



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

CAUSE NO. FSD 70 OF 2021 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF THE COMPANIES WINDING UP RULES (2018)

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

Before: The Hon. Raj Parker

Appearances:

Mr Paul Kennedy and Ms Nienke Lillington of Campbells LLP for the Shareholders of SSS Insurance SP

Mr Colin McKie KC instructed by Ms Nicosia Lawson of Baker and Partners (Cayman) Limited for the Official Liquidator

Heard: On the papers

Date of decision: 21 September 2023

Draft Ruling circulated: 21 September 2023

Ruling delivered: 4 October 2023

HEADNOTE

Security for costs in respect of an appeal-jurisdiction-discretion-scope-quantum.

RULING

Introduction

1. On 24 March 2023, the Court made orders that the SSS SP shareholders' (the "shareholders") costs of the AJOL Summons "shall be paid to SSS SP by the JOLs out of the assets of the Company" and the shareholders' costs of the Amendment Remuneration Summons "shall be paid to SSS SP by the JOLs out of the assets of the Company ..."
2. On 6 April 2023, the Official Liquidators (the "OL") issued an application for leave to appeal (amended on 13 June 2023), seeking *inter alia* leave to appeal against those costs orders.
3. On 8 June 2023, the Court made directions regarding the appeal and an application for security for costs by the shareholders. It directed that the security for costs application be determined on the papers prior to the application for leave to appeal and any subsequent appeal.

Parties' submissions

4. Written submissions (with relevant authorities) and extensive evidence¹ from both parties have been considered by the Court.
5. The shareholders seek an order that the Company and/or the OL personally give security for the shareholders' costs of the proceedings to date; an order for security of the shareholders' costs of resisting the OL's leave to appeal application and an order for security of the shareholders' costs of any appeal by the Company/OL. They also seek a stay of the leave application, and the OL's appeals generally, until such security is given.
6. The OL accepts that an order can be made for security for the shareholders' costs of the application for leave to appeal and, if leave is granted, of the appeal.

¹ *Affidavits and exhibits from Nienke Lillington and Kenneth Kryz.*

7. The OL submits that the proper amount payable by way of security in respect of the appeal should not exceed US\$127,942.50.

Jurisdiction

8. The OL seeks to appeal on behalf of a company that is in liquidation. There is insufficient evidence before the Court to show that the shareholders' outstanding costs as awarded by the Court will be met, as well as their costs to be incurred in resisting the appeal.
9. The Court has jurisdiction to award security for costs in respect of a prospective appeal² from a Cayman Islands company³. There is also jurisdiction to award security, not just as to future costs, but those already outstanding between the parties⁴. The Court has concluded that it would be just to do so in this case.

Appeal costs-quantum

10. The Court however agrees with the OL that the total hours estimated for a short application for leave to appeal and an appeal not lasting more than a day are excessive (put forward by the shareholders at US\$283,980) and that the total number of hours should be discounted for the reasons given by the OL. The disbursements claimed should also be reduced for the reasons given by the OL.
11. Having considered the evidence, the Court will set security for costs in the amount of US\$113,000 (being fees) plus, US\$14,000 (for disbursements), amounting to a total of US\$127,000 in respect of the leave to appeal application and an appeal, if leave is granted.

Other costs

12. The proposed appeal (as amended) now only addresses the order of priority of payments within the liquidation of the Company and the interim costs order the Court has made (US\$200,000) which has not been paid.

² *Court of Appeal Act (2023 Revision) section 33*

³ *S. 74 Companies Act (2023 Revision)*

⁴ *Walkers v Arnage [2021] (2) CILR 277 §§ 54-57*

13. There is no appeal against the award of costs in favour of the shareholders in relation to the AJOL summons and Remuneration summons.
14. The two statements referred to in Lillington 3 § 22 indicate the costs incurred by the shareholders in relation to the AJOL summons were US\$117,375.00 (to be taxed on the standard basis) and in relation to the Remuneration summons US\$203,906.25 (to be taxed on the indemnity basis).
15. These costs will remain outstanding regardless of the outcome of the proposed appeal.
16. The shareholders' estimate their total costs of the proceedings (after set-off) at US\$503,910.86 and ask for 70% of that sum which amounts to US\$352,737.60. This figure results from the combined figures of the AJOL costs, the Remuneration costs, and their estimated costs of the appeal which comes to US\$605,261.25. After set-off of the OL's entitlement to remuneration (of US\$101,350.39), this results in a net figure due to the Shareholders of US\$503,910.86.
17. It is in the Court's view just and in accordance with the Overriding Objective to require the OL in this case to satisfy the Court's costs orders as a condition of being allowed to progress the appeal. Those costs in the Court's estimation are likely to be assessed, if not agreed, at between US\$200,000 (the Interim costs awarded) and US\$321,281.25 (the AJOL and Remuneration summons' figures).
18. The Court fixes a reasonable figure for sufficient security at US\$220,000 in respect of the outstanding costs orders.
19. When combined with the costs of the appeal of US\$127,000, the amount of security for costs is to be US\$347,000 (the "Security").
20. The OL submits that the amount payable by way of security should be held by his attorneys, Baker & Partners, in their client account (bearing interest) rather than be paid into Court.
21. The Court has concluded, as a pragmatic matter, that the Security should be in the form of a payment into Court or a bank guarantee from a Class A licensed Cayman Islands bank. This will ensure enforceability through a third party without any difficulty.
22. The Court will not permit any application for leave to appeal to proceed until these conditions have been met in the sum set out for the Security.

23. The leave to appeal application will be stayed until those conditions are satisfied within 14 days. If they are not satisfied within 14 days, the leave application will be dismissed.
24. There will be no order as to the costs of this application.



THE HON. MR JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT