

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2019/COM/bnk/00077

IN THE MATTER of The Companies Act, 1992 Ch 308

AND

IN THE MATTER of the PACIFICO GLOBAL ADVISORS LTD.

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Simone Morgan-Gomez with Philesea Bethel for the Official
Liquidator
Gail Lockhart-Charles KC for the Liquidation Committee

In attendance: Mark Munnings and Tiphaney Russell, Joint Official Liquidators,
Luca Lanciano and Alexander Mailis

12 April 2023 and 25 April 2023

RULING

WINDER, CJ

This is the application for the sanction of fees and expenses of the joint official liquidators of PGA.

[1.] The application is made by Summons of the JOLs, which were filed December 16, 2022. The Summons is supported by the 9th Affidavits of Mark Munnings dated 16 December 2022, the 11th Affidavit of Mark Munnings dated 11 April 2023 and the 12th Affidavit of Mark Munnings dated 19 April 2023.

[2.] The JOLs seeks to recover the following fees and expenses:

A	Joint Official Liquidators for the period of 31 July 2021 to 31 May 2022	B\$433,812.00
B	Deloitte & Touche Bahamas for the period of 31 July 2021 to 31 May 2022	B\$524,493.32
C	Callenders & Co. for the period of 7 September 2021 to 31 May 2022	B\$58,038.40
D	Official Liquidator (former) and Intelysis Ltd., for the period of 17 June to 30 November 2021	B\$91,840.00
E	Quetelle Ferguson, Agent for the Official Liquidator, Nassau. N.P.	B\$ 1,465.88
F	Callenders & Co. acting for the Official Liquidator for the period of 16 June to 30 July 2021	B\$ 160,440.96

[3.] Rule 12 of the Insolvency Practitioners Rules, 2012 provides:

Consideration of remuneration by the liquidation committee.

(1) An official liquidator may not make an application to the court under rule 13 without first-

(a) seeking the liquidation committee's approval of the basis of his remuneration and the amount of the remuneration for which he intends to seek the court's approval;

...

In accordance with the rule the retired OL and JOLs have sought the approval of the Liquidation Committee (the LC) with respect to the approval of their fees and remuneration.

[4.] The application is opposed by the LC. The LC has relied on the Affidavits of Luca Lanciano dated 3rd May 2023. That Affidavit provided at paragraphs 4 – 12 that:

4. The LC wishes the Court to note that, prior to his resignation, the previous Official Liquidator, Mr Edmund Rahming, ("the OL") claimed costs in the total amount of \$2,130,906.93 for the work that he did in performance of the duties of liquidator prior to demitting office. These costs were summarized in a table in paragraph 16 of the 15th Affidavit of the Edmund Rahming as follows:

	OL Costs	Callenders &Co.	Total
General Liquidation Costs	\$1,126,936.19	\$589,404.85	\$1,716,341.04
Sub Fund Liquidation Costs	\$152,169.01	\$131,479.32	\$283,648.33
Non Sub Fund Liquidation Costs	\$17,309.80	\$80,122.00	\$97,431.80
NX Sub Fund Liquidation Costs		\$33,485.76	\$33,485.76
Total Costs	\$1,296,415.00	\$834,491.93	\$2,130,906.93

5. In addition, the OL provided an estimate of the future costs to conclude the liquidation, stating in paragraph 19 of his 15th Affidavit as follows: *we have estimated costs to complete the liquidation after 16th July 2021 ("Estimated Future Costs"). These costs are not included in the costs allocation schedule below at this time as they have not been incurred but we would expect the allocation thereof to be in accordance with the Court's determination of the Summons. These estimated costs are as follows:*

ESTIMATED EXPENSES & DISBURSEMENTS		BS
Official Liquidator and his back office to dissolution of the liquidation		\$300,000.00
	VAT	\$36,000.00
Official Liquidators Legal Counsel to dissolution of the liquidation		\$170,000.00
	VAT	\$20,400.00
Official Liquidators' Legal Counsel's Advances		\$1,600.00

TOTAL

\$528,000.00

6. The JOL's have confirmed that they have charged fees on a time spent basis, but they have refused to provide a detailed breakdown of the time charges. Paragraph 27 of the Ninth Affidavit of Mark E. Munnings provides as follows:

The JOLs and Deloitte have produced a Statement of Account dated 09 June 2022 (" the Deloitte Statement of Account") in respect of time spent by them for the period of 31 July 2021 to 31 May 2022. The account total is BSD 958,305.32 and relates to the JOLs' and Agents' fees on a time spent basis, in the amount of BSD 433,812 (VAT inclusive) and BSD 524,493 (VAT inclusive) respectively. The fees charged are in accordance with the discounted hourly rates set forth hereinabove. There is now produced and shown to me a true copy of the Statement of Account at pages 16 to 19 of Exhibit MEM1

7. The LC does not challenge the qualifications of the JOLs nor does the LC take issue with the hourly rates proposed; however, the LC is gravely concerned that, notwithstanding the knowledge of the serious cost issues in this liquidation, the JOLs have apparently run up costs far in excess of the estimate provided to the Court by the outgoing Official Liquidator. The LC has informed the JOLs that a detailed description of the time spent by fee earner and the work done is required so that an assessment can be made as to the reasonableness of the remuneration claimed.

8. The LC has repeatedly expressed its concerns to the JOLs with regard to costs. The JOLs were aware at the time that the LC was canvassing possible persons to recommend as a replacement of the outgoing OL that costs were a major issue and that the LC's goal was to see to it that the client's assets were returned without delay and at a minimum cost. This position was repeatedly stressed to the JOLs by the LC. There is now produced and shown to me marked Exhibit LC 1 a copy of an e-mail dated 29 September, 2021 from the LC's counsel to the JOLs which expresses the LC's position and concerns relative to costs as follows:

The LC has made it clear from the outset that its goal is for the Liquidation to be conducted in a manner that secures the return of the Client's assets without delay and at a minimum cost. The LC canvassed this goal with the candidates that it was considering recommending to replace the outgoing OL. I suggested that the LC consider recommending you, as, in my experience, you were someone we could work with to achieve this goal. Prior to its decision to put your name forward as the recommended person to replace the outgoing Official Liquidator, the LC made this goal known to you and it was of the view that we were on the same page with regard to the manner in which the Liquidation would be conducted, In particular, the LC did not expect (and does not wish) to be faced with costly contentious litigation over the return of the clients' assets once again. The LC is of the view that, if the JOLs proceed along that path again, they do so at their own risk.

9. The LC has requested a fully particularized break down of the costs claimed; however, this has not been provided. In response to the LC's request for an itemized breakdown of the JOL's bills, the JOL's by letter dated 8 July, 2022 provided a "summary of the tasks performed by the Liquidators and their Agents". This summary has been exhibited to the Ninth Affidavit of Mark Munnings. This summary does not give the details of the time spent doing the items of work listed, nor does it give sufficient detail for the LC to understand whether the time spent was reasonable. It further appears from the summary of tasks that overlapping time was spent by multiple persons on the same tasks and that no regard was given to the cost estimate provided to the Court by the outgoing OL at the handover of the assignment.

10. It is further noted that should the approval of the JOL's costs be given in the amounts claimed all of the company's assets will be depleted. It is also evident from the 16 December Summons that the JOL's will be pursuing a separate application for payment of further costs (or some of them at least) out of trust assets. The LC is of the view that in this context it is even more important to have a full and clear understanding of the work done by the JOLs and their team and the amount of time that it took them to do it. Without this information it cannot be discerned whether the work was necessary, whether it duplicates work already done and billed for by the OL, whether an unreasonable amount of time billed for doing the work, whether multiple people were doing the same thing and so on.

11. The LC is also very concerned that numerous investors have still not received their funds and losses appear to have been suffered due to the outgoing OL improperly converting assets to US dollars from the foreign currency in which they were held at the commencement of the liquidation. The LC has raised this issue with the Court previously in its submissions to the Court in connection with the application for approval of the outgoing OL's costs to which the Court is respectfully referred. In the LC's view, these matters are all relevant as they go to the issue as to whether the expenses that are being claimed as remuneration for the JOL's are properly incurred having regard to S 204 (1) of the Companies Winding Up (Amendment) Act, 2011 ("the Act") which provides that "The expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims." (emphasis supplied).

12. The LC maintains that the information and details requested is also crucial having regard to S 204 (2) of the Act which provides: "There shall be paid to the official liquidator such remuneration, by way of percentage or otherwise, that the court may direct acting in accordance with Rules made under section 252; and if more liquidators than one are appointed such remuneration shall be distributed amongst them in such proportions as the court directs."

[5.] The JOLs responded to the LC's affidavit in the 11th Affidavit of Mark Munnings. At paragraphs 17-25 of that Affidavit, Mr Munnings stated:

Response to the Luca Affidavit

...

17. Paragraph 4 of the Luca Affidavit refers to the former OL, Mr. Edmund Rahming, charging \$2,130,906.93 per his Fifteenth Affidavit dated 24 June 2021 and filed herein 25 June 2021 ("OL's Fifteenth Affidavit"). The Luca Affidavit fails to state that:
 - i. the former OL and his liquidation team were not paid \$283,648.33 which were liquidation expenses associated with the Sub funds and not paid per the Order of Justice Mckay dated 17 September 2020, wherein she held contrary to s.204(3) Companies Winding Up Amendment Act that certain trust assets should not be charged with the expenses directly attributable to their identification, recovery, realization and disbursement;
 - ii. the remaining balance of \$1,847,258.60 due to the former OL and his team was further reduced by 35% (\$646,540.51) per a Ruling of this Court dated 17th January 2022 ("January 2022 Ruling") and
 - iii. the total amount to be paid by the PGA estate (a portion of which is to be reimbursed by the trust assets per the January 2022 Ruling) is \$1,200,718.09, most of which has already been paid out.
18. Paragraph 5 of the Luca Affidavit stated that the former OL estimated the costs to complete PGA's liquidation after 16 July 2021 at BSD 528,000 ("the Estimation"). In this regard, please see our response in paragraphs 19-22 herein below.
19. The former OL was a duly appointed Officer of the Court, who resigned and was formally released from his duties as the PGA OL on 14 July 2021, effective 30 July 2021, by an Order of the Court
20. The former OL provided the Estimation prior to demitting office. As his duties ended on 30 July 2021, he is not a party to the events that occurred in the PGA liquidation since that time and does not have to perform the tasks required to facilitate and complete the PGA liquidation. Accordingly, as the former OL's Estimation was prior to the JOLs' appointment, we are unable to speak to the Estimation.
21. It is noteworthy that on 23 June 2021 (the date of the swearing of the former OL's Fifteenth Affidavit) the former OL was not aware of what the future held for this PGA liquidation. The future included the JOLs actions set out in the JOLs First Report (for the period of 31 July 2021 to 30 April 2022) exhibited to the Fifth Affidavit of Mark Munnings filed herein on 13 June 2022 ("JOLs' First Report"), specifically:

- i. Preparation for and attendance at the 80% trust asset payout hearings in September and October 2021;
- ii. Preparation for and attendance at various meetings between the JOLs and LC;
- iii. The challenges the JOLs encountered reviewing and responding in great detail and with numerous interactions with the 12 clients (out of a total of 98 fiduciary clients) who actually successfully submitted documents in satisfaction of the 07 October 2021 Consent Order (filed 03 November 2021) ("October 2021 Order") and to receive their 80% payouts;
- iv. Attending to and communicating with 8 clients (out of the group of 20 clients who submitted documents in attempting to satisfy the October 2021 Order) or their representatives concerning discrepancies or insufficient documentation prior to the JOL's First Report (see paragraph 3.2.15 of the JOLs' First Report);
- v. The challenges encountered by the JOLs who had to explain to certain persons who the PGA clients of record were and that those persons, not ultimate beneficial owners of PGA clients, were the proper parties to claim the trust assets;
- vi. Dealing with clients/LC who accused the JOLs of not transferring 80% of their assets even though said clients have not submitted complete, appropriate or any documents per the October 2021 Order;
- vii. Reviewing the files and responding to the requests of clients/clients' attorneys/representatives regarding incomplete submissions of documents that are not in satisfaction of the October 2021 Order;
- viii. Reviewing the files and responding to clients and/or their attorneys/representatives regarding client companies that have been struck off the register and what has to be done so that they can comply with the October 2021 Order and receive their 80% payout;
- ix. Attending to and dealing with clients who are still insisting that they should get a 100% payout despite the 11% contribution to liquidation expenses ordered by the Court in January 2022 Order and despite the 80% payout ordered by the Court in the October 2021 Order;
- x. Attending to and dealing with the challenges encountered with the transferring three securities to Clients because of the third party custodian restrictions on the quantity of securities that could be transferred from PGA's account on behalf of the clients, changes to the names of the securities held on behalf of the clients and external matters at a financial institution that delayed the transfer of the securities (see paragraph 3.1.8 of the JOLs' First Report);
- xi. Attending to and keeping track of the values of the various assets held on behalf of the various clients, currency fluctuations, positive

- and negative cash balances (see paragraph 3.2.1 – 3.2.8 of the JOLs' First Report);
- xii. Attending continuously to attempts to recover monies owed by clients who have negative cash balances with PGA (see paragraph 3.2.7 of the JOLs' First Report);
 - xiii. Attending to facilitating the distribution of 80% of trust assets to clients which included, but was not limited to the JOLs and their team reviewing PGA's records as of the 30 September 2019 and 30 September 2020, the statement for PGA's accounts held at financial institutions, notices of admission, partial rejection notices and rejection of proof of debts issued by the former OL to clients and using the information to ascertain clients' assets as of the Liquidation Date and to prepare the clients' statement as of 31st January 2022 and 30 April 2022 (see paragraph 3.2.8 of the JOLs' First Report);
 - xiv. Attending to the process of identifying clients' assets at the Liquidation Date and allocating or ensuring that transactions relating to clients were allocated to their accounts and identifying and allocating to certain clients various corporate actions (dividends and interest payments, liquidation or suspension of the assets, redemption of sales proceeds, changes to the quantities and names of the securities, bank charges etc.) that affected the trust assets held on their behalf (see paragraph 3.2.9 of the JOLs' First Report)
 - xv. Attending to and notating in PGA's records foreign exchange losses, changes in security prices due to market fluctuations (see paragraph 3.2.11 of the JOLs' First Report)
 - xvi. Attending to instances where the JOLs gave instructions to financial institutions to transfer cash to clients per the October 2021 Order, but the monies were returned to PGA's accounts because of changes in the wire transfer instructions for the clients' correspondence bank (see paragraph 3.2.14 of the JOLs' First Report);
 - xvii. Attending to instances when securities held on behalf of a client were not transferred in a prompt manner due to challenges experienced by the financial institution (see paragraph 3.2.14 of the JOLs' First Report) e.g. a transfer of a client's securities took 6 months before the financial institution completed the transfer;
 - xviii. Attending to and liaising with approximately 70 of the remaining 98 clients concerning whether or not they would be submitting documentation in compliance with the October 2021 Order (see paragraph 3.2.16 of the JOLs' First Report);
 - xix. Attending to identifying, assessing and communicating with clients regarding certain challenges concerning their assets, e.g. a financial institution informing the JOLs that there is a minimum quantity of securities required to transfer 6 securities valued at USD 132,739

- held on behalf of 10 clients, one of whom is unknown (see paragraph 3.2.17 of the JOLs' First Report);
- xx. The January 2022 Ruling and the subsequent work required of the JOLs;
 - xxi. The January 2022 Ruling and the subsequent work required of the JOLs including reviewing the January 2022 Ruling and identifying questions and issues with the interpretation of same, instructing JOLs. Counsel to communicate with the court thereon and setting out said concerns in an omnibus Court application (which meant that the court documents had to be drafted and submitted) the hearing of which is pending (see paragraph 3.3 of the JOLs' First Report)
 - xxii. Attending to and drafting an allocation application so that the JOLs can know how much of the remaining trust assets are to be charged for all of the work done in regard to same (see paragraph 3.4.1 of the JOLs' First Report);
 - xxiii. Attending to and preparing for the hearing on the 27 June 2022 regarding Petal Rose's claim for payment of its legal bills from the PGA Estate and subsequent work regarding the taxation process after the 18 July 2022 Ruling thereon;
 - xxiv. Attending to and preparing for the hearing in 2022 concerning Mr. Gianluca Bertis (a former business introducer PGA per paragraph 3.15 of the First OL Report) claim for 100% of his general creditor claim;
 - xxv. Reconciling the accounts for the 10 trust clients (sub funds) that were in receivership whose assets had been transferred from PGA prior to the JOLs' appointment;
 - xxvi. Attending to and calculating the 11% reimbursement amongst the 98 fiduciary clients subsequent to the January 2022 Order;
 - xxvii. Attending to, liaising and corresponding with the various Regulators (SCB, Compliance Commission, Financial Intelligence Unit, Ministry of Finance) regarding matters, including FIU production orders, that occurred after the OL demitted office;
 - xxviii. The arduous 8-month process of completing control and custody of trust assets including dealing with one custodian informing the JOLs that certain PGA accounts holding trust assets (US \$2,820,000) had to be closed (see paragraphs 3.1.3 and 3.1.4 of the JOLs First Report);
 - xxix. Attending to, identifying and assessing instances where the quantities and values listed for some of the trust assets at financial institution differed from the quantities and valued recorded in PGA's records and an instance where a security was said to have been sold, but was still listed in PGA's account at a financial institution (see paragraph 3.1.7 of the JOL's First Report);
22. It is trite, but must be stated, that one party/individual may not speak on another party's/individual's behalf. The JOLs were not consulted regarding the Estimation and did not contract with the LC on that basis.

23. The JOLs informed the LC that we could not serve as JOLs for approximately BSD50,000 which was suggested by the LC Counsel when the JOLs were first approached to consider taking on this file. The JOLs could not and did not estimate the costs to complete the PGA's liquidation, prior to being appointed. In this regard, it was stated that if the JOLs were appointed as PGA's JOLs we would offer a discount of our rates, which we did.
24. Certainly, the JOLs could not and did not estimate the cost occurred by the OL and his team between the date of his Fifteenth Affidavit (which contained the Estimation) and 30 July 2021.
25. It is uncertain whether the former OL, at the date of the Fifteenth Affidavit, was aware of the time and effort required to prepare and attend the five extremely contentious hearings that occurred in July 2021 prior to his release, regarding: fees, allocation formulas concerning the contribution from the trust assets, NX Sub Fund's objections to being charged with any of the liquidation expenses and his resignation.

[6.] According to Mrs Lockhart-Charles KC, the LC does not question the rates charged nor are the qualifications of the JOL's questioned but there is a very real concern as to whether the costs and expenses have been reasonably and properly incurred. They also say that: "prior to accepting their appointment, the JOLs would have been aware of the serious concerns that the LC and the investors had as to costs. It is respectfully submitted that, in this context, it cannot be regarded as reasonable for the JOLs to have run up costs far in excess of the costs estimated by the OL to conclude this matter and it is even more unreasonable for them to refuse to provide a detailed breakdown of the billed hourly charges justifying their claim for costs."

[7.] At paragraph 15 of the submissions, the LC says:

15. The "summary of the tasks performed" which is exhibited to the Ninth Affidavit of Mark Munnings does not give the details of the time spent doing the items of work listed, nor does it give sufficient detail for the LC to understand whether the time spent was reasonable. Most concerning is the level to which the cost estimate provided to the Court by the outgoing OL has been exceeded by the JOLs and their agents. The entire process begs the question – does this liquidation exist for the benefit of the Liquidators alone? It certainly seems that at this rate the creditors will not receive a single dime of the assets of the Liquidation, because all of this money will be paid to the Liquidators. As if this were not bad enough, after the Liquidators have taken all of the assets of the Company, they will be seeking to dip into trust assets to benefit themselves even further. It is trite law that a primary duty of Liquidators is to act in the interest of the Creditors; however, in the present case the entire liquidation will have been of no benefit to the creditors

unless the Court imposes some semblance of reasonableness and proportionality on the Liquidators' charges.

- [8.] The main complaint of the LC therefore are:
- (a) The disparity between the estimate of the outgoing Official Liquidator and the fees of the JOL.
 - (b) The absence of particulars in the invoices of the JOLs.

[9.] When the matter came on for hearing on 12 April 2023 the LC raised the complaints as to the absence of particulars in the invoices of the JOLs. They complained that the Joint Official Liquidators have done their billings substantially different from the way that the previous Official Liquidator did his billing. The Joint Official Liquidators have provided a bill where they are not able to see who did what, when. They also say that there are numerous overlapping things, very general statements and no detail as to what was done.

[10.] The matter was adjourned to permit the JOLs to amend the invoices to add additional particulars as directed by the Court. This resulted in the 12th Affidavit of Mark Munnings which provided the narrative for the items listed in the invoice.

[11.] Section 204 of the Companies Act provides as follows:

204. Remuneration of official liquidators

- (1) The expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.**
- (2) There shall be paid to the official liquidator such remuneration, by way of percentage or otherwise, that the court may direct acting in accordance with Rules made under section 252; and if more liquidators than one are appointed such remuneration shall be distributed amongst them in such proportions as the court directs.**
- (3) Where in the course of the reasonable exercise of his functions as liquidator in relation to assets 'which the company in liquidation held upon a trust, expressed or otherwise, the liquidator—**
 - a) identifies or attempts to identify;**
 - b) recovers or attempts to recover;**
 - c) realizes or attempts to realize;**
 - d) protects or attempts to protect; or**
 - e) distributes such assets to the person or persons beneficially entitled, the liquidator to the extent of such activities (or other activity**

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

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

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

[12.] The JOLs, and by extension their agents, have a statutory entitlement to the payment of their fees for work done and the skill expended in accordance with their statutory duties. The LC does not challenge the qualifications of the JOLs nor does the LC take issue with the hourly rates proposed; however, the LC express their grave concerns that, notwithstanding the knowledge of the serious costs issues in this liquidation, the JOLs have, they say, "run up costs far in excess of the estimate provided to the Court by the outgoing Official Liquidator".

[13.] The crux of the LCs complaint is captured in this statement by Mrs Lockhart-Charles KC, on behalf of the LC,

"If the Court approves these fees, what will happen is that there will be no funds to pay any creditors. The liquidators would have, between Mr. Rahming and the new Joint Official Liquidators, they would have spent all of the assets available to pay creditors. Creditors would not get a single penny and the liquidators would have come in and spent all of the money on their fees."


Respectfully, the concern for the level of fees is shared by the Court and all stakeholders in a liquidation but cannot obviate the need for the job to be done properly. The JOLs have a statutory obligation which they are expected to take seriously and which has not been seriously doubted by anyone concerned. Litigation is expensive and understandably creditors are uneasy with any fee which is levied. But this is the messy nature of a company whose life is brought to an end involuntarily, having to be wound up by external forces.

[14.] The JOLs could not reasonably be expected to be bound by the estimate of retired OL, who could not have foresaw the challenges to be encountered by the JOL's in returning funds to some investors. He obviously would not have factored the time and effort require by the JOLs to review and come up to speed with the dealings in the liquidation prior to their engagement. The fees of the JOLs have been rendered at a discount. I am not satisfied that the LC has shown how the remuneration of the JOLs was

not reasonably incurred. Having considered the fees myself, and the averments in both the 11th and 12th affidavits of Mr Munnings, I cannot say that they have not been reasonably incurred and I sanction those fees in relation to the JOLs and to liquidation counsel, Callendars & Co.

[15.] In relation to the fees of the retired OL and his agent, I defer a decision on those fees pending the determination of the Summons dated 3 March 2023, as there is some concern that the retired OL ought not to receive any further payments, where his alleged unnecessary action, of changing the currency of the fund, has caused losses to the liquidation estate.

Dated this 20th day of November 2023

A handwritten signature in black ink, appearing to be 'I-R' with a large flourish at the end.

Sir Ian R. Winder
Chief Justice