation of costs the PL stated at para 32 of Krys 15:

"Given the small and ever depleting pool of Trust Assets that could be used to meet the Costs of the allocation / reallocation exercises, and the ongoing criticisms from the Ad Hoc Committee of the Provisional Liquidator's Costs, the Provisional Liquidator's approach to the Allocation Proposal was guided by a desire to provide Her Ladyship with an amount to be allocated to Non-BA Costs, consistent with her determinations, and in a cost-efficient manner. It is my understanding that, when conducting work of this nature, this Court has accepted the proposition that where perfection might only be achieved at inordinate cost, a cost-efficient and proportionate approach is appropriate. I have sought to follow that guidance throughout the Quantum and Apportionment Application process."

222. I consider the PL's approach to the re-allocation exercise to be consistent with principle and appropriate in that it was intended to limit the costs of what has been a costly remuneration application, hard fought by the Committee.

223. At the conclusion of the exercise, the PL proposed a reallocation of US$566,738.07. An Excel spreadsheet which showed the Provisional Liquidator's workings was submitted to Committee pursuant to the Court's direction that the parties should seek to reach agreement on the quantum of costs to be reallocated.

224. The Committee considered that they needed the assistance of a costs specialist to review details of the allocations made by the PL. They instructed Mr. Philip Daval-Bowden, a litigation costs specialist, to undertake the review. In his Report, Mr. Bowden states that he reviewed the costs in light of the judgment and determined that a number of the PL's proposed allocations did not capture all of costs which the Court directed should be reallocated to the Company.

225. The Report and supporting appendices (the "Bowden Report") were delivered to the PL.

226. After the PL received the Bowden Report, he undertook a comprehensive review of each line item included in the appendices. It is his evidence that his attorneys conducted a similar line by line review of the appendices attached to the Bowden Report.

227. The PL subsequently reallocated the sum of $760,513.84 as costs falling outside the Berkeley Applegate principle. His final allocation of the costs up to June 2020 is US$2,944,289.33 as costs recoverable out of the trust estate and of US$861,692.74 to be borne by the assets of the Company.

228. When the matter returned to Court on 4 March 2022, Mr. Halkerston invited the Court to approve the PLs' application as to quantum and as to allocation, that the BA costs and Non-Ba Costs be approved on the basis explained by the PL. The Committee maintained their objection to the allocation of costs by the PL.

229. The Committee contends that the allocations made by the PL to the Company are not consistent with the directions given by the Court. They rely on the Bowden Report in support of their continued opposition to the PLs' costs application despite the substantial reallocation of costs consistent with their original objections. The Committee now proposes that only US$1,630,724.82 of the costs incurred by the Controllers/JPLs fall within the Berkeley Applegate principle and that only $343,935 of the Legal Expenses incurred are recoverable on that basis.

230. Mr. Halkerston takes exception to the Committee's position on many fronts, not least because at the hearing of the fee application in November 2020, the Committee had agreed US$1,815,875 as *Berkeley Applegate* costs and had accepted Legal Expenses of US$ 1,109,726 as being payable out of the trust assets on the same basis.

231. The point is made by PL in his affidavit where he states that,

> *"Mr. Bowden's report conflicts with the Ad Hoc Committee's prior evidence contained in reports and tables exhibited to the first and second affidavits of Ad Hoc Committee member Andrew Bolton, sworn on 7th and 8th September 2020. Mr Bowden now asserts that a larger sum should be allocated to the Non-BA Costs than what the Ad Hoc Committee had ever contended for. "*[26]

232. Referring to correspondence between the Committee and the clients, the PL goes on to observe,

> *"Indeed, the Ad Hoc Committee had acknowledged to the Clients in writing, before the hearing of the Quantum & Apportionment Application that the 50% reduction figure they were arguing for at the time was not a realistic position for the Ad Hoc Committee to adopt, so it must know the rehashed similar figure contended in the Bowden Report is not credible now."*

233. Mr. Halkerston invites the Court to disregard the Bowden Report on the ground, *inter alia*, that it does not undertake the exercise mandated by the Draft Judgment and carried out by the PL, but is instead a wholesale review and critique of all the PLs' costs, including costs that were not the subject of any criticism or dispute at the hearing of the remuneration application.

234. Two examples of Mr. Bowden's analysis by the PL[27] amply support this criticism.

235. One is in respect of the costs in the category *Determination of Client Trust Asset Status and Confirmation Process* which the Court approved as *Berkeley Applegate* costs save for the line of costs in the sub-category in Krys 5 99(m) and 50% of the legal costs attributable to Duane Morris

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[26] Krys 15 35(g)
[27] Krys 15 35 (h) and

(see para 101 and 121 above). Despite this, Mr. Bowden suggests that other entries within this category should be re-allocated as non-*Berkeley Applegate* costs.

236. The second relates to costs incurred for work done in the category *Investigations, Analysis and Reconciliation of the Company* which were approved by the Court as *Berkeley Applegate* costs and no reallocation directed. The PL states that Mr. Bowden suggests that certain of these costs which fall within that category, and reported as such by the Provisional Liquidator, actually fall within the category *Books, Records, Cash Management and Supervision* and should be re-allocated to the Company.

237. The PL's analysis is set out comprehensively in his affidavit but this summary of the points he makes is sufficient to support the charge that the Bowden Report is not a review of the re-allocated costs in line with the Draft Judgment but an invitation to allocate further items of costs to the Company.

238. Committee's final submission to the Court is as follows:

> *"…the Committee comes to the following position as to one much the PL should be entitled to be paid out of the clients' assets. For reasons set out above this is not and cannot be specific. We say that the whole process should have followed a different and less expensive path, and would have done in the hands of another liquidator more concerned to keep costs to a minimum and serve the best interests of the clients. But the Court has to arrive at a number. We accept that it is not helpful simply to say that it should take into account the points we have made and should set "a much lower number" than that claimed by the PL. With that in mind we have addressed the claim following the PL's categories. We have indicated in relation to each category how much should be excluded on the basis that part or all of the work falls outside Berkeley Applegate and how much should be taken off for other reasons mainly efficiency and failure to follows the appropriate course of action. "*

239. I decline to consider discounting any sum *"for inefficiency and failure to follow the appropriate course of action."* The PL is liable to be criticised for not doing work in a manner which is cost effective, but the criticisms which were made at the hearing of the application have already been dealt with by the Court and will not be considered again. As already stated, though perhaps not in terms, the proportionality of work done cannot only be considered the results achieved but must be considered in light of those matters outside the office-holders' control which create additional work, as for example in this case, the work of responding to enormous amounts of correspondence from the clients and the costs of returning the assets to clients which were increased by the IB's approach. Further, the question of what is the appropriate course of action is a matter or the liquidator. As the Chief Justice stated in *Re SPhinX,* when assessing whether the

remuneration sought is fair and reasonable in all the circumstances, the Court will give significant latitude to the commercial judgment of the liquidator.

240. I also decline to consider the Committee's further objections to costs as falling outside the *Berkeley Applegate* principle. The PL's criticism of the A Committee's response to the Draft Judgment as an attempt to have a second bite at the cherry is well made.

241. The PL says, and I accept that, he has dedicated a significant amount of time to understanding the contents of Mr Bowden's work, and then forensically reviewing his costs in order to respond to the Bowden Report.

242. He also says, and I accept, that:

> "*The review of the Bowden Report has been an extremely time-consuming task as the Ad Hoc Committee was told would be the case when they indicated any intention to engage Mr "Bowden. I would note that this work should not have been necessary as the Draft Judgment itself makes clear… that the level of detail that I have already provided in support of the Quantum & Apportionment Application was sufficient. I have previously commented, and my counsel has submitted, that the detail I have provided in support of my request for approval of Costs is appropriate. The Ad Hoc Committee did not query any of this work at the time of the Quantum & Apportionment Application hearing*. "
>
> "*I have… conducted an entire, detailed review of all of the time entries that Mr Bowden attempts to criticise and I have instructed my legal advisors to carry out the same forensic analyses of their time entries. "*
>
> *"As a result of this comprehensive exercise, I have produced an analysis that addresses all the entries Mr Bowden criticises and I have considered and responded to every one of them. My advisors (other than Foley, whom I refer to further below) have done the same. As a result of this exercise, I am confident and I respectfully submit that this Court ought to accept my sworn statement as an officer of this Court, that the Costs claimed, and the reallocations I propose are correct and appropriate, and that they cohere with the directions in the Draft Judgment. "*[28]

243. I am satisfied and find that the costs have been properly allocated between the Company and the trust assets according to the Draft Judgment and that the work done in identifying and returning the trust assets to the clients was necessary and the costs incurred reasonable and proportionate.

244. I approve the PL's application for costs in the sum of 3,805,982.07. The sum of US$2,944,289.33 is to be paid out of the trust assets and US$861,692.74 to be paid out of the liquidation estate.

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[28] Paragraphs 37 to 40

245. The Committee had submitted that the PL should not have his costs of the remuneration application. I will not rehearse the submissions here but say only that there is nothing in the way in which the PL or his advisers have conducted this application that would justify such a departure from the norm.

246. The PL's costs of the application are to be paid out of the reserve.

247. Before I leave this matter, I refer to Mr. Halkerston's written submissions on behalf of the PL, where he sets out what he refers to as the practical position of this liquidation which is that:

> a. The Reserve has very limited funds to close out the remaining work required to manage trust assets;
>
> b. There are no funds to undertake any Non-BA liquidation work or to meet any other claims that are treated as Non-BA Costs. As noted above, as at 31 January 2022 there was a net deficit of (US$268,260.74)
>
> c. The reallocation of BA Costs as Non-BA Costs will result in the net deficit in the liquidation increasing on a dollar-for-dollar basis.

248. I appreciate that these are the consequences attendant on the Court's determination that certain costs must be reallocated, but the Court has no jurisdiction to make any award out of trust assets in respect of work done which is strictly referable to the Controllership or the provisional liquidation.

Postscript

249. Subsequent to the delivery of the further draft judgment, attorneys for the Committee asked the Court to delete paras 245 and 246 on the ground that the question of costs had not been addressed and that they would wish to argue that the PL should not have his costs as he had not bested an offer to settle made by the Committee.

250. The decision of the Court at para 246 speaks only to the PL's right to be indemnified for his costs out of the trust assets pursuant to the order made by the Chief Justice. It was made in response to the Committee's submission that the costs of the remuneration application should be borne by the Company, a submission, in essence, that the PL should not be paid. In his oral submissions on the point, which I now set out in full, Mr. Robinson said this:

> *"The entire purpose of the quantum application was to determine which costs were to be borne by the liquidation estate and which by the trust estate. The PL has gone to great lengths to argue that these costs are to be borne out of the Trust estate. This is an argument precisely against the interest of the beneficiaries of that Trust and if, in the view*

of the Court, he has lost that argument, then when the Court comes to determine the question of costs, the Court is entitled to treat the costs incurred by his lawyers with respect to the application, himself, and his staff as being payable out of the liquidation estate."

251. Mr. Robinson concluded his submissions by saying that such a ruling by the Court would not infringe the principle that a liquidator has the right to be indemnified from the fund in his control; it was a matter of which fund should bear the cost.

252. I did not - and do not - accept that, in making the case that the majority of his costs fell within the *Berkeley Applegate* principle, the PL took a position which was adverse to the interests of the Clients or, indeed, that he had conducted the proceedings in any manner deserving of criticism by the Court. I intended to convey that the costs of the PL's remuneration application are properly payable out of the trust assets and that any other order would be an unjustified departure from the norm.

253. It appears to me that in seeking to raise the question of whether or not the PL is entitled to his costs on the basis that he refused a *Calderbank* offer, the Committee is not seeking to relitigate an issue which has already been decided - which would have been improper - and that no amendment to the Draft Judgment is required as the Court decided an issue which had been fully argued.

254. I have considered the Committee's position as set out in the correspondence and the PL's response, and am of the view that I am able to deal with the question without a further hearing and that it would be desirable for me to do so in light of the costs which have been incurred on this application.

255. If the Committee considers a further hearing is required, skeletons and authorities should be filed within 21 days of the date hereof.

ORDERED

256. The PL's costs in the sum of 3,805,982.07 are approved. The sum of US$2,944,289.33 is to be paid out of the trust assets.

DATED THE 17th JUNE 2022

RAMSAY-HALE J