In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
COMPANIES (WINDING-UP)
2020: Nos. 304 & 305

IN THE MATTER OF NORTHSTAR FINANCIAL SERVICES (BERMUDA) LTD.

AND IN THE MATTER OF OMNIA LTD.

AND IN THE MATTER OF THE COMPANIES ACT 1981

AND IN THE MATTER OF THE INSURANCE ACT 1978

AND IN THE MATTER OF THE SEGREGATED ACCOUNTS COMPANIES ACT 2000

AND IN THE MATTER OF THE PRIVATE ACTS

RULING

Dates of Hearing: Tuesday 12 December 2023

Date of Ruling: Wednesday 20 March 2024

Counsel for the Joint Provisional Liquidators:	Mr. Michael Todd KC of Erskine Chambers and Ms Christina Herrero of Marshall Diel & Myers Limited
Counsel for the Variable Representatives:	Mr. Edward Davies KC of Erskine Chambers and Ms Jennifer Haworth of MJM Limited
Counsel for the Fixed Representatives:	Mr. Christopher Tidmarsh KC of 5 Stone Buildings and Mr. Nicholas Miles of Kennedys Chudleigh Limited
Counsel for the General Representatives:	Mr. Matthew Collings KC of Maitland Chambers and Mr. John Blackwood of Chancery Legal Limited

Consequential Hearings – Segregated Accounts Companies Act 2000 – Allocation of costs of segregation summonses and costs in liquidation between the fixed, variable and general classes of investors

RULING of Shade Subair Williams J

Introduction:

1. The ongoing litigation in this case arises out of the liquidation of two Bermuda exempt companies, namely Northstar Financial Services (Bermuda) Limited ("Northstar") and Omnia Limited ("Omnia") (Northstar and Omnia collectively being the "Companies").

<u>Northstar</u>

2. On 18 February 1998 Northstar was incorporated under the name "*Nationwide Financial Services (Bermuda) Ltd*". It was registered under the name "Northstar" on 6 April 2006. On 1 June 2007 Northstar amalgamated with Metlife International Insurance Ltd ("Metlife"). Insurance and investment policies issued by Northstar were governed by Private Acts, namely the Nationwide Financial Services (Bermuda) Ltd. Act 1998 ("the Nationwide Act"), the

Citicorp International Insurance Company Ltd. Act 1999 (“the Citicorp Act”) and the Northstar Financial Services (Bermuda) Ltd. Private Act 2008, subsequently amended by the Northstar Financial Services (Bermuda) Ltd. Amendment Act 2018 (“the Northstar Act”).

3. On 4 April 2008 Northstar was registered as a segregated accounts company (“SAC”) pursuant to the Segregated Accounts Companies Act 2000 (the “SAC Act”). Northstar provided services which entailed the sale and management of investment and annuity products. It did this via three separate blocks of business, namely “*Nationwide Business*”, “*Metlife Business*” and “*Northstar Business*”. The products offered under these blocks of business were marketed by various categorized classes of investment plans. The categories of note were “variable investment plans”, “fixed rate investment plans” and “indexed investment plans”. (No practical or relevant distinction has been made between indexed investments and fixed investments.)

4. On 14 November 2021, Northstar amalgamated with NFSB Investment Ltd before the entire of its issued share capital was acquired by BMX Bermuda Holdings Ltd (“BMX”). BMX was ultimately and beneficially controlled by one Mr. Greg Lindberg. Prior to the BMX acquisition, Northstar had a policy of investing a 75% lion’s share of the sums backing fixed investments into liquid income securities which were managed by Black Rock Asset Management (UK) Limited (“Black Rock”). It was expected that the residual share of those fixed contract premiums would be invested at a high-yield level in portfolios such as funds, loans, real estate and equities.

5. Mr. Lindberg came to be the subject of an investigation launched by the US Department of Justice on or around October 2018. This was partly on account of the replacement of Northstar’s liquid assets for illiquid equity and debt instruments. At a subsequent point, adversarial litigation proceedings ensued in the United States.

Omnia

6. Incorporated on 15 May 2000 under the name “Sage Life (Bermuda) Ltd”, Omnia, unlike Northstar, never registered as an SAC. Notwithstanding, it carried on the business of issuing insurance policies linked to what it purported to be segregated accounts established under two Private Acts, namely the Sage Life (Bermuda) Ltd. (Segregated Accounts) Act 1999 (“the Sage

Act") and the Omnia (Bermuda) Ltd. (Segregated Accounts) Consolidation and Amendment Act 2004 ("the Omnia Act").

7. Omnia's insurance and investment policies were offered under fixed and variable annuity contracts. It provided investments plans referred to as the "Universal Investment Plan", the "Guaranteed Rate Plan" and the "Guaranteed Index Plan". As was the case with Northstar, Omnia offered policyholders variable, fixed and indexed investment options. Only those who subscribed to the Universal Investment Plan were entitled to the benefit of variable investments in underlying mutual funds.

8. Before BMX took over Northstar, Omnia (the smaller company) was acquired by PBX on 30 June 2017. PBX sold Omnia's investment-grade assets in exchange for illiquid debt instruments and equity in entities which had some level of affiliation with Mr. Lindberg. So, these sale transactions triggered the attention of the investigation unit of the US Department of Justice.

The Represented Parties

9. Significant investments and purchases of Northstar's and Omnia's policies were made. By a representation order made on August 2021 (the "Representation Order"), the Court established that these groups would be categorized as either the "Fixed Class" the "Variable Class" or the "General Class".

10. The Fixed Class represented the beneficiaries of plans which guaranteed an explicit and defined return at a set interest rate. This was to be sourced from the proceeds of investments made with their funds to the Companies.

11. By contrast, the Variable Class invested in a range of mostly mutual fund assets of their choosing. Their returns were contingent on the performance of those underlying funds. In the case of both Northstar and Omnia's variable investments, the investments were used by the Companies to acquire holdings in whichever underlying fund was selected by the policyholder. That policyholder would then be assigned a "unit" which was used to measure the value of the

variable investment option. Effectively, the policyholder never had any direct holding in the underlying investment funds. Rather, it was the Companies which did.

12. The General Class is made up of the creditors other than those who held fixed, indexed or variable investments.

The Winding-Up Proceedings for Northstar and Omnia

13. On account of non-compliance and liquidity issues, the Companies came under the scrutiny of the Bermuda Monetary Authority (the "BMA"). In May 2020, the BMA retained the services of Deloitte for the purpose of conducting an independent review of the Companies' files. On 18 September 2020, the BMA presented winding up petitions on the grounds that the Companies were insolvent and in breach of their statutory obligations. On 25 September 2020 joint provisional liquidators were appointed by the Court and on 26 March 2021 the Companies entered liquidation.

14. Ms. Rachelle Ann Frisby and Mr. John Johnston, the Joint Provisional Liquidators (the "JPLs") of Northstar and Omnia filed two amended summons applications, dated 26 July 2021 ("the segregation summons[1]") for the Court's direction on various questions as to the creation of segregated and/or separate accounts established by Northstar and Omnia and the pool of assets either linked or available to those account holders. The issues raised on the segregation summons were settled by the judgment of the Court handed down on 28 July 2023 by Hargun CJ (now retired) (the "Judgment").

The Present Application

15. Without the benefit of having presided over the substantive hearing of the segregation summons, I have inherited the unenviable task of ruminating over the consequential and controversial issues of cost allocations as between the Companies and the various classes of investors and creditors. This Court is also asked to consider the position as between the members within those classes in order to determine the incidence of those costs. In doing so,

[1] The "segregation summons" is a collective reference to the JPLs' original summonses for Northstar and Omnia of 1 June 2021 as amended on 26 July 2021

consideration is to be given to the allocation of the JPLs' costs and expenses on the segregation summons in addition to the fees, costs and expenses in the liquidation generally. This entails decision-making on both the historic and future costs of the liquidation.

16. The exercise has not been a simple one as it gives way to many overlapping points. However, I was assisted by leading Counsel for each of the represented classes whose submissions to the Court were both rigorous and graceful. For that I am particularly grateful.

17. This is my decision and reasoning.

Background Summary:

18. In the Judgment, the Companies were found to have created segregated accounts for all of the accounts which they purported to be segregated accounts. On the subject of asset-linkage, it was held that the legislative requirements under the SAC Act were satisfied where company records were found to be evidence of "*entries recording data, assets, rights, contributions, liabilities and obligations linked to such account*". In this regard, the Court accepted that the pre-condition of segregation applies to the maintenance of company records rather than any segregated funds. So, it is key that the assets are connected to company records which are wholly separate and distinct from all other records. As long as the records evidenced that independence, comingling of the funds is a non-issue.

19. The significance of whether segregated accounts were established is relatively straightforward. In accordance with the relevant provisions of the SAC Act, the assets of a segregated account are impermeable in that they are reserved for the exclusive benefit of the beneficial owner or counterparty. It follows that assets in a segregated account cannot lawfully be used to meet the liabilities of anything other than the segregated account to which it is linked. That being so, it is also the case, on the legal findings of the Court, that policyholders with a segregated account have no recourse to the general assets of the Company in the event of a shortfall in the segregated assets.

20. On the factual findings made in the Judgment, Northstar established segregated accounts by the terms of all Northstar Act Policies and the Nationwide Act Policies. Segregated accounts were also established on a majority portion of Northstar's Citicorp Act Policies.

21. It was determined that the variable assets were held in segregated accounts in both Northstar and Omnia. Other than the investors of the Universal Life Product, the investors of the Variable Class were holders of segregated accounts which had assets linked to those accounts. Of note, Omnia offered a product called "*Sage Wealth Accumulation Product*" ("SWAP") which was held by the Liffey policyholders. This product allowed for variable investments which the Court linked to segregated accounts. This put the Liffey policyholders in similar position to that of the Variable Class subscribed to the 'Universal Investment Plan'. So, while the Liffey policyholders are party to separate Court proceedings, I am reminded that they are to be regarded in a real sense as sibling to or part of the Variable Class for the purpose of costs allocations in the liquidation generally.

22. The Fixed Class, by and large, were not as fortunate as the Variable Class. Save for a tranche of investors within this investment class, the Court found that the Companies did not keep records sufficiently linked to any pool of assets. Notwithstanding, the Court ruled that segregated accounts for the Fixed Class had indeed been established and that the members of the Fixed Class were to be treated as policyholders with a segregated account. Against that background, the Court opined that the Fixed Class might, as a possible remedy, file a separate civil claim in order to tap into the general assets of the Companies, emphasis given to this not being an ordinary right or entitlement under the SAC Act.

23. Within the class of fixed investment policyholders, there were varying levels of interest in Northstar.

24. One group consisted of investors in Northstar with interests in "Warrants" issued by Barclays which were purchased to support the "Global Index Product". There, the principal sum invested was protected with a chance for an "index return amount". This sub-class of fixed investors ("Group 1") were found to have the benefit of linked assets on the basis that their purchases of

Warrants were for particular policies. That is to say that their premiums were not to be used as a means of supporting Northstar's general repayment obligations. To that end, the Court recognized a direct correlation between an indexed investment and the Company's purchases of Warrants.

25. The second group ("Group 2") of fixed investment policyholders relates to the "Global Asset Portfolio". The contract for the Global Asset Portfolio provided for the establishment of a "*separate account*" pursuant to the relevant Private Act, namely the Citicorp Act. This separate account was said to be divided into a number of subdivisions, creating "*sub-accounts*". However, those sub-accounts did not create separate accounts. Collectively, Group 2 was a member of a single separate account. That being the case, the contract for the Global Asset Portfolio was said to have expressly provided for this Group to have recourse to the general assets of Northstar should this separate account prove to be inadequate to satisfy the claims of fixed investors. So, on Hargun CJ's findings, Group 2 has a contractual right of access to the general account of Northstar in the event of a shortfall of assets to meet its liabilities.

26. The remaining members of the Fixed Class ("Group 3") are those who have segregated accounts but no linked assets. This group has no access to any assets. They are barred from partaking in the assets of any other segregated accounts and they have no right of access to the assets of the general account. Their only recourse would be to commence separate claims grounded on civil causes of action. A claim for breach of duty to implement an effective structure or a tracing claim under section 18(16)(a) of the SAC Act is envisaged.

27. There were two particular Metlife policies issued by Northstar which did not meet the standards of effective segregation for the fixed class of investors. These policies were termed the "*Variable Universal Life*" and the "*Group Variable Deferred Annuity*". It is stated in the Judgment[2] that all of the represented parties agreed that approximately $52,000,000.00 of claims relating to these two fixed investment policies were not segregated and should consequently be treated as claims against the general account. The members of these sub-classes of fixed investors were accordingly re-designated to the General Class by a previous

[2] See paragraph 120 of the Judgment

Order of the Court (during the course of the Metlife Application). The joinder was motivated by the Court's aim to maintain within the Fixed Class a unified class of fixed investors who had policies in segregated accounts, albeit without linked assets.

28. In summary, all policies issued by Northstar and Omnia created segregated accounts, save for Northstar's Universal Life Product and the fixed investment plans termed the Group Variable Deferred Annuity and the Variable Universal Life Product.

29. As earlier noted, the General Class comprises all creditors of the Companies other than investment or policyholders of the Variable or Fixed Classes.

30. The estimated value of the claims for each of the classes was provided to the Court. As it relates to Northstar, the Fixed Class claims approximately $225,000,000.00 and the Variable Class claims an approximate aggregate sum of $105,000,000.00. The total value of the claims for General Class significantly increased from $500,000.00 to $53,000,000.00 as a result of the Metlife Application. So the total value of the claims in Northstar is said to be approximately $413,000,000.00. Turning to Omnia, the Fixed Class claims $41,600,000.00, the Variable Class claim $95,000,000.00 and the remaining claims come to $3,700,000.00. This brings about a total sum of $140,300,000.00 in claims against Omnia.

31. Thus, the aggregate value of the claims against the Companies is $553,300,000.00, i.e. an excess of a half billion dollars.

The Issues:

32. Paragraphs 11-12 of the Representation Order provides:

"*The reasonable and proper costs of the Parties up to and including the Substantive Hearing (but not any appeal) are to be paid as an expense of the liquidation and/or out of the assets of the Segregated Accounts (or any of them). Such costs shall be met in the first instance from the Company's bank account…*

The incidence of those costs of the Parties as between the assets of any Segregated Account and [Northstar's/Omnia's] other assets is reserved to the Judge at the Substantive Hearing."

33. Accordingly, the issues for me to determine are as follows:

(i) The allocation of costs of the Segregation Summons
(ii) The costs of the Metlife Application
(iii) The costs to be paid by the Liffey policyholders
(iv) The disbursement fees payable to Black Rock
(v) Historic and future costs, fees and expenses of the Liquidation

The Relevant Law:

34. The law governing the winding up of a Bermuda incorporated SAC is in steady development. Its statutory sources are grounded in both the Companies Act 1981 (the "CA 1981") and the Companies Winding-Up Rules 1981 (the "Rules"). The provisions in the CA 1981 and the Rules are to be construed, where possible, in accordance with the provisions of the SAC Act. That is the effect of section 25A(2) of the SAC Act which provides:

"*To the extent possible, where they relate to a segregated accounts company that is a company to which the Companies Act 1981 applies, the provisions of this Act shall be construed consistently with the relevant provisions of the Companies Act 1981*."

35. That being the case, it is not to be forgotten that the marriage between the CA 1981 and the SAC Act is a hierarchical one, the latter being supreme. Should an irreconcilable conflict arise between these two Acts of Parliament, it is plain by the wording of section 25A(3) of the SAC Act that its provisions shall prevail. Section 25A(3) provides:

"*In the event of an irreconcilable conflict between this Act and the Companies Act 1981, the provisions of this Act shall prevail*."

36. (In this instance, I am not burdened with any suggestion of statutory conflicts.)

37. Sections 25(1)-(2) of the SAC Act prescribe two main principles in cases involving the winding up of segregated accounts: (i) segregation of assets and liabilities: "…*the assets linked to one segregated account are not applied to the liabilities linked to any other segregated account or to the general account…*" and (ii) the liability of any segregated account to remunerate a liquidator is to be assessed individually and is to be made commensurate only to the services provided and attributable to the individual segregated account.

38. Section 25(1) provides:

"***Application of Assets***

"25(1) Notwithstanding any statutory provision or rule of law to the contrary, in the winding up of a segregated accounts company the liquidator shall deal with the assets and liabilities which are linked to each segregated account only in accordance with this Act and accordingly the liquidator shall ensure that the assets linked to one segregated account are not applied to the liabilities linked to any other segregated account or to the general account, unless an asset or liability is linked to more than one segregated account, in which case the liquidator shall deal with the asset or liability in accordance with the terms of any relevant governing instrument or contract."

39. At the essence of section 25(1) where a company is being wound up, the assets and liabilities of a segregated account are to be administered independently from any other segregated account and from the general account of an SAC. That means that any interference which compromises the fiscal isolation of a segregated company must be carefully avoided. Segregated accounts are accordingly to be regarded as unmalleable and insulated cells which are immune to trespass.

40. While I have the advantage of referring to persuasive case law, it is to be observed that these kinds of cases are neither commonplace nor atypical. Noting the then absence of clear

precedents against a detailed statutory code, Kawaley J (as he then was) in *Re CAI Master Allocation Fund Ltd* [2011] Bda L.R. 57 was faced with complexities novel to the Court in the winding up of two segregated account fund companies, one being the Master Fund and the other being the Feeder Fund. Comparable to the present case, the petitioning grounds for a winding up order were filed by the BMA on the basis of regulatory concerns. The evidence before the Court was that investors deposited monies into JP Morgan for approval and forwarding on to Goldman Sachs where those monies were to be used for active investments. In one instance referred to in Kawaley J's judgment, it was alleged that the condition precedent for the investment of funds submitted never occurred.

41. While it seems that neither of the two fund companies were insolvent, the Court was concerned with the winding up principles for the purpose of redistributing the fund companies' assets. Leaving aside the question of proprietorship over the monies remitted to these segregated account fund companies for shares never issued, Kawaley J considered the applicability of the ordinary corporate-insolvent winding up regime to segregated accounts companies. In doing so, he accepted that the principles governing a conventional winding up would be prime as the starting assumption for the winding up of a segregated company. Of particular relevance, Kawaley J also recognized the autonomy of each segregated account and the need for its winding up to be done on an individual basis i.e. separate from any other segregated account or entity. Again, noting the freshness of the soil covering this new legal ground, Kawaley J said [13]:

"*13. So the Companies Act winding-up regime appears to apply, save that (principally) each segregated account must be wound-up on an individual basis. The liquidators will, until a coherent body of practice evolves, be free to decide to what extent (if at all) the general winding-up regime should be followed in relation to each insolvent segregated account. But the starting assumption will generally be that the umbrella principles which inform the modus operandi of a traditional winding-up will apply in the Segregated Account Companies Act context…*"

42. Section 17(2)-(2A) of the SAC Act reinforces section 25(1) in that both provisions not only promote but mandate autonomous budget operations so that the application of the assets and liabilities of segregated accounts is uncompromised by any form of external blending. Section 17(2) is focused on the liabilities of a segregated account. It sheathes all other segregated account owners from being responsible for the liabilities of another segregated account. Section 17(2) states:

"*Notwithstanding any enactment or rule of law to the contrary, but subject to this Act, any liability linked to a segregated account shall be a liability of that account and not the liability of any other account and the rights of creditors in respect of such liabilities shall be rights of the relevant account and not of any other account*."

43. Similar to the approach required to encase the liabilities of a segregated account to a segregated account owner, section 17(2A) prescribes that the assets in a segregated account are to be reserved only for the benefit of the account holders or counterparties to a transaction linked to the segregated account. Those assets may only be used to meet the liabilities of the account holders or creditors of that segregated account. In unequivocal terms, the general population of shareholders or those entitled or interested in the general shareholding of a segregated accounts company are excluded from access to any funds held in any one segregated account. As Mr. Davies KC reportedly put it during the segregation proceedings, this legislation is designed to ensure an effective "firewall" or "iron curtain" between the assets and liabilities of each segregated account and the general account.[3]

44. Section 17(3) is residual to sections 17(2)-(2A). It is plainly so, on the wording of subsection (3), that the general assets of an SAC are the only assets that the company has recourse to. The SAC cannot lawfully draw from the assets of any segregated account in the absence of an agreement to the contrary between all affected parties. (Section 17(4) permits a transfer of the general assets to a segregated account only in circumstances where the company in question is solvent and there is expressed written concurrence from all of the shareholders.) Section 17(3) is also consistent with section 18(1) which provides:

[3] See paragraph 225 of the Judgment

"*Notwithstanding any enactment or rule of law to the contrary, any asset of a segregated accounts company which is linked to a particular segregated account is deemed to be owned by the company as a separate fund which does not form part of the general account.*"

45. Similar to the present case, the Court in *Re CAI Master Allocation Fund Ltd* also had to grapple with the legal position consequential to a deficiency of funds in any one of the segregated accounts. Section 17(7) of the SAC Act governs the principles as to the rank between creditors and account holders where any such shortfall of assets in a segregated account occurs. It provides:

"*In the event that a segregated account has insufficient assets to pay all of its obligations in full, the order and priority of the rights in relation to assets linked to a segregated account shall (without prejudice to the rights of any parties holding valid security interests against assets linked to that segregated account and any valid preferential claims in respect of that segregated account) be determined by the terms of the governing instrument and any contracts pertaining to that account, and any ambiguity in respect of the order and priority rights shall be resolved as follows:*

(a) the claims of creditors shall rank ahead of the claims of account owners;
(b) the claims of creditors inter se shall rank pari passu; and
(c) *the claims of account owners inter se shall rank pari passu*.

46. Section 17(7) of the SAC Act aligns with the principles applicable to a traditional winding up where priority rank is given to creditors.

47. Turning to the provisions which deal with a liquidator's fees, I have had regard to section 25(2) of the SAC Act which provides:

"(2) The remuneration to be paid to the liquidator shall be apportioned by the liquidator to each segregated account and the general account in such amounts as would best reflect the duties performed by the liquidator and approved by the court."

48. On the question of priority for the payment of a liquidator's fees, section 232 of the CA 1981, as is well known to winding-up practitioners, prioritizes a liquidator's fees and properly incurred expenses above all other claims to be paid out of the assets. However, this only applies to cases where the liquidation is *voluntary*. It states:

"*All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims*."

49. Section 232 does not apply to companies in the process of being compulsorily wound-up.

50. Section 25(3) of the SAC Act empowers the Court to determine any issue arising on the question of a liquidator's fees. It states:

(3) The liquidator, or any person affected by a decision of the liquidator, may apply to the court for directions in relation to the remuneration of the liquidator."

Decision and Reasons:

Decision and Reasons: The Allocation of Costs of the Segregation Summons

51. The Representation Order provided for the costs of the segregation summons to be paid as an expense out of the Companies' assets and/or any segregated accounts.

52. The JPLs reported their costs of the segregation summons in Costs Reports for each of the Companies. As it relates to Northstar, a Costs Report of 10 November 2023 (the "Northstar Report) was produced. In respect of Omnia, a Costs Report also dated 10 November 2023 (the "Omnia Report") was filed preparatory to the hearing before me.

53. The JPLs' legal fees for Northstar in the segregation proceedings totaled $1,072,811.35. For Omnia, their costs totaled $688,239.80. These sums refer only to the portions they propose to be allocated *pari passu* between all of the represented classes in the segregation summons. It should be further noted that these sums exclude any calculation of costs of these proceedings on the Consequential Issues.

54. Directions are now needed to determine the allocation of costs amongst the classes and the incidence of those costs within the classes. This requires my consideration of the following sub-issues:

    (i) How the JPLs' costs of the segregation summons should be allocated between Northstar and Omnia;

    (ii) How the JPLs' costs of the segregation summons should be allocated between the represented classes in Northstar and Omnia;

    (iii) How the JPLs' costs of the segregation summons should be allocated between the segregated account holders within each class of Northstar and Omnia; and

    (iv) How the class representatives' costs of the segregation summons should be allocated between the segregated account holders within each class of Northstar and Omnia.

55. The segregation summons was relevant to both Northstar and Omnia and no submission to the contrary was made. So I am not troubled in finding that the JPLs' costs of the segregation summons will be shared between the Companies. That said, Mr. Collings KC for the General Class pushed for an apportionment which best reflects the differing sizes of the estates as between Northstar and Omnia. Measuring this by the total values of the claims against the Companies, a 75/25% split was proposed on the written submissions filed on behalf of the General Class.

56. In my judgment, an apportionment of the costs of the segregation proceedings by reference to the size of the estates betrays the reality that the Court was no less concerned with Omnia than Northstar in formulating its analysis of the applicable law on segregated account companies. The legal principles relied on to establish segregation of records and linkage of assets was of equal relevance and importance to both Northstar and Omnia. So, I am bound to reject any proposition which is adverse to an equal footing apportionment as between Northstar and Omnia.

57. Moving on to the question of payment of the JPLs' costs by each of the represented parties is to be resolved by answer to the following binary question. Was the need for the segregation summons proceedings shared by each of the represented classes of investors?

58. Mr. Davies KC for the Variable Class never suggested that they should be exempted from liability for a share of the costs to be apportioned. However, Mr. Tidmarsh KC for the Fixed Class correctly flagged that it was never argued during those proceedings that the Groups 2 or 3 of the fixed investors had linked assets[4]. The case advanced for those Northstar divisions of the Fixed Class was that they were entitled to claim against the general account. This, however, was without success in respect of Group 3[5]. More so, the Fixed Class as a whole was unsuccessful in arguing that the Variable Class had no linked assets[6]. That said, I find that all three classes relied on the assistance of the Court to resolve the legal and factual issues decided.

59. It must also be said that a structured classification of investors was achieved by the segregation proceedings. This was clearly in aid and in furtherance of the JPLs' general and equitable duties in proceeding with the liquidation of the Companies. By bringing the segregation summons proceedings the JPLs also obtained much needed clarity from the Court on the question of linkage of assets and the accessibility of the general account to Fixed and Variable Classes in the event of a deficiency of assets to meet the liabilities of those accounts. So, the segregation summons proceedings was clearly of wholesale value to each of the classes within

[4] See paragraphs 172-173 of the Judgment
[5] See paragraphs 221–234 of the Judgment
[6] See paragraphs 117-119 and 162-171 of the Judgment

both Northstar and Omnia, albeit that the findings of the Court produced a largely unfavourable result for the Fixed Class. It is evident that at some point or the other, each of the represented parties would have likely called upon the Court for adjudication of these issues. For those reasons, each of the classes party to the segregation proceedings, as a matter of principle, ought to be made responsible for a portion of the JPLs' costs of the segregation summons.

60. One important caveat: where the JPLs have been able to isolate the legal work which was prepared or carried out for the primary benefit of a particular class, costs should be apportioned to that particular class only. That category of costs has been termed "Allocated Costs" in the Northstar and Omnia Reports. Otherwise, costs should be allocated between the classes *pari passu*.

61. There is real discord between the parties as to how the *pari passu* allocation of the JPLs' costs is to be apportioned as between the account owners and counterparties within each class of the Companies. It was generally accepted that it would be impractical or overly burdensome for the JPLs to record the costs on a policy by policy basis. This opens up the question as to whether costs ought to be proportionate to the aggregated value of the claims of the policyholders of each class or whether the costs calculation within the classes should be by reference to the total assets of each policyholder within each class.

62. Messrs. Todd and Davies KC contend that the best approach would entail a calculation contingent on the liabilities within each class. The Fixed Class, however, champions the division of costs to be carried out by reference to the assets and future recoveries within the Variable Class, Group 1 of the Fixed Class and the General Class. On this point, Mr. Tidmarsh KC submitted that in practical terms these other classes would be minimally affected by using the lesser values to allocate the JPLs' costs to the Fixed Class. He added that the issue of costs for Group 3 would be best handled at a later stage by the Court when considering the tracing and/or breach of duty claims since the JPLs would need to retain sufficient assets to meet any such tracing claims afoot. On that basis, Mr. Tidmarsh KC urged this Court to leave the issue of costs to be decided by the judge who will preside over the anticipated tracing and/or breach of duty claims.

63. In my judgment, costs should not be parasitic to any class of investors by reason of their good fortune in discovering that their assets are linked to their accounts. Liability for costs is a liability grounded on discretionary principles of law relevant to the conduct of litigation. I do not consider it to be an appropriate exercise of the Court's discretion to manipulate a costs calculation as a means of compensating any one class of investors for their business losses. So, the loss of the Fixed Classs assets cannot be determinative of an equitable assessment of their fair share of the costs' liability for the segregation summons. (The position may differ where it concerns the payment of disbursements in the liquidation as the question of linked assets becomes relevant.)

64. The most reasonable of the options put to this Court is for a *pari passu* allocation of the JPLs' costs on the segregation summons to be calculated by reference to the size of the account holders' claims within each class for both Northstar and Omnia. The need for the services of liquidators aligns more with the liability of an account rather than its asset-fortune.

65. All of that said, I am mindful that this leaves Group 3 of the Fixed Class policyholders in a particularly unenviable position as they have no immediate means of making good payment on a costs order. (Further below, I return to the question of the shortfall of assets to meet the costs liabilities of Group 3 of the Fixed Class.)

66. It is also to be noted, for the avoidance of any uncertainty, when I refer to the costs to be borne by the Variable Class, this does not include the Liffey policyholders as they were not party to the segregation summons proceedings.

67. I now turn to the costs of the legal fees for different classes on the segregation summons. The JPLs have appropriately allocated these fees between the Companies based on the subject matter of the legal services performed. There is no good reason to interfere with that approach. The allocations, in my judgment, should be consistent with each of the classes bearing their own costs. This best preserves the segregation of assets of the Variable Class and generally protects the classes of policyholders for segregated accounts from being responsible for the liability of other account holders and classes.

Costs of the Metlife Application

68. Two policies for the fixed class of investors, namely “Variable Universal Life” and the “Group Variable Deferred Annuity’ fell short of the statutory thresholds for effective segregation. As noted further above, the members of these sub-classes of fixed investors were re-designated to the General Class. This was the purpose of the Metlife Application where the issue before the Court was whether those policyholders would remain in the Fixed Class or be transferred, classification wise, to the General Class.

69. In principle, the JPLs’ costs of this application should thus be borne *pari passu* as between only the Fixed Class and the General Class. Those two classes should also bear their own costs. As that application was not done for the benefit of the Variable Class, I find that no costs order should be made against the Variable Class in respect of the Metlife Application.

Historic Costs and Expenses of the Liquidation

70. The Northstar and Omnia Reports provide an outline of the historical costs, fees and expenses which have been incurred in the (provisional) liquidation for the period commencing on 25 September 2020 (when joint provisional liquidators were first appointed by the Court) running up to 31 July 2023. For the unallocated portion of the JPLs’ historical costs, fees and expenses the total is $3,712,982.79 for Northstar. As it relates to Omnia, the total sum is $1,225,584.76.

71. Where costs cannot be allocated for the exclusive benefit of any one particular class, the JPLs’ costs, fees and expenses should be divided *pari passu*. Using this approach the JPLs report that a *pari passu* allocation based on the value of Northstar’s liabilities as at March 2021 would make the classes responsible in the following proportions:

	Liability values	%
Variable Class	$116,974,421.63	27.8
Fixed Class	$249,567,516.75	59.4

General Class	$53,672,937.83	12.8
Total	**$420,214,876.21**	

72. Using the value of Omnia's liabilities, a *pari passu* allocation of the JPLs' historic costs of the liquidation as at March 2021 would make the classes responsible in the following proportions:

	Liability values	%
Variable Class	$110,456,812.30	71.7
Fixed Class	$41,247,510.72	26.8
General Class	$2,383,424.00	1.5
Total	**$154,087,747.02**	

73. The above allocations between the classes serve only as a rough and ready approximation of what the JPLs esteem could be the result of a *pari passu* distribution of the costs, fees and expenses which are currently unallocated. These historic costs of the liquidation comprise the JPLs' fees, the fees of Counsel for the JPLs and various disbursements.

74. Mr. Todd KC for the JPLs submitted that the Liffey policyholders ought to be made to bear some portion of the costs of the liquidation. Having cautioned the Court against over-reliance on the class distinctions for the purpose of allocating the costs in the liquidation, Mr. Davies KC argued that the Liffey policyholders should be joined with his clients, the Variable Class, for the purpose of assessing its portion of liquidation costs. Mr. Davies KC contended that neither the Liffey policyholders nor the Variable Class should be compelled to pay for any liquidation costs or expenses unless it is for work performed for the benefit of the segregated accounts held by those policyholders. Otherwise put, the assets linked to the Variable Class cannot lawfully be made to pay for the liabilities of other classes of creditors.

75. I accept that this is the correct principle to be used. A similar approach is to be employed in respect of the Fixed Class. Group 1 of the Fixed Class with linked assets cannot be properly liable for expenses that arise out of services performed for the benefit of other classes of account holders. Equally, Groups 2 and 3, subject to the potential of successful tracing or other civil claims, ought not to bear the burden of liability for services protecting or maintaining the

value of assets which are not currently linked to their class. Conversely, where costs and expense have been incurred for the general benefit of all classes, the allocation should be *pari passu* between all classes, including the Liffey policyholders.

Decision on Legal Fees:

76. The JPLs retained the legal services of Marshall Diel & Meyers Limited ("MDM") and Leading and Junior Counsel of Erskine Chambers in London ("UK Counsel"). Their bill for these services relating to Northstar is $1,248,343.85. The sum of $593,079.60 is payable in respect of Omnia. It is the position of the JPLs that all of the legal work undertaken by MDM and UK Counsel benefitted each of the classes equally. They therefore propose a *pari passu* apportionment between each of the classes.

77. Having examined the costs breakdown in the JPLs' skeleton arguments and the Costs Reports, I accept this proposal as fair and equitable, subject to one point of clarification. In the Costs Reports, there is an item particularized in the costs-breakdown table which provides "*Application to liquidate variable investments*". It was explained that in February 2022, the JPLs sought to liquidate certain investments in mutual funds made on behalf of policyholders who held variable investments. As I understand it, the liquidation of these investments is for the benefit of the liquidation of the Companies as a whole. That being the case, a *pari passu* apportionment is appropriate.

78. If, however, the liquidation of 'variable investments' was instead intended to mean the liquidation of variable *assets* belonging to the Variable Class (with no benefit to the Fixed or General Class) then those portions of the legal fees ought to be borne only by the Variable Class. If that is the case, the attributed Northstar fees of $7,365.00 (MDM) and £7,075.00 (UK Counsel) would be excluded from the *pari passu* split between the classes of Northstar. I would make the same finding in respect of Omnia. In the Omnia Report, there is a mirror charge of $79,060.00 (MDM) and £18,085.00 (UK Counsel). Again, if the application refers to the liquidation of *assets* of the Variable Class, then the related legal fees should be paid only from the assets of the Variable Class.

79. The JPLs also reported that a notable portion of their work has been committed to recovering assets in various ongoing proceedings in the United States Bankruptcy Court for the Southern District of New York (the "US Bankruptcy Court"). US law firm, Stevens & Lee, with the assistance of MDM and UK Counsel, represented the JPLs in this pursuit. The US Bankruptcy Court proceedings name Northstar and Omnia in addition to two other companies under the liquidation control of the JPLs. So the JPLs have divided the legal fees between these four companies.

80. The JPLs provided four categories of the work undertaken for both Northstar and Omnia:

    (i) Chapter 15 Preparation and Administration
    (ii) Johnston v Lindberg Adversary Proceeding
    (iii) Asset Realization / Asset Recovery
    (iv) Rule 2004 Applications, Enforcement, Motions to Compel

81. Only the first category is proposed to be allocated *pari passu*. This entailed the preparation and filing of Chapter 15 petitions for both Northstar and Omnia and the compilation of company documents. The JPLs also motioned to enforce a stay against certain North Carolina-domiciled insurance companies in addition to defending an action commenced by those same insurance companies for declaratory judgment against the Companies.

82. I see no correlating benefit between the US proceedings and the Fixed and Variable Classes. These proceedings appear to be driven by the JPLs' efforts to recover assets which are neither linked to the Fixed Class nor the Variable Class. It is only the General Class which appear to be interested in the outcome of the asset recovery pursuit. For that reason, I am bound to reject the proposed approach and I accordingly allocate these costs to only the General Class.

83. The remaining three categories are unallocated. This Court is therefore required to determine the incidence of the JPLs' legal fees relevant to these categories.

84. The second category relates to the investigation of Mr. Lindberg, the ultimate beneficial owner of BMX which acquired Northstar in July 2018. It also concerns the acquisition of Omnia by

"PBX" on 30 June 2017 where its low risk assets were sold for debt instruments and equity in Lindberg-affiliated companies. In the case of Northstar, fixed contract premiums in the MetLife blocks had been used to purchase the replaced liquid fixed income securities. This is the backdrop to the adversarial proceedings in this second category which are not only against Mr. Lindberg but also over 900 other defendants.

85. Again, the post-acquisition disposals clearly concern the General Class as Hargun CJ did not find that any of the affiliated or non-affiliated assets in the US are linked to the segregated accounts. Therefore, the recovery of assets in the US will be for the benefit of the General Class, subject to the potential success of any future claims for the benefit of any investment class. As matters currently stand, only the General Class appear to have an interest in the outcome of these proceedings against Mr. Lindberg and others so associated. For this reason, I find that payment of this set of legal fees must be drawn only from the general accounts for both Northstar and Omnia.

86. I now turn to the legal fees for the third category of asset realization and recovery. The total costs of these legal services, which were carried out by Summit Law, is £283,025.15. These fees apply only in respect of Northstar. The JPLs advise that 90% of these legal services relate to asset realization and recovery of affiliated assets.

87. The terms "affiliated" and "non-affiliated" are used by the JPLs to refer to assets which, although not linked to any particular class of investors, are of potential benefit upon recovery. The definitions provided are as follows:

(i) **Affiliated Assets**: non-variable investments relating to entities affiliated with Mr. Lindberg

(ii) **Non-Affiliated Assets**: non-variable investments relating to entities which are *not* affiliated with Mr. Lindberg

88. Mr. Tidmarsh KC argued that the recovery of these assets are of no direct benefit to the Fixed Class because, once again, the assets are not linked to any of the investment classes. He

correctly emphasized that they are now part of the ownership of the General Class, subject to any future claims. Accordingly, this 90% portion of the JPLs' legal fees is to be apportioned to the liability of the General Class, unless those asset recoveries are later shown to be of direct benefit to either the Variable Class or the Fixed Class.

89. The remaining 10% of Summit Law's legal services in relation to a Northstar D&O insurance policy is said to be for the benefit of all investors and creditors as a whole. On that basis, I would agree with a *pari passu* allocation here.

Decision on JPLs' Fees:

90. In addition to their legal fees, the JPLs' fees, costs and expenses total $25,529,826.03 for Northstar and $7,192,248.54 in respect of Omnia.

91. A portion of these totals arise out of accounting, banking and treasury services which are said to have largely benefitted each of the classes. For that reason a *pari passu* allocation between all classes, including the Liffey policyholders, is only appropriate.

92. This Court's direction is also needed for a costs determination on the work which falls under administration and planning, e.g. file searches and process-reporting for the Registrar of Companies and Company secretary. The JPLs report that 75% of this category of work for Northstar is for the wide benefit of all classes. So, again, a *pari passu* apportionment between the Northstar classes of investors and policyholders is reasonable. The same is so for Omnia, only that 80% of the work is to be paid for out of the assets of each class, *pari passu*. The remaining 25% for Northstar, relating to potential asset-recovery in the US, is to be borne by the General Class for the same reasons that the related legal fees have been so allocated. The same approach applies to the remaining 20% of the JPLs' work in Omnia; so, the General Class is entirely responsible for the JPLs' efforts for asset-recovery in the US.

93. Asset custody and realization is another sub-category.

94. For Northstar these services total $1,044,887.69. A 70% portion of this work pertains to asset-recovery in the US. That is to be drawn from the assets of the General Class, subject to any future successful claims by the Fixed Class in relation to affiliated assets. The remaining 30% of this work is also to be paid from the general assets. Again, this is subject to any future successful claims by the Fixed Class in relation to non-affiliated assets. For the realization of fixed-term deposits managed by the JPLs, the costs allocation is to be *pari passu* between all classes. This is because the JPLs intend to use the related interest towards the general expenses of the liquidation. Finally, for the JPLs' work done in relation to the Variable Class's linked assets, those costs are to be paid from variable assets.

95. The total sum due from Omnia for the JPLs' work in asset recovery and realization is $184,926.33. A 75% portion of this work relates to the potential recovery of assets in the US. Applying the same reasoning as I did for Northstar, these fees are to be paid out of the assets of the general account. This direction is equally reviewable upon any future success for the Fixed Class in claiming against any such assets. For the work which relates directly to the variable assets, the Variable Class is to pay the bill. Consistent with the position for Northstar, the realization of fixed-term deposits is to be paid *pari passu* between all classes.

96. Part of the JPLs' work with creditors and distributors can be allocated *pari passu* between the Companies. The JPLs esteem that a 40% share should be assigned to Northstar and 23% to Omnia. That is reasonable as the work streams in this category equally apply to all classes in the Companies.

97. Outside of that, the JPLs invite this Court to consider the position for Northstar separate from the position for Omnia.

98. For Northstar, 40% of the work in this category is to be allocated *pari passu* between the classes as the measurement of the benefit proved equal for all classes. Another 20% is to be allocated *pari passu* between the Fixed Class and the Variable Class based on to whom the benefit of the work relates. The remaining portion is to be allocated according to the amount of work

undertaken for the benefit of each class. In this regard, a 25% portion is to be paid by the Fixed Class, 13% by the Variable Class and 2% by the General Class.

99. Using the same approach for Omnia, 25% of this category of work is to be applied to all of the classes and should accordingly be allocated *pari passu*. Where the work performed related only to policyholders, the Fixed Class is to assume 30% of the costs and the Variable Class will take on the 42% share of the costs. The remaining 3% of work which was done for the benefit of the General Class should be apportioned accordingly.

100. I now move on to the JPLs' work in relation to the US Department of Justice investigations. I accept that 20% of this work is to be apportioned *pari passu* as that share is attributable to the standard initial investigations into the Companies pursuant to the JPLs' statutory duties. For the work which relates directly to the investigations into the recoveries of affiliated and non-affiliated assets, this is to be allocated only to the General Class.

101. The JPLs have also carried out tasks which call for due diligence checks in relation to various fund houses holding investment assets and compliance issues for the avoidance of money laundering issues. They report that for Northstar, these fees totaled $1,140,869.05. Half of this work was for the benefit of all classes and should therefore be apportioned *pari passu*. The other half of this work was beneficial only to the policyholders. Accordingly, the General Class ought not to be engaged. Of this second half of the work, 15% is to be apportioned *pari passu* between the Fixed and Variable Classes to reflect the equal benefit between those two classes. Payment of the costs of the residual work streams is also to be earmarked for the Fixed and Variable Classes according to the ratio of work done for each. The Variable Class shall cover 15% and the Fixed Class shall be responsible for 15% of this part of the JPLs' fees for Northstar.

102. In respect of Omnia, these fees total $531,652.14. Coverage of the largest portion of these fees, being 94%, is to be divvied up only between the two investment classes *pari passu* in accordance with the level of benefit to each class, resulting from the JPLs' labour. Only 6% of the JPLs' services was of wide-ranging benefit to all of the classes. Those costs are to be apportioned *pari passu*.

103. The JPLs' fees also relate to various Court matters such as the joint status conference between the US Bankruptcy Court and the Supreme Court and the Court-to-Court Communications Protocol. It also encompasses their work, preparatory and/or consequential, to various Court motions in the United States. The JPLs' work for the US proceedings represents 30% of the total work in this area. This relates to the potential recovery of affiliated and non-affiliated assets and should be assigned to the General Class, subject to the outcome of any future claims. The work streams tethered to Court proceedings in Bermuda consumes the remaining 70% of the JPL's Court-related work. This applies to the liquidation as a whole and is to be apportioned between all classes *pari passu*.

104. For the confidential and progress reports prepared by the JPLs in relation to the liquidation of the Companies and filings under the US Foreign Account Tax Compliance Act, the JPLs' fees total $898,560.55 for Northstar and $406,855.16 for Omnia. The majority of this work, making up for 85% of this category, applies to both Northstar and Omnia. Thus, the allocation is *pari passu*. The balance of the work in respect of Northstar is to be apportioned to the Fixed Class at 11% and the Variable Class at 11%. In Omnia, 3% is to be paid out of fixed assets and the remaining 12% is to taken out from the variable assets.

Decision on Disbursements:

105. By way of general approach, where the JPLs report that disbursement costs are of no particular benefit to any one class, costs are to be discharged between the Companies and all the classes *pari passu*. Where the costs relate to the US proceedings and the potential recovery of affiliated and non-affiliated assets, the costs are to be allocated to the General Class only. It is also appropriate for the JPLs to apportion costs between the segregated classes based on the total count of the policyholders. However, if any portion of the services performed under this category can be identified for the particular benefit of any one class, costs for that portion should be charged to the relevant class.

Decision on Disbursements: BlackRock Asset Management (UK) Limited

106. The JPLs opined that the fees charged by BlackRock could rightly be charged to the Fixed Class who object on the basis that they have no access to the assets under the management. In the Northstar Report, the JPLs explained that these fees, which totaled $332,608.70, arose from the management of investment portfolios and for BlackRock's facilitating of purchases of securities using fixed contract premiums in the MetLife blocks.

107. I find merit in the complaint made by Mr. Tidmarsh KC on these fees. In the absence of any linkage to the assets, it would be wrong to attribute liability to the Fixed Class. The same logic has been applied for the benefit of the Variable Class. For that reason, these fees should be allocated to the General Class only.

Decision on Disbursements: Trust Fees and Custodian/Custody Fees

108. It is stated in the Judgment that most of the policies issued by the Companies were held pursuant to a trust structure, meaning a trustee or sub-trustee would purchase the policy on behalf of the policy-holder who would be the ultimate beneficiary of the trust. For Northstar variable investments, the contracts provided for the policyholder's beneficial ownership to be measured by the allocation of units to the policyholder rather than the distribution of shares in the underlying mutual fund. Omnia contracts were also structured in this fashion.

109. On 31 October 2006 HSBC Institutional Trust Services (Bermuda) Limited ("HTBM") was appointed as trustee of the Omnia Trusts. While holding a neutral stance, the JPLs propose that these flat fees in the sum of $175,000.00 be allocated *pari passu* between Fixed and Variable Classes. I agree. The setting up of these trust structures is payable regardless as to whether trust assets were held.

110. There is also the question of disbursements for Omnia's appointment of HTBM as custodian, which in turn subcontracted with HSBC Trinkaus & Burkardt GmbH ("HSBC Germany") for custodian services in relation to mutual fund holdings for the Variable Class. Clearly these fees, totaling $149,740.02 are to be fully paid out of the assets of the Variable Class in respect of Omnia.

111. For Northstar's custody fees, the JPLs proposed allocation to the Fixed Class according to the underlying investments to which they relate. So, payment is allocated to Group 1 to pay for the custody fees taken from the index warrants bank account. The same approach would equally apply to the underlying investments related to Groups 2 and 3.

<u>Shortfall of Fixed Assets to meet Costs Liabilities</u>

112. Further to the above, I considered various statutory provisions relevant to the question of a shortfall of assets in a segregated account. It has been established that section 17(2) of the SAC Act barricades the assets of a segregated account so that it cannot be lawfully accessed for the purpose of paying the liabilities of another segregated account. So, clearly the variable assets cannot be used to supplement any shortfall of fixed assets for the payment of costs. The same principle applies to the General Class, as they too are barred from accessing the assets of the Variable Class.

113. What of the assets of the General Class? Save for circumstances in which there is a clear contractual provision to the contrary, section 17(5) bars a segregated account owner from access to the general assets of an SAC. Section 25(1) restates the rule in the context of a winding up of an SAC. So, where there is a shortfall of assets in the segregated account to meet the liabilities of that segregated account, there is no recourse to the general assets of the SAC save for where there is an express agreement between the affected parties.

114. Hargun CJ found that the members of Group 2 have a contractual right under the Global Asset Portfolio to seek recourse from the general assets in the event of a shortfall. This is not cause, in my judgment, for a deferral on the question of costs liability for the Fixed Class. However, enforcement of their costs' liability may possibly be stayed pending the final determination of

any future claims for the recovery of fixed assets or for a remedy arising out of the loss of those assets.

115. The priority given under section 232 of the CA 1981 to the payment of JPLs' fees and expenses applies only to voluntary liquidations. So any issue arising as to the payment of the JPLs' fees and expenses is to be resolved by an exercise of judicial expression, pursuant to section 25(3) of the SAC Act. While I am empowered to direct that payment of the JPLs' fees and expenses is to be deferred until a stage subsequent to any tracing claims or other civil action in pursuit of a remedy for the Fixed Class, I find it would be wrong in principle to hold payment for the JPLs hostage to this. Where I have directed that their costs, fees and expenses are to be drawn from fixed assets, this must be done in priority of all other claims against the fixed assets.

116. Groups 1 and 3 of the Fixed Class are not entitled to claim against the General Assets. Out of a sense of practical fairness, it seems that these two Groups ought to be given priority in rank over Group 2 to claim from the fixed assets as they, unlike Group 2, have no ultimate recourse to the general assets. However, in resolving any question of priority rights of creditors of a segregated account, this Court is guided by the approach adopted by Kawaley J in *Re CAI Master Allocation Fund Ltd.* Applying section 17(7) of the SAC Act, the claims of the fixed investors to the fixed assets shall rank *pari passu* behind the claims of creditors.

117. That draws an end to the question of a shortfall.

<u>Future Costs of the Liquidation</u>

118. The future costs of the liquidation is considered to cover the period of the liquidation commencing 1 August 2023. To the extent that these costs fall within any of the categories of the historic costs, the incidence of those costs are to be resolved in the same way.

119. In respect of the JPLs' *ex parte* summons made returnable for 14 December 2023, directions were sought as to the future conduct of the liquidations. So far as these directions are of general application to the winding up of the Companies, the costs of that *ex parte* summons should be

allocated between all of the represented parties (in addition to the Liffey policyholders) *pari passu*.

120. Where the JPLs incur expense in relation to steps reasonably taken to investigate or adjudicate any debts claimed by creditors, their costs, fees and expenses are to be paid from the assets of the class to which any such creditor claim relates. On the subject of an interim distribution to creditors, I see no reason to prevent the JPLs from following through with this. Following the final distribution, the JPLs' reporting duties and other related formalities are to be paid between all of the represented parties (in addition to the Liffey policyholders) *pari passu*.

Liberty to Apply

121. The JPLs and any other represented party shall have liberty to apply to the Court for clarification on any direction made herein, as may be reasonably necessary to assist with the drawing up of a formal Order from this Ruling.

122. Further directions may also be sought in the event that any consequential issue cannot be resolved by reference to this Ruling.

123. As the Liffey policyholders were unrepresented in the hearing before me, (being party to separate proceedings), I give them liberty to apply to set aside any direction I have made herein which pertains to them directly or specifically.

124. Finally, any party has liberty to apply for further directions or to vary or set aside any of the directions herein as a result of any future claims against affiliated or non-affiliated assets.

Costs of this Application

125. Unless any party wishing to be heard on the issue of costs files a Form 31D within 28 days of

the date of this Ruling, 85% of the JPLs' costs of this application is to be paid by all of the represented parties, *pari passu*. The remaining 15% is to be paid by the Liffey policyholders.

126. As for the costs of the represented parties, each party is to bear their own costs subject to any future Order of this Court in the event of a hearing on an application for costs.

Dated this 20th day of March 2024

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT