In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION

COMPANIES (WINDING-UP)
2020: No. 305

IN THE MATTER OF OMNIA LTD

AND IN THE MATTER OF THE COMPANIES ACT 1981

AND IN THE MATTER OF THE INSURANCE ACT 1978

Before: **The Hon. Chief Justice Hargun**

Representation: **Mr Christian Luthi of Conyers Dill & Pearman Limited for the Applicants**

Ms Christina Herrero of Marshall Diel & Myers Limited for the JPLs of Omnia Ltd (in liquidation)

Dates of Hearing: **3 April 2023**

Date of Judgment: **28 July 2023**

JUDGMENT

Test for determining whether a segregated account had been established by a segregated account company operating under a Private Act

HARGUN CJ

Introduction

1. At the conclusion of the hearing on 3 April 2023 the Court ordered and declared as follows:

   (1) That the Policy and the shares held by Omnia Ltd (in liquidation) ("**Omnia**" or the "**Company**") in Liffey International Holdings Limited ("**Liffey**") form part of the Omnia Segregated Account and, as such are segregated from the other assets and liabilities of Omnia and its other segregated accounts (if any); and

   (2) That the Court sanctions the Joint Provisional Liquidators of Omnia (the "**JPLs**") entering into a novation agreement, the effect of which will be to novate the Policy and to transfer the Shares to a segregated account of Lombard International Global Insurance Ltd ("**Lombard**") (the "Lombard Segregated Account") on terms substantially in the form of the draft Novation Agreement provided to the Court.

2. This Judgment sets out the Court's reasons for making the order. This Judgment is being delivered at the same time as the Judgment of the Court, in proceedings 2020 Nos 304 and 305, dealing with the issues: (i) to what extent, if any, has Northstar Financial Services (Bermuda) Ltd (in liquidation) ("**Northstar**") and Omnia established segregated or separate accounts in respect of investments made in it or policies issued by it; (ii) to what extent, if any, are the assets of Northstar and Omnia to be held exclusively for the benefit of any such segregated accounts; and (iii) to what extent, if any, do claimants in

respect of any segregated accounts have claims against the general assets of Northstar and Omnia ("**the Main Judgment**").

Background

3. In support of this application, Mr Steven Kettle of Stonehage Fleming Financial Services Limited ("**Stonehage**") has sworn an affidavit dated 28 October 2022 in which he confirms that in 2002, he, on behalf of certain members of the Ackerman-Robins family ("**the Policyholders**") arranged with Mr Liebowitz of Sage Life (Bermuda) Ltd ("**Sage**") to enter into a Sage Wealth Accumulation Policy #025 ("**the Policy**"). The Policy is described as "Wealth Accumulation Policy" and provides for the payment of "Death Proceeds" to "Beneficiaries" on the death of the "Assured."

4. The Policy was funded by a "premium-in-kind", being the shares in Liffey. Liffey is an investment holding company incorporated in the British Virgin Islands ("**BVI**"). Liffey held assets valued at the time in the sum of US $8,063,412.

5. As set out in the Main Judgment, Omnia was incorporated in Bermuda on 15 May 2000 under the name "*Sage Life (Bermuda) Ltd*" and has since undergone several changes of name. Between 2003 and 2016, Omnia formed part of the Old Mutual group of companies.

6. On 30 June 2017, Omnia was acquired by PBX. Following this acquisition, a significant proportion of the investment-grade assets held by Omnia were replaced with illiquid debt instruments and equity issued by entities affiliated with Mr Lindberg. Mr Lindberg and his affiliated entities' conduct in relation to Omnia is the subject of the complaint issued by the JPLs on 4 January 2023 in the United States Bankruptcy Court for the Southern District of New York in respect of historical alleged wrongdoing in relation to the affairs of Omnia and Northstar.

7. Between 2000 and 2009, Omnia sold various policies under fixed and variable annuity contracts, primarily under products known as the Universal Investment Plan, Guaranteed Rate Plan and Guaranteed Index Plan. Omnia was never registered under Segregated

Accounts Companies Act 2000 ("**the SAC Act**"). Instead, it purported to establish segregated accounts under two Private Acts. Policies were initially issued and administered under the Sage Life (Bermuda) Ltd (Separate Accounts) Act 1999 Act (the "**Sage Life Act**"), and latterly (from 4 April 2004) under the Omnia (Bermuda) Ltd. (Segregated Accounts) Consolidation and Amendment Act 2004 (the "**Omnia Act**"). Except for the Liffey Policy, the JPLs do not currently have access to any policy contract forms in respect of policies issued under the Sage Life Act.

8. On 15 April 2019, the Company was placed under enhanced supervision by the Bermuda Monetary Authority **(**"**BMA**"), and certain conditions were placed on its insurance licence in order to assist that supervision.

9. On 18 September 2020, the BMA presented a petition to wind up the Company under section 35 of the Insurance Act 1978 on the grounds that the Company is unable to pay its debts within the meaning of sections 161 and 162 of the Companies Act 1981 and that it has failed to comply with its statutory filing obligations. Rachelle Ann Frisby and John Johnston were appointed JPLs by Order of the Court dated 25 September 2020. On 26 March 2021, Omnia entered liquidation, with the JPLs directed to continue in office.

Issue of Segregated Accounts

10. As set out in the Main Judgment, the Court has held that the legal position under the SAC Act is that a segregated account can and should be treated as having been established in respect of a particular policy (or policies) where, (a) the relevant contractual materials for the product in question evince an intention that there should be a segregated account and, (b) particular assets (being assets of a kind that the relevant policy provides may be segregated) are connected in the company's records to the particular policy (or policies). Commingling of funds does not preclude the operation of segregation.

11. The Omnia Act is a private act of the Bermuda Legislature, presented by Omnia in order to consolidate and amend the Sage Life Act. It came into force on 4 April 2004. Section 27(1)

of the Omnia Act expressly repeals the Sage Life Act. However, that repeal does not have effect so as to affect the previous operation of the Sage Life Act or affect anything done by virtue of or in pursuance of the Sage Life Act. Section 5(1) of the Omnia Act provides that for the avoidance of doubt, "*this Act applies to all Policies and Financial Instruments including without limitations, policies and Financial Instruments issued prior to the commencement of this Act*."

12. For the purposes of considering the issue whether the relevant statutory regime provides for segregated accounts, there is no material difference between the Omnia Act and the Sage Life Act. Both Acts provide for segregated accounts to be created. The Main Judgment sets out the relevant provisions relating to the issue of segregation from the Sage and Omnia Acts, which make substantially similar provisions for the creation and operation of the segregated accounts, in the following table:

Provision (Sage Act)	**Provision (Omnia Act)**	**Summary of effect**
—	s. 1(s)	"*Linked*" is defined in the same way as in s. 2(1) of the SAC Act.
s. 2(1)(p)	s. 2(1)(dd)	A "*Separate* [or Segregated] *Account*" is an account "*established or recorded in the records of the Company pursuant to [the relevant section of] this Act, which shall be evidenced in the records of the Company and may be composed of sub-accounts and, where there are sub-accounts, the expression 'Separate Account' shall mean also each sub-account"*.
s. 5(1)	s. 7(1)	Where required under the terms of a policy and in accordance with the terms thereof, the Company shall establish and maintain a Separate Account for such policy or any particular class of Policies with a sub-account for each policy forming a part of the said class.

		[*In the Sage Act only: each said sub-account shall be deemed to be a Separate Account for the policy to which it relates*.]
s. 5(2)	s. 7(2)	Subject to this Act, rights and interests in the property subject to a Separate Account shall be determined by the terms of the relevant policy and no other rights or interests which might exist in the said property shall be recognised notwithstanding any statutory provision or rule of last to the contrary. Each policy shall be deemed to have a provision incorporated therein to the effect that no claim under the policy may be paid from the Assets or funds of any Separate Account not relating to such policy.
S. 5(3)	s. 7(3)	The Company shall allocate or credit to the relevant Separate Account such portion of the [assets specified below]* attributable to the policy as the policy may stipulate. *Sage Act: "*retrospective premium and the receipts from or attributable to the related Policy*"; Omnia Act: "*premium and other receipts and any Asset or other property of or under the control of the Company attributable to the [Policy]"*.
s. 9(1)(b)	s. 13(1)(a)	Subject to the terms of the policy to which a Separate Account relates, for each Separate Account, without prejudice to the protections afforded by this Act to property subject to Separate Accounts, the Company may invest and deal with the Assets, investment income and other property belonging to or concerning a Separate Account in such manner as the Company thinks fit including without limitation commingling the property thereof with property belonging to or in control of the Company or for which the Company is responsible (whether relating to other Separate Accounts or not) provided always that proper records are maintained

		which would allow the Approved Actuary to identify and allocate the property or the interest in the commingled fund or combined or converted property which represents the property or its proceeds or property or allocations of portions of property among the Separate Accounts.
s. 9(1)(c)	s. 13(1)(c)	The Company shall allocate to a Separate Account all expenses, income, interest, gains (or losses) incurred or earned from investing or dealing with the Assets, investment income and other property belonging to or concerning that Separate Account.
s. 10	—	The Company shall not issue any policies under a Separate Account unless the policy provides that: (1) the amount of all claims by all Policyholders under a Separate Account shall not exceed the aggregate of the Assts of the Separate Account; (2) in the event that a Separate Account has insufficient Assets (including reinsurance recoverables) to pay all such claims, the claims shall be reduced, as provided in the policy, or, if no such provision is made for reduction in claim amounts, in the sole discretion of the board of directors of the Company; and (3) no claim shall be made under any policy on the Assets of any Separate Account other than the one under which such Policy was issued. Any policy issued by the Company without the aforementioned provisions shall hereby be deemed to have such provisions incorporated therein and the reduction in claim amounts referred to in subsection (2) hereof shall be determined by the board of directors of the Company in its sole discretion.
s. 13	—	No creditor of the Company, or of a purchaser of a policy or of any Policyholder, may attach any rights or interests in the property

		subject to a Separate Account or the proceeds of a Policy of the Company that is subject to a Separate Account, unless [certain conditions are met].
s. 14(a)	s. 25(1)	Notwithstanding any statutory provision or rule of law to the contrary, the liquidator shall deal with the property of a Separate Account in accordance with the Act [*but in the case of the Omnia Act, where an Asset or Liability is Linked to more than one Segregated Account, the liquidator shall deal with it in accordance with the terms of the relevant Governing Instrument or contract*].
s. 14(e)	—	To the benefit of the relevant Policyholder the remedies of tracing in law and in equity shall apply to the property and the proceeds of the property of any Separate Account where such property or proceeds may have been commingled.

13. As held in the Main Judgment, the central feature of the Omnia Act, like that of the SAC Act, is that it provides for segregation between various segregated accounts, and between the assets and liabilities of a segregated account and those of the Company's general account. As with the SAC Act, under the Omnia Act, a segregated account can and should be treated as having been established in respect of a particular policy (or policies) where, (a) the relevant contractual materials for the Product in question evince an intention that there should be a segregated account and, (b) particular assets (being assets of a kind that the relevant policy provides may be segregated) are connected in the company's records to the particular policy (or policies).

14. In relation to the issue of segregation, the Policy provides for a number of provisions which make it clear that the Policy is intended to be protected by the mechanism of a segregated account.

15. The Policy defines "*Separate Account*" as:

"*The account established and recorded pursuant to the Private Act which shall be (i) evidenced in the records of the Company and may be composed of sub-accounts and, where there are subaccounts, the expression "separate account" shall mean also each sub-account and (ii)* ***which are separate and distinct from other separate accounts of the Company and the general account of the Company and maintained for the purposes of each Policy****."*

16. The Policy expressly provides that:

"*Your Policy will be linked to a Separate Account or subaccount of a Separate Account established by Us for You. No other policies will be linked to the separate account.* ***No claim shall be made under any policy on the assets of any Separate Account other than the one under which such policy was issued. Each Separate Account is a separate and identifiable account established pursuant to the Private Act.***

No other rights or interests shall exist with regard to the assets or funds in the Separate Account save and except as determined by the terms of this Policy. No amount under the Policy may be paid from the assets or funds of any other Separate Account not relating to linked to the Policy and vice versa."

17. It is plain that both the statutory regime (the Omnia Act and the Sage Life Act) and the Policy provide for a segregated account such that no other creditor can make a claim against the assets of the segregated account other than the Policyholder and the Policyholder is confined to the assets of the segregated account and in particular can make no claim against other segregated accounts or the general account of the Company. The remaining issue to consider is whether the assets of the Policy (shares of Liffey) are connected in the Company's records to the particular the Policy.

18. As noted from the terms of the Policy, the Policy is to be held in a segregated account. Omnia in fact created a segregated account. The account was designated a separate number and referred to as such (#25). The assets (and liabilities) of the account were kept separate and distinct from the other assets in the name of Omnia. The assets consisted of shares of Liffey, which in turn held the investment portfolio managed by Stonehage. The Liffey assets were not part of or co-mingled with any other fund or investment product offered or managed by Omnia.

19. The Liffey portfolio was at all material times managed and accounted for separately by Stonehage. The assets were listed as a segregated account. A separate account was created on the IMS, the Kane LPI Solutions Limited electronic policy administration system used to administer contracts issued by Omnia. Omnia's auditors annually sought and were given separate valuation confirmation by Stonehage on behalf of Liffey.

20. In the report prepared in relation to the affairs of Omnia by the JPLs dated 6 September 2022, the JPLs confirm that in relation to the Liffey Policy:

> *"In addition to the one active Policy, the IMS displays only one other Managed Product Policy, which is shown from that display to have been surrendered. It is the JPLs' understanding that, rather than paying cash premiums, the Policyholders of the one active Policy invested "premium-in-kind" in the form of the entire issued share capital of Liffey, which remains wholly owned by the Company. The underlying assets backing Liffey's investment are held and managed by a third party, as is indicated above.*
>
> ***These assets are accounted for in the Company's financial statements for the year ended 31 December 2017, appearing at Appendix Fl 1.1, where they are listed as a segregated account (Level 2) asset valued at $24,491,515 (Note 6), with a corresponding liability in the same amount. On the basis of the JPLs' review to date of the limited contemporaneous email correspondence contained in the KPMG audit file (which, as noted above, is incomplete), the JPLs consider that the "Level 2" sum represents the value of the Variable Assets held pursuant to this Policy****."*

21. On the basis of the above evidence, the Court is satisfied that there is sufficient evidence in the records of Omnia linking the assets (shares of Liffey) to the Policy. The Court should also note that none of the parties ,including the JPLs, have in fact disputed the declaratory relief sought by the Applicants. It was for these reasons that, following the hearing, the Court made the order that the Policy and the shares held by Omnia in Liffey form part of the Omnia Segregated Account and, as such are segregated from the other assets and liabilities of Omnia and its other segregated accounts (if any).

Dated this 28th day of July 2023

NARINDER K HARGUN

CHIEF JUSTICE