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IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD. 353 OF 2023 (IKJ)

CAUSE NO. FSD. 354 OF 2023 (IKJ)

CAUSE NO. FSD. 355 OF 2023 (IKJ)

CAUSE NO. FSD. 356 OF 2023 (IKJ)

CAUSE NO. FSD. 357 OF 2023 (IKJ)

CAUSE NO. FSD. 358 OF 2023 (IKJ)

CAUSE NO. FSD. 359 OF 2023 (IKJ)

CAUSE NO. FSD. 360 OF 2023 (IKJ)

CAUSE NO. FSD. 361 OF 2023 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF BO RUN SPC

AND IN THE MATTER OF CHINA ENHANCED INCOME FUND SP2

AND IN THE MATTER OF CHINA REAL ESTATE STABLE INCOME FUND SP4

AND IN THE MATTER OF CHINA REAL ESTATE STABLE INCOME FUND SP8

AND IN THE MATTER OF CHINA FIXED INCOME STABLE RETURN FUND SP10

AND IN THE MATTER OF CHINA REAL ESTATE STABLE INCOME FUND SP11

AND IN THE MATTER OF CHINA REAL ESTATE STABLE INCOME FUND SP12

AND IN THE MATTER OF CHINA REAL ESTATE STABLE INCOME FUND SP16

AND IN THE MATTER OF CHINA REAL ESTATE STABLE INCOME FUND SP19

AND IN THE MATTER OF CHINA REAL ESTATE STABLE INCOME FUND SP20

240307- In the Matter of Bo Run- FSD 353, 354, 355, 356, 357, 358, 359, 360 and 361 of 2023(IKJ) Ruling

IN CHAMBERS

Before:	The Hon. Justice Kawaley
Appearances:	Mr Harry Shaw of Campbells LLC, for the Petitioner
Heard:	On the papers
Draft Ruling Circulated:	23 February 2024
Ruling delivered:	7 March 2024

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Petitions to appoint receivers in respect of segregated portfolios-application for refund of court fees after consolidation of various proceedings-Companies Act (2023 Revision), sections 152, 216, 224, 225 –Grand Court Rules (2023 Revision) Order 102 (4) (e)-Court Fees Rules (2023 Revision), rules 3 (4), First Schedule Part B paragraph 1

RULING

Introductory

1. When a petition to appoint a receiver in respect of more than one segregated portfolio within a single segregated portfolio company ("SPC") is filed under sections 224-225 of the Companies Act (2023 Revision), is it:

    (a) permissible to file a composite petition; or

    (b) necessary to file a separate petition for each portfolio?

2. Under paragraph 1 of Part B of First Schedule to the Court Fees Rules (2023 Revision), $5000 is the prescribed fee for each originating process which is filed (save for those governed by GCR

Order 102, rule 17 or GCR Order 85, rule 8). Bo Run SPC, ("the Petitioner") wished to appoint receivers in relation to nine of its segregated portfolios. Its attorneys attempted to file a single petition. The Clerk of the Court insisted that separate petitions were required. The Petitioner's attorneys beat a strategic defeat, and nine separate petitions were filed and sealed by the Registry on 30 November 2023. Filing fees of $45,000, instead of $5000, were paid. If it had hands, the public purse would have applauded.

3. The Summons for Directions was dealt with administratively. On 22 December 2023, I ordered that the Petitions should be heard concurrently and consolidated. The hearing took place on 24 January 2024. I granted the Orders sought. In addition to seeking the substantive relief of appointing receivers, the Petitioner sought a refund of the filing fee in respect of eight of the Petitions on the grounds that there was no legal requirement to file separate petitions for each segregated portfolio of a single company. I declined to grant the refund application during the hearing and instead gave directions for the Clerk of the Court to file substantive submissions in response and for the Petitioner to reply. Mr Shaw admitted in the course of argument no consistent approach had been taken to applications relating to multiple segregated portfolios.

4. The refund application did not appear to me to be a "slam-dunk" one, because in the course of argument, Mr Shaw very properly pointed out that past practice was far from clear. In some cases involving SPCs (both receivership and winding-up petitions), separate petitions had been filed and in other cases a single petition had been filed in relation to more than one segregated portfolio. This demonstrated that there was no general consensus, within the Court or at the Bar, about how procedural rules predominantly designed to deal with artificial and/or natural persons should be applied in relation to the bespoke legal construct of segregated portfolios.

5. The answer to this conundrum becomes ultimately clear once one focusses on seeking to understand how the existing procedural scheme interacts with this peculiar hybrid legal creature, the segregated portfolio. The Petitioner's submissions contended that crucial part of the procedural scheme was section 224 of the Companies Act, and the Clerk of the Court's submissions focussed entirely on the Court Fees Rules. Both the Act and the Rules, read together, help to elucidate the question of whether a composite petition may or may not be filed in relation to more than one segregated portfolio.

The relevant fees

6. Rule 2 of the Court Fees Rules ("**Presumption against liability**") pivotally provides:

> "*2 (1) A party to a proceeding which is commenced on or after the Commencement Date is liable to pay only those fees specified in these Rules…*" [Emphasis added]

7. As one would expect, fees are paid by parties. This confirmed in clearer terms by Rule 3, which provides in relevant part as follows:

> "*(4) The fee prescribed in paragraph 1 of Part B of the First Schedule shall be payable by the party seeking to issue an originating process in connection with a financial services proceeding or an admiralty proceeding*." [Emphasis added]

8. It is accordingly clear beyond sensible argument that only the party originating the proceedings, the applicant, the petitioner or the plaintiff, is liable to pay the fixed fee. It is equally clear from Part B paragraph 1 of the First Schedule, that the $5000 fee is payable in respect of each originating process which is issued. The fee payable is not affected by the number of originating parties, nor by the number of persons affected by the proceeding. As the Clerk of the Court rightly submitted, the prescribed filing fee is payable in respect of each petition (or other form of originating process) which is filed.

9. On the face of the Petitions in this case, however, the proceedings were brought not only "*IN THE MATTER OF BO RUN SPC*", but also "*IN THE MATTER OF*" each segregated portfolio as well. The Petitioner's counsel initially attempted to present a composite petition which would fairly raise the following question: are these not, by analogy with ordinary company petitions, in fact separate matters requiring separate petitions? Is the composite petition idea not simply a fee-dodging ruse? The answer to these questions can only be found in the statutory provisions which define the legal status of SPCs and segregated portfolios and, in particular, those provisions relating to applications to appoint receivers. Unsurprisingly, there is nothing in the Court Fees Rules which restricts the ability of any litigant to file a single originating process against or in relation to multiple persons.

The winding-up regime

10. It may be helpful to start by considering the winding-up regime as this appears to be the source of the notion that separate petitions ought to be filed in respect of each portfolio. It is well recognised that if a creditor wishes to wind-up a variety of companies, a separate petition must be filed in respect of each company. The position is the same in relation to the bankruptcy of an individual or the administration of the estate of a deceased person. This practice is quintessentially grounded in the proposition that the affairs of a person or entity with legal personality are being administered on a collective basis. It is clear, not just from longstanding practice, but also from the language of section 91 of the Act, that a winding-up petition can only be presented against a single company:

> "***Jurisdiction of the Court***
>
> *91. The Court has jurisdiction to make winding up orders in respect of —*
>
> *(a) an existing company;*
>
> *(b) a company incorporated and registered under this Law;*
>
> *(c) a body incorporated under any other law; and*
>
> *(d) a foreign company which —*
>
> *(i) has property located in the Islands;*
> *(ii) is carrying on business in the Islands;*
> *(iii) is the general partner of a limited partnership; or*
> *(iv) is registered under Part IX.*"

11. The same logic of 'one petition per company' does not obviously apply to an SPC and its segregated portfolios, for the reasons set in relation to receivership applications below. Single winding-up and/or restructuring officer petitions were presented against the same company in relation to more than one segregated portfolio in *Performance Insurance Company SPC (in Official Liquidation)*, FSD 70/2021(RJP), Judgment dated 6 April 2022 (unreported) and *Re Holt Fund SPC*, FSD 309/2023(IKJ), Judgment dated 26 January 2024 (unreported). In the latter case I initially doubted whether the winding-up jurisdiction applied to segregated portfolios within an SPC, and following the receipt of supplementary submissions was forced to accept that my contrary provisional views were wrong. I strongly suspect there are other cases where separate winding-up petitions were filed

by the same petitioner in relation to more than one segregated portfolio manged by a single SPC. This illustrates how difficult it is, even when one thinks one is familiar with the segregated portfolio construct, to work out when general principles of company law are or not applicable.

12. In disposing of an unrelated dissolution application, I stumbled upon a provision in the winding-up regime which strongly suggests that a segregated portfolio should be treated as an analogue of a company for winding-up purposes. An order for dissolution is made at the end of the winding-up of a company by the Court and necessarily is made in relation to one company alone. If a similar order can be made in relation to a segregated portfolio, then that would strongly suggest that this would occur in a winding-up proceeding commenced in relation to the single portfolio concerned. Section 152 of the Companies Act (2023 Revision) provides as follows:

> "***Dissolution following winding up by the Court***
>
> *152. (1) When the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved from the date of that order or such other date as the Court thinks fit, and the company shall be dissolved accordingly.*
>
> *(2) The effect of an order for dissolution in respect of a segregated portfolio is that its creditors' claims against the company shall be extinguished, notwithstanding that the company has not been liquidated and dissolved.*
>
> *(3) The official liquidator shall file the order for dissolution with the Registrar.*
>
> *(4) An official liquidator who fails to file the order for dissolution with the Registrar within fourteen days from the date, upon which it was perfected, commits an offence and is liable on summary conviction to a penalty of ten dollars for every day during which that person is so in default. Dissolution following winding up by the Court.*" [Emphasis added]

13. Reading subsections (1) and (2) of section 152 together, a segregated portfolio can be wound-up on a petition presented in relation to it against the relevant SPC. When the affairs of the portfolio have been wound-up, the portfolio may be dissolved even though the SPC is not. It is somewhat odd to find no explicit provision in the earlier provisions of Part V of the Act prescribing how segregated portfolios are to be wound-up, nor even in Part XIV which deals with SPCs (and prescribes how the winding-up of such companies should be conducted). But it is now well settled that winding-up petitions may be presented against an SPC in relation to the insolvency of one or

more of its segregated portfolios. Section 152 is consistent with the prevailing legal consensus, together with the fact that the Companies Winding Up Rules (drafted with companies in mind) do not appear to make any provision modifying the winding-up process in cases involving segregated portfolios. It also similar in a general sense to the way in which the winding-up provisions applicable to companies are applied, with minor modifications, to exempted limited partnerships, which have a hybrid form of legal personality as well.

14. In my judgment it is ultimately obvious that the legislative scheme in Part V of the Companies Act envisages that a single winding-up petition should be presented in relation to each segregated portfolio it is proposed to wind-up (or indeed restructure). Although this point does not fall for actual decision in the present case, the Clerk of the Court is of course free to implement this view of the law as a matter of administrative policy leaving any controversy to be resolved by a formal legal challenge.

15. The position in relation to winding-up is not, of course, dispositive as to the position in relation to the entirely separate provisions relating to receivership.

Petitions filed in relation to segregated portfolios

16. If there is one single overarching principle which runs through the SPC statutory regime in Part XIV of the Companies Act, it is this: a segregated portfolio has no separate legal personality. A portfolio is accordingly not analogous to a natural or artificial person, which can sue and be sued. It is more akin to a separate branch of a business which is comprised of several separately managed segments, all carried on under the ownership of a single company or individual. This is clear from section 216:

> "***Segregated portfolios***
>
> *216. (1) A segregated portfolio company may create one or more segregated portfolios in order to segregate the assets and liabilities of the segregated portfolio company held within or on behalf of a segregated portfolio from the assets and liabilities of the segregated portfolio company held within or on behalf of any other segregated portfolio of the segregated portfolio company or the assets and liabilities of the segregated portfolio*

company which are not held within or on behalf of any segregated portfolio of the segregated portfolio company.

(2) A segregated portfolio company shall be a single legal entity and any segregated portfolio of or within a segregated portfolio company shall not constitute a legal entity separate from the segregated portfolio company.

(3) Each segregated portfolio shall be separately identified or designated and shall include in such identification or designation the words 'Segregated Portfolio' or 'SP' or 'S.P.'." [Emphasis added]

17. It is in this context that section 224, subsection (2) of which Mr Shaw submitted was dispositive, should be read. It provides, so far as is material for present purposes:

"*(1) Subject to subsections (2) to (5), if in relation to a segregated portfolio company, the Court is satisfied —*

(a) that the segregated portfolio assets attributable to a particular segregated portfolio of the company (when account is taken of the company's general assets, unless there are no creditors in respect of that segregated portfolio entitled to have recourse to the company's general assets) are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio; and

(b) that the making of an order under this section would achieve the purposes set out in subsection (3),

the Court may make a receivership order under this section in respect of that segregated portfolio.

(2) A receivership order may be made in respect of one or more segregated portfolios.

(3) A receivership order shall direct that the business and segregated portfolio assets of or attributable to a segregated portfolio shall be managed by a receiver specified in the order for the purposes of —

(a) the orderly closing down of the business of or attributable to the segregated portfolio; and

(b) *the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto…*"

18. Section 224 (2) does not, as the Clerk of the Court rightly submitted, explicitly address the number of petitions question at all. This was essentially the sole point made in answer to the Petitioner's main submission. But in my judgment this subsection clearly does, by necessary implication, provide that a single petition can be presented with a view to obtaining a single order "*in respect of one or more segregated portfolios*". It is only possible to obtain a single order in respect of more than one segregated portfolio in the context of one proceeding. It is true that subsection (3) speaks only of a single segregated account, but in my judgment the dominant provision is subsection (2). If that is the literal meaning, something must be found to justify displacing the natural and ordinary meaning of the legislation. Is there something in wider statutory context, or in the way receivership is generally legally understood, which displaces the primary meaning of the statute? Not only is the idea of one petition per portfolio inconsistent with the fact that segregated portfolios are not separate legal entities (section 216 (2)). There is also nothing in the statutory scheme, which seems clearly designed to create a commercially efficient and flexible business vehicle, to suggest such a 'clunky' procedural requirement. Strictly, an application to appoint a receiver is made under section 225, but its terms provide no assistance to the present inquiry. Nor do the terms of GCR Order 102 rule 4 (e), which indicate that the application should be made by petition.

19. The wider statutory context includes the parallel winding-up regime. If the more formal winding-up regime is available in respect of segregated portfolios, this strongly suggests that the receivership regime is intended to be an alternative less formal and commercially efficient means of winding-up a segregated portfolio's affairs. The receivership process concludes most formally with the directors of the SPC resolving to terminate the segregated portfolio (section 228A), subject to their power to reinstate. There is at least one clear statutory provision in the winding-up context which makes it clear that the winding-up regime applicable to companies applies by analogy to an individual segregated portfolio. Part XIV creates a bespoke receivership regime which does not have any precise statutory comparator under the Companies Act.

20. It is true that section 11A of the Grand Court Law does provide for the appointment of a receiver as a form of interim relief. However, perhaps the closest comparator to section 224 of the Companies Act is section 24 (2) of the Insurance Act 2010, which provides:

> "*(2) Where subsection (1) applies, the Authority may do any of the following—*

...

(h) at the expense of the licensee, appoint a receiver or person to assume control of the licensee's affairs who shall have all the powers necessary to administer the affairs of the licensee including power to terminate the insurance business of the licensee . . ."

21. Anthony Smellie CJ (as he then was) confirmed the powers of the "*controllers*" appointed pursuant to those provisions in *Re Premier Assurance Group Limited SPC* (in controllership) [2020 (2) CILR 864] to enable them to obtain recognition in overseas proceedings. An insurer is generally likely to have different lines of business and/or separate branch offices, so that provision would clearly seem to envisage that a single receiver (or joint receivers) may be appointed on one application to deal with different business segments managed by a single company. It is clear from paragraph 7 of the judgment in that case that the statutory 'receivers' were appointed in a single proceeding in relation to both of the SPC's two segregated portfolios. To the extent that the term 'receiver' has a private law equivalent, it is of general interest to note that the same receiver is often appointed under a fixed or floating charge relating to more than one property owned by a single borrower.

22. What powers receivers have under other statutory provisions or private law instruments is of course of no direct relevance to how to construe section 224(2) of the Companies Act with a view to deciding whether or not a single petition may be presented in respect of "*one or more*" segregated portfolios in the same company. But it provides indirect support for the construction the Petitioner contends for in the present filing fee dispute in that the term 'receiver' cannot be said to suggest a person who is in other legal contexts appointed separately in relation to discrete assets or segments of a company's business. It makes the straightforward reading of section 224(2) far more plausible than would otherwise have been the case. It supports rather than undermines the contention that when the Act says a receiver can be appointed in respect of "*one or more*" segregated portfolios (implicitly through a single application), this was precisely what the relevant words were intended to mean.

23. There may well be cases where, because of conflicts of interest or cross-claims between various portfolios, an applicant (most likely the company or its directors) might elect to file separate petitions in respect of different segregated portfolios. This would entirely be a matter for the judgment of the applicant, not the Court. The mere fact that separate petitions might be appropriate in some cases does not provide any support for the proposition that separate petitions must be filed against each segregated portfolio in every case. In principle then, the Petitioner's refund application

succeeds. It remains to consider the propriety of adjudicating the application in the present proceedings.

The legal basis for the refund application

24. Unsurprisingly, the Clerk of the Court was unable to articulate any coherent principled basis for a mandatory requirement to file separate petitions in respect of multiple segregated portfolios within a single SPC. For the avoidance of doubt, however, I agree with her submission that a party which properly files multiple proceedings which are subsequently consolidated cannot use the mere fact of consolidation as a basis for claiming a fees dispensation. However, that is not the basis of the present refund application. Before turning to the basis for the application, it is important to note that the Court Fees Rules do not create any express general right to seek a reimbursement of fixed filing fees. There is a right to challenge the assessment of *ad valorem* fees (rule 4 (9)) and a carefully circumscribed right to seek reimbursement of hearing fees when hearings go short (rule 6). The payment of fees is a prerequisite for progressing applications (rule 6 ("*Enforcement*")).

25. In my judgment it would clearly undermine the efficacy of the scheme of the Rules if litigants were permitted to, willy-nilly, file originating process, pay the requisite fixed fees, obtain a hearing and the substantive relief sought and then seek to recover a substantial portion of the fees paid. Because it is an essential element of the fixed fee regime that the relevant tariff for filing specific documents are not subject to challenge. Here, however, the Petitioner was required to file nine originating documents when it wished to file one (and sought the refund relief via eight of those originating documents). Access to justice being considered together with the rule of law, a litigant wishing to challenge their liability to pay any fees under the Rules must be able to enforce their right under rule 2 only to pay what is actually prescribed by law without compromising their rights of access to the Court. Such a litigant must be able to "pay under protest" with a view to gaining access to justice, reserving the right to seek declaratory relief later. Absent any express power under the Rules to obtain reimbursement, the Court in its inherent jurisdiction is clearly competent to declare that more than what was lawfully due was paid. Such relief should be sparingly granted, and only where the fee payer has not waived the right to make a challenge.

26. Even though the refund applications were formally made within the relevant Petitions themselves, it is nonetheless necessary to determine precisely what occurred in the lead up to the filing of the

Petitions when the refund application was first considered). The central basis of the present application is that the Petitioner was effectively compelled to file multiple petitions after its arguments that a composite petition was permissible were rejected. In what context was the separate Petitions filed and the requisite fees paid? The Hearing Bundle placed before the Court shows that:

(a) on 31 October 2023 at 1.50 pm, a composite petition was filed for the nine portfolios;

(b) on the same day at 3.29 pm, the FSD Registrar requested that nine separate petitions be filed;

(c) at 9.01 am on 1 November 2023, Mr Shaw emailed the FSD Registrar setting out his case that only one petition was required;

(d) a chasing email was sent on 6 November 2023 and at 1.00 pm that day the FSD Registry responded that the assignment request was being followed up. The next day at 11.32 am, counsel was advised that the matter had been assigned however that email was recalled by the FSD Registrar at 11.53 am the same day; and

(e) in commenting on a draft of this Judgment, counsel indicated that the Hearing Bundle contained a series of emails which were exchanged between the FSD Registrar and Mr Shaw between 7 and 14 November 2024 in which they set out their respective positions regarding the number of petitions required to be filed. I was still unable to locate the relevant correspondence in the electronic Hearing Bundle, but accept from counsel that this material was indeed before the Court.

27. It appeared that the entreaties set out in the Petitioner's attorneys' correspondence with the FSD Registry between 6 and 14 November 2023 were rejected, because the nine separate Petitions which actually proceeded were dated 29 November 2023 and were sealed on 30 November 2023. The Petitioner contended by way of submission that it was effectively compelled to file nine Petitions to obtain a hearing.

28. Out of an abundance of caution, on 21 February 2024, I asked my Personal Assistant to seek clarification from counsel as to when the intention to seek a refund was first formally asserted. My anxiety that the Hearing Bundle might not have included the complete record of relevant correspondence was vindicated by counsel's response the following day in two respects. Firstly, and most significantly, in an email to the Court dated 29 November 2023, which was not in the Hearing Bundle, Mr Shaw indicated that eight additional filing fees were being paid for the eight additional petitions, but: "*While we respectfully reserve our clients position in relation to the relevant filing fee payable, we are instructed to proceed with filing nine separate petitions for each of the segregated portfolios as suggested by the Registry*."

29. Secondly, the Petitioner's counsel reminded the Court of a point which was drawn to my attention during the 30 January 2024 hearing of the Petitions but forgot when preparing the present Ruling. Eight of the Petitions contained the following prayer for relief:

> "*10. That the filing fee paid in the amount of CI5, 000 in respect of this Petition be refunded to the Petitioner.*"

30. It was those pleas which persuaded me (on 30 January 2024) that it was appropriate, having regard to the Overriding Objective, to determine the refund application as part of the present proceedings. It would cause both delay and wasted costs to require the Petitioner to follow the most formally correct procedure, which would have been commencing a separate proceeding, whether by private action or a judicial review application, with a view to obtaining the same relief. I am accordingly satisfied, having regard to the circumstances in which the multiple petitions were filed and the multiple fees paid, that I have jurisdiction to decide whether or not the Petitioner was legally required to pay the additional fees for the additional eight Petitions which it filed and paid under protest in the context of the present proceedings.

Conclusion

31. For the above reasons, I find that the Petitioner was not required to pay the $5000 it paid for each of the additional Petitions it was required by the Court to file on the hypothesis that a separate petition was required for each segregated portfolio. Under the law as it presently stands (and in

contrast with the case of winding-up petitions), there is no mandatory requirement to make separate receivership applications under sections 224- 225 of the Companies Act to appoint a receiver in relation to more than one segregated portfolio belonging to the same SPC. It follows that the Petitioner is entitled to be repaid the $40,000 it paid in excess of the fees which were properly required. This conclusion, for the avoidance of doubt, only affects:

(a) the present case, because the Petitioner did not waive the right to challenge the fee obligation when paying the disputed fees (and of course any other similar case); and

(b) future cases where petitioners elect to file a single petition under section 225 of the Act in respect of more than one segregated portfolio. Nothing in this Ruling should be construed as suggesting that is in any way inappropriate for multiple petitions to be filed where, in the judgment of the petitioner, it is more commercially and legally appropriate to commence separate receivership proceedings in relation to multiple portfolios managed by the same SPC.

32. Unless any application is made in relation to costs by letter to the Court within 21 days of the date of delivery of this Ruling, I would propose to make no order as to the costs of the refund application. There are two closely connected matters of principle which suggest this would be the just result. Firstly the Petitioner sought to obtain a refund as part of the Petition proceedings, effectively on an *ex parte* basis, and in that regard simply sought its costs out of the assets of the segregated portfolios. Secondly, the additional costs of responding to the Clerk of the Court's submissions were *de minimis* and were incurred because of directions made by the Court in the interests of justice in circumstances where she was not afforded any reasonable opportunity to compromise the dispute without formal adjudication.

THE HONOURABLE MR JUSTICE IAN KAWALEY
JUDGE OF THE GRAND COURT