IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Neutral Citation Number: [2025] CIGC (FSD) 90

CAUSE NO. FSD 141 of 2022 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2025 REVISION)

AND IN THE MATTER OF MAGELLAN ASSET FINANCE LIMITED (IN OFFICIAL LIQUIDATION)

IN CHAMBERS

Appearances:	Ms Jessica Williams, Ms Anya Allen and Ms Kelsey Sabine on behalf of the Joint Official Liquidators ("JOLs")
Heard:	On the papers
Date of decision:	12 August 2025
Draft Reasons circulated:	25 August 2025
Reasons delivered:	29 August 2025

Illiquid estate-Sanction application-remuneration agreement-conditional fee agreements within and without of the jurisdiction-Companies Act (2025 Revision), section 110 (2) (a). Schedule 3 Part I-Grand Court Act (20215), section 11 (2)- the Private Funding of Legal Services Act (2020 Revision), sections 4, 12-Companies Winding Rules (2023 Consolidation), Order 5 rule 2, Order 25 rules 1-2-Private Funding of Legal Services Regulations, regulation 3-9-Insolvency Practitioners' Regulations (2023 Revision), regulations 11-13, 15

REASONS FOR DECISION

Background

1. By a Summons dated 9 June 2025, the JOLs sought sanction for (1) commencing certain proceedings in England and Wales, (2) funding arrangements for themselves, their local attorneys and English solicitors and counsel and (3) the issuance of a letter of request. I acceded to their request that the application be dealt with on the papers. On 18 July 2025, a Hearing Bundle, Skeleton Argument and Authorities bundle were filed. I granted the directions sought in two separate orders (one dealing with commencing proceedings/ remuneration and the other the letter of request) dated 12 August 2025. For obvious reasons of confidentiality, these Orders were sealed.

2. The applications for sanction of the decision to commence recovery proceedings in England and Wales and to issue a Letter of Request raised no unusual issues of law or practice. The remuneration applications, however, raised what are likely to be common problems in relation to illiquid estates which have not been directly addressed in previous published local judgments. Counsel filed a very meaty Skeleton Argument running to 69 pages and 180 paragraphs, the preponderance of which dealt with the funding applications. The fact that these Orders were made (in contrast with certain aspects of the basis for making them) and the Company's illiquidity are not, in my judgment, confidential. Nor are the main features of the local conditional fee agreement, because all such agreements must comply with standard statutory requirements and will inevitably take a broadly similar form.

3. I accordingly now give reasons for the legal basis of my decision to sanction the various funding arrangements.

Sanction principles

4. Counsel helpfully set out the governing principles in an appropriately concise and accurate manner in the following three paragraphs of their Skeleton Argument:

> "*23. Section 110(2) of the Companies Act (2025 Revision) states:*
>
> *The official liquidator may –*

(a) with sanction of the Court, exercise any of the powers specified in Part I of Schedule 3; and

(b) with or without that sanction, exercise any of the general powers specified in Part II of Schedule 3.

24. Essentially, the scheme of section 110(2) is that the powers specified in Part I of Schedule 3 may only be exercised with the sanction of the Court. Powers specified in Part II of Schedule 3 can be exercised without sanction but an official liquidator is still permitted to seek sanction from the Court if they so wish.

25. The principles governing the exercise of the Court's discretion whether or not to grant sanction are settled and are well summarised in the decision of the Honourable Justice Doyle in In the matter of Premier Assurance Group SPC Ltd (in Official Liquidation) (Grand Court, unreported, 10 September 2022):

> *'29. The legal principles applying to the exercise of sanction of a liquidator's powers were summarised in DD Growth Premium 2X Fund [2013 (2) CILR 361] at [30] as follows:*
>
> *(a) The decision whether to sanction the exercise of a power falling within Part I of the Third Schedule to the Law is a decision for the Court (see Greenhaven Motors Ltd. [1999] 1 BCLC at 642).*
>
> *(b) In exercising its discretion as to sanction, the Court must consider all the relevant evidence (see In re Universal & Surety Co. Ltd. [1992-93 CILR 149] at 152).*
>
> *(c) The Court must consider whether the proposed transaction is in the commercial best interests of the company, reflected prima facie by the commercial judgment of the liquidator (see Re Edennote Ltd. (No. 2) [1997] 2 BCLC 89).*
>
> *(d) The Court should give the liquidators' views considerable weight unless the evidence reveals substantial reasons for not doing so (Re Edennote Ltd. (No 2) [1997] 2 BCLC 89 and 92).*

(e) The liquidator is usually in the best position to take an informed and objective view (see Re Greenhaven Motors Ltd. [1999] 1 BCLC 635 at 643).

30. The principles on which the Court decides sanction applications were also considered in Re Trident Microsystems (Far East) Ltd [2012 (2) CILR 424] in which it was held at [18(c)] (citing Re Universal Surety and Co Ltd) that the decision whether to sanction the exercise of a power under Part 1 of Schedule 3 to the Companies Act was a decision for the Court, which must consider the correctness, or otherwise, of the liquidator's decision having regard to all the evidence, in particular:

(a) the financial consequences of the decision for stakeholders;
(b) the wishes of stakeholders; and
(c) whether the interests of stakeholders are best served by permitting the company to enter into the particular transaction.

31. In the case of Re Saad Investments Company Limited (In Official Liquidation) (unreported, Grand Court of the Cayman Islands, Smellie CJ, 1 October 2019) [the Hon. Chief Justice Smellie as he then was] referred to the legal principles in Re DD Growth Premium 2X Fund and Re Trident Microsystems (Far East) Ltd set out above before concluding that the net effect of these decisions was as follows:

'39. C. The net effect of these decisions, taken together as I accept they should be taken, is that <u>the Court should ordinarily respect the commercial judgment of the liquidator and grant sanction, unless the course of action proposed by the liquidator is regarded by the Court as so unreasonable or untenable that no reasonable liquidator would take it</u> or, in the more strident words of the English Court of Appeal in Re Edennote Ltd [1996] 2 BCLC 389 "so utterly unreasonable and absurd that no reasonable person would have done it" (emphasis added)."'

5. How did those generic principles fall to be applied in the specific context of liquidators of an illiquid company seeking approval for bespoke funding arrangements designed to facilitate the recovery of assets for the estate? In my judgment they fell to be applied in essentially the same way as would appertain in relation to a proposed commercial transaction. Whether or not it was in the interests of the stakeholders for recovery proceedings to be pursued (as opposed to simply dissolving the Company) was quintessentially a matter of commercial judgment for the JOLs and the interested stakeholders. Here, the JOLs had the support of a creditor with a 99% stake in the liquidation and credible legal advice about the merits of the claim. Subject to one important *caveat*, there was no discernible basis on which the Court could find that the commercial desirability of seeking to turn what appeared to be straw into gold was "untenable".

6. The one important *caveat* was whether the local legislative framework governing insolvency practitioners' and legal practitioners' fees, as a matter of law, permitted the approval of the proposed funding arrangements.

The JOLs' entitlement to be paid otherwise than on the usual basis

7. The JOLs sought approval for a remuneration agreement according to which some of their fees would be paid in the usual prescribed manner based on hourly rates and some as a percentage of recoveries. The application was made on the basis that the JOLs would seek further formal approval for their actual fees claimed. Reliance was placed on regulation 11(1)(a), (c) and (e), and regulation 15(3)(b) of the Insolvency Practitioners' Regulations (2023 Revision) (the "IP Regulations"). Regulation 11 (1) provides as follows:

> "***Basis of Remuneration***
>
> *11. (1) An official liquidator may be remunerated on the basis of —*
>
> *(a) the time spent by the official liquidator and the official liquidator's staff upon the affairs of the liquidation; or*
>
> *(b) a percentage of the amount distributed to creditors and members of the company; or*
>
> *(c) a percentage of the amount realised upon the sale of the company's assets (net after deduction of the direct costs of sale); or*
>
> *(d) a fixed fee; or*

(e) a combination of some or all of the above." [Emphasis added]

8. Regulation 15 (3) provides:

> *"(3) In the event that the official liquidator agrees to be remunerated on the basis of a percentage of realisations, it shall be a term of the remuneration agreement that the official liquidator and the official liquidator's firm shall be paid —*
>
> *(a) a percentage of the amount realised upon sale of the company's assets, net after deduction of the direct costs of sale; and*
>
> *(b) a percentage of the gross amounts recovered from the company's debtors and contingent debtors; and*
>
> *(c) the percentage rate shall not exceed the maximum prescribed in Part B of the Schedule."* [Emphasis added]

9. The proposed form of fee arrangement did not perfectly align with regulations 11 (1) and 15 (3) as the JOLs' counsel's submissions implied. The non-alignment arises from the fact that regulation 11 (1) appears to permit only two bases of 'contingency' fee arrangement (or a combination of them):

(a) percentages based on the amounts of distributions made; or

(b) percentages based on the net proceeds of sales of assets.

10. The proposed remuneration agreement contemplated a percentage based on the amount recovered from the Company's debtors, which did not fall into either regulation 11 (1) (a) or (b) category strictly read. However, there is in commercial terms no clear distinction between a percentage of sale proceeds and a percentage of recoveries made. Both are based on asset recoveries in contrast to distributions.

11. Regulation 15 of the IP Regulations, however, suggests that the term "*realisations*" in regulation 11 (1) (c) has broader meaning than that expressed because it contemplates a fee

basis including both "*a percentage of the amount realised upon sale*" (regulation 15 (3) (a)) and "*gross amounts recovered from the company's debtors and contingent debtors*" (regulation 15 (3) (b)). This suggests:

(a) the "*and*" between (a) and (b) must be read as "or"; and

(b) the prefatory reference to "*realisations*" in paragraph (3) must mean realisations based on either asset sales and/or assets collected from debtors.

12. Paragraphs (1) and (2) of regulation 15 deal with fixed fee agreements and percentages of distributions, respectively. Those paragraphs correspond to paragraphs (a) and (b) of regulation 11, respectively. That suggests that paragraph 3 is intended to correspond to paragraph (c) of regulation 11, and potentially conflicts insofar as regulation 11 (c) only explicitly contemplates percentage based realisations from assets sales and not from asset collections. Both percentage paragraphs (2) and (3) of regulation 15 complement regulation 11 by imposing a cap on the percentage which may be charged, a requirement with which the JOLs proposed to comply. Having regard to the breadth of the statutory sanction jurisdiction under section 110 (2) of the Companies Act (and the entitlement to official liquidators to have their remuneration paid out of the assets of the company under section 109 (1)), regulation 11 (1) (c) can properly be construed as including both asset collections in conformity with regulation 15 (3).

13. For the reasons I expressed in *Re Oriente* 2022 (2) CILR 391 (at paragraph 31), subsidiary legislation in cases of doubt must be construed in a manner designed to uphold rather than undermine the primary legislation under which it is made. On this basis, I accepted the submission that that regulations 11 (1) (a), (c) and 15 (3) (b) of the IP Regulations permitted the JOLs' proposed remuneration agreement.

Local lawyers' fees

Companies Act sanction regime

14. The JOLs under Part I of Schedule 3 to the Companies Act have the following powers with the sanction of the Court:

"*11. The power to engage attorneys and other professionally qualified persons to assist that person in the performance of that person's functions.*"

15. The Companies Winding UP Rules (2023 Consolidation) ("CWR") supplements this broad statutory power through the provisions of Order 25. Order 25 pertinently provides:

"***Lawyer's Fees (O.25, r.2)***

2. (1) All lawyers engaged by the official liquidator shall be remunerated on a time spent basis (at agreed hourly rates which are stated in the engagement letter) unless the Court has sanctioned some other basis of remuneration

(2) If the official liquidator or the liquidation committee consider that the amount of fees and expenses charged by the official liquidator's lawyer is excessive, the official liquidator may require that such fees and expenses be taxed on the indemnity basis by the taxing officer.

(3) Conversely, if the lawyer considers that the amount which the official liquidator offers to pay is inadequate, the lawyer may require that the lawyer's bill of costs be taxed on the indemnity basis by the taxing officer.

(4) The lawyer shall be entitled to be paid out of the assets of the company as an expense of the liquidation the amount(s) stated in the costs certificate and the official liquidator shall have no authority to pay more than that amount."

16. That the Court may sanction the engagement of lawyers by liquidators on a conditional fee basis is uncontroversial and not infrequently occurs in the context of illiquid estates with potentially recoverable assets. Here the proposed conditional fee agreement ("CFA") for the JOLs' local lawyers had the following elements to it:

(a) all payment was entirely conditional upon a successful outcome;

(b) normal time-based fees were estimated and capped;

(c) the success fee was capped at 100% of the normal fees;

(d) a detailed risk assessment was set out in the Schedule to the CFA; and

(e) a success fee cap (an uplift over the normal fees) was fixed at 33.3% or 40% of the amount awarded or obtained in accordance with the Private Funding of Legal Services Act (2020 Revision) (the "Funding Act") and the Private Funding of Legal Services Regulations (the "Funding Regulations".

17. From a Companies Act perspective, there was no basis for declining to sanction an agreement which the liquidation's sole significant creditor had approved and which the JOLs considered was reasonable.

Funding Act regime

18. The JOLs' counsel submitted that there was no local authority considering the Funding Act and how the success fee should be evaluated by the Court in the context of a sanction application. *Foster v Scott* [2025] CIGC (Civ) 3 (Asif J) dealt with a contingency agreement in relation to a personal injury claim and provided no guidance for the present case. Here, the question was whether the Court should approve an increase of the prescribed success fee of 33% to the maximum permitted success fee of 40%.

19. Section 4 of the Funding Act provides as follows:

> "***Conditions applicable to contingency fee agreements***
>
> *4. (1) Subject to subsection (2), where a contingency fee agreement provides that an attorney-at-law is entitled to a success fee, the success fee shall not exceed the normal fees of the attorney-at-law by more than one hundred per cent.*
>
> *(2) In the case of claims sounding in money, the total of any such success fee payable by a client to an attorney-at-law shall not exceed the prescribed percentage of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for the purposes of calculating any excess, include any costs.*
>
> *(3) Where a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceedings, the amount to be paid to the attorney-at-law shall not be more than the maximum percentage, if any, prescribed by regulations, of the amount or of the value of the property*

recovered in the action or proceedings, however the amount or property is recovered.

(4) Notwithstanding subsections (1), (2) or (3), an attorney-at-law may enter into a contingency fee agreement where —

(a) the amount paid to the attorney-at-law is more than the prescribed maximum percentage of the amount or of the value of the property recovered in the action or proceedings; or

(b)the success fee exceeds either of the percentages set out in subsections (1) or (2),

and where a joint application by the attorney-at-law and the client is brought within ninety days of the execution of the contingency fee agreement and the contingency fee agreement is approved by the Grand Court.

(5) In determining whether to grant an application under subsection (4), the Grand Court shall consider —

(a) the nature and complexity of the action or proceedings;

(b) the expense or risk involved in the action or proceedings; and

(c) any other factors as the Grand Court considers relevant.

(6) The Grand Court in determining an application under subsection (4) shall not approve a contingency fee which exceeds forty per cent of the total amount awarded, of any amount obtained by the client or of the value of any property recovered in the action or proceeding, however the amount or property is recovered.

(7) A contingency fee agreement shall not include in the fee payable to the attorney at-law, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless —

(a) within ninety days of the execution of the agreement, the attorney-at-law and client jointly apply to a judge of the Grand Court for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and

(b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of the costs, subject to subsection (6).

(8) A contingency fee agreement that is subject to approval under subsection (4) or (7) is not enforceable unless it is so approved." [Emphasis added]

20. Section 4 contains the following limits:

(a) a success fee shall not exceed normal fees by more than 100 % (subsection (1));

(b) a success fee in a money claim shall not exceed the prescribed percentage of the amount recovered (subsection (2));

(c) a contingency fee calculated as a percentage of the sums recovered claim shall not exceed the prescribed percentage of the amount recovered, however it is recovered (subsection (3));

(d) a more generous success fee or contingency fee may only be agreed if approved by the Court under section 4 (4).

21. The Funding Regulations provide:

"***Maximum fees***

8. (1) For the purposes of section 4(2) of the Act, in the case of claims sounding in money, the total of any success fee payable by the client to the attorney-at-law shall not exceed thirty-three point three per cent of the total amount awarded

or of any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.

(2) For the purposes of section 4(3) of the Act, where a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceedings, the amount to be paid to the attorney-at-law shall not exceed thirty-three point three per cent of the amount or of the value of the property recovered in the action or proceedings."

Application of the statutory principles to the present case

22. The normal fees in the CFA were not subject to a contingency based on a percentage of recoveries made; only the success fee engaged regulation 8. Approval was sought for a success fee of 40% which was above the limit prescribed by regulation 8 (2) (33.3%) pursuant to section 4 (4) of the Act but within the maximum limit of 40% fixed by section 4 (6) of the Act. Adjudicating the application required the Court to have regard to the following matters required to be taken into account by section 4 (5) of the Funding Act:

"*(a) the nature and complexity of the action or proceedings;*

(b) the expense or risk involved in the action or proceedings; and

(c) *any other factors as the Grand Court considers relevant.*"

23. In a Judgment redacted for publication, Jalil Asif J in *Foster-v-Scott* summarised his approval of a conditional fee agreement in the following terms:

"*I approve the terms of the Contingency Fee Agreement between Ms Foster and her attorneys, which in my judgment strikes a reasonable balance between the risk incurred by the Plaintiff's attorneys and the value of her claim; and I approve the legal fees sought by the Plaintiff's attorneys in accordance with s.5 of the Private Funding of Legal Services Regulations.*"

24. That appears to have been a case where the entire conditional fee agreement required approval because the plaintiff was under a disability. It is instructive that Asif J considered that the key question was whether there was "*a reasonable balance between the risk incurred by the*

Plaintiff's attorneys and the value of her claim". This will in most cases be the most significant overarching consideration as demonstrated by persuasive authorities. The JOLs' counsel submitted that despite legislative differences and the fact than many English cases were personal injury cases, general principles could be extracted from persuasive authorities in relation to what considerations were relevant to the task of determining the appropriateness of a conditional fee agreement. These included:

(a) the circumstances of the case and the risks the lawyers were assuming (*Callery v Gray* [2001] EWCA Civ 1117 at [82]-[83]);

(b) the success fee should reflect the risk of not being paid at all which the lawyer is assuming (*Callery v Gray* [2002] UKHL 28 at [69]; *C v W* [2008] EWCA Civ 1459);

(c) the risk assessment should be reasonable and not self-serving (*Motto v Tradifura Ltd* [2011] EWCA Civ 1150 at [122]); and

(d) whether or not the client gave their informed consent (*Herbert v HH Law* [2019] EWCA Civ 527).

25. In my judgment the level of scrutiny of the CFA which the Court was required to undertake in the circumstances of the present case was far lower than would be required in a case where a vulnerable litigant was seeking compensation for tortious injury and was potentially at risk of having their award swallowed up by 'voracious' lawyers. In such cases, conditional fees will only facilitate access to justice if substantive justice can actually be achieved by the client. There is likely to be an inequality in bargaining power between lawyer and client and the Court's overarching duty will be to ensure, as Asif J put it in *Foster-v-Scott*, that there is "*a reasonable balance between the risk incurred by the Plaintiff's attorneys and the value of her claim*". The present context was entirely different.

26. Here, I was satisfied that the success fee reflected the risk of not being paid at all which the lawyers were assuming and that the risk assessment which had been conducted was reasonable and not self-serving. But the pivotal considerations which justified granting the sanction sought under the relevant provisions of the Funding Act and Funding Regulations as read with the sanction provisions of the Companies Act and CWR were the following:

(a) the Company was illiquid and so retaining lawyers on a conditional fee basis was indispensable to the functionality of the liquidation;

(b) the contingency fee in question (the success fee) fell within the limits prescribed by Parliament;

(c) the JOLs, officers of the Court acting in a fiduciary capacity, had given their informed consent to the CFA;

(d) the main economic stakeholder in the Company, a sophisticated corporate investor, had given its informed consent;

(e) as the underlying claim sought compensation for an impaired non-consumer investment, the merits of the funding arrangements were quintessentially matters of commercial judgment for the JOLs and the stakeholders to decide; and

(f) although the application was formally made only by the client, it was supported by evidence filed by the lawyers and so the requirements for a joint application (Funding Act, section 4 (3)) was substantially complied with.

27. The JOLs' counsel identified an apparent conflict between the provisions of the Funding Act and CWR Order 25:

> "*67. The Funding Act provides that:88 'Except as otherwise provided in this Act, a bill of an attorney-at-law for the amount due under a contingency fee agreement is not subject to any taxation or to any provision of law respecting the signing and delivery of a bill of an attorney-at-law.' Rather, the Regulations state that a contingency fee agreement must include: 'a statement that informs the client of the client's right to request the Grand Court to review and approve the attorney-at-law's bill, which statement shall include the applicable timelines for asking for the review.' As noted, these express requirements do not sit comfortably with the requirement in Order 25, rule 1(4)(c) that fees are subject to taxation of the Grand Court and rule 2(2) that official liquidators may require fees and expenses to be taxed on the indemnity basis. There is no guidance as to how these provisions are intended to interact.*"

28. I did not consider this apparent inconsistency to be an impediment to approving the CFA for three main reasons. Firstly, it seemed unlikely that formal taxation of the legal fees by this Court would as a practical matter be required. Secondly, to the extent of any inconsistency did arise between Order 25 and the Funding Act did arise, I was content to assume that the provisions of the primary legislation would prevail over the subsidiary legislation. And thirdly, and most importantly, no need to formally determine the issue arose in the context of the present application.

The retention of foreign solicitors and counsel

29. It was submitted that before the enactment of the Funding Act, this Court recognised that where foreign lawyers were engaged in relation to foreign proceedings, contingency fee arrangements could be sanctioned on the basis that their relevant terms were permitted by applicable foreign law: Re *ICP Strategic Credit Income Fund Limited* 2014 (1) CILR 314. I accepted the submission that the Funding Act was not intended to have extra-territorial effect and that although foreign lawyers had been retained under contingency fee agreements governed by Cayman Islands law, the law of England and Wales properly applied to the issue of what type of success fee was permissible in connection with English proceedings. I was satisfied that the agreements met the very basic requirements of CWR Order 25 and that a case for sanctioning the agreements under the usual Companies Act regime was clearly made out.

Conclusion

30. For these reasons on 12 August 2025, I sanctioned the JOLs' entry into a remuneration agreement for their own fees and fee agreements with local and foreign lawyers on a contingency basis under the provisions of section 110 (2) of the Companies Act (and CWR Order 25) and section 4 (4) of the Funding Act.

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THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT