In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT 2020: No. 304 & 305

IN THE SUPREME COURT OF BERMUDA

COMPANIES (WINDING UP)

IN THE MATTER OF NORTHSTAR FINANCIAL SERVICES (BERMUDA) LTD

IN THE MATTER OF OMNIA LTD

IN THE MATTER OF THE COMPANIES ACT 1981

IN THE MATTER OF THE INSURANCE ACT 1978

IN THE MATTER OF THE INVESTMENT BUSINESS ACT 2003

AND IN THE MATTER OF THE SEGREGATED ACCOUNTS COMPANIES ACT 2000

Before: **Hon. Chief Justice Hargun**

Representation: **Mr. Michael Todd QC, Ms. Katie Tornari and Ms. Christina Herrero of Marshall Diel & Myers Limited, for the JPLs of Northstar Financial Services (Bermuda) Ltd (in liquidation) and Omnia Ltd (in liquidation)**

Mr. Christian Luthi of Conyers Dill & Pearman Limited for United Nations Federal Credit Union

Mr. Matthew Mason of Wakefield Quin Limited for Cititrust (Bahamas) Limited, Cititrust (Cayman) Limited, Cititrust (Singapore) Limited and Citibank N.A. (the "Cititrust Group")

Date of Hearing: **26 July 2021**

Date of Judgment **26 August 2021**

JUDGMENT

appointment of representatives to represent classes of creditors in winding up proceedings; scope of RSC O. 15 r,12, meaning and scope of "same interest" and "same grievance"; scope of Rule 111(2) of the Companies (Winding-Up) Rules 1982

Introduction

1. By *ex parte* Summonses dated 1 June 2021 (amended 26 July 2021), Rachelle Ann Frisby and John Johnston of Deloitte Ltd, the Joint Provisional Liquidators (the "**JPLs**") of Northstar Financial Services (Bermuda) Ltd (in liquidation) ("**Northstar**") and Omnia Ltd ("**Omnia**") (collectively the "**Companies**") seek determination of the following issues in the liquidation of Northstar and Omnia:

    (a) To what extent, if any, have Northstar and Omnia established segregated or separate accounts in respect of investments made in them or policies issued by them (the "**Segregated Accounts**")?

    (b) To what extent, if any, are the assets of Northstar and Omnia to be held exclusively for the benefit of any such Segregated Accounts?

    (c) To what extent, if any, do the claimants in respect of any Segregated Accounts have claims against the general assets of Northstar and/or Omnia? (the "**Segregation Issues**").

2. For purposes of seeking a determination of these issues the JPLs seek, pursuant to Order 15, Rule 12 of the Rules of the Supreme Court 1985 ("**RSC**"), the following representation orders in relation to the substantive hearing:

   (a) an investor or policyholder in Northstar and/or Omnia holding only variable investments shall be appointed as the "**Variable Representative**" and shall represent the interests of those investors or policyholders in Northstar and/or Omnia holding variable investments;

   (b) an investor or policyholder in Northstar and/or Omnia holding only fixed or indexed investments shall be appointed as the "**Fixed Representative**" and shall represent the interests of those investors or policyholders in Northstar and/or Omnia holding fixed and/or indexed investments; and

   (c) a creditor of Northstar and/or Omnia not holding any such investments or policies shall be appointed as the "**Creditor Representative**" and shall represent the interests of creditors in Northstar and/or Omnia not holding fixed, indexed or variable investments.

   (together, the "**Representatives**" and, together with the JPLs, the **"Parties"**).

3. United Nations Federal Credit Union ("**UNFCU**"), represented by Mr. Luthi of Conyers Dill & Pearman Limited, and Cititrust Group, represented by Mr. Mason of Wakefield Quin Limited, are members of the ad hoc Committee of Inspection ("**AHCOI**") for Northstar. Approximately 475 UNFCU members hold approximately 705 Northstar policies, with an estimated value of US $87 million. Cititrust Group has an interest in a total of 28 Northstar policies with a total cash surrender value of over US $17 million. As members of the AHCOI, the JPLs have provided counsel for UNFCU and the Cititrust Group with copies of all documents before the Court in relation to Northstar. The JPLs have further agreed that they do not object to UNFCU and Cititrust Group attending the directions hearing and making submissions to the Court on the basis that the applications will remain *ex parte*, that UNFCU and the Cititrust Group are not being made parties to

the proceedings and that UNFCU and the Cititrust Group will attend the hearing solely in their capacity as members of the AHCOI.

Background

4. Northstar was incorporated on 18 February 1998 under the name Nationwide Financial Services (Bermuda) Ltd, before changing its name to Northstar Financial Services (Bermuda) Ltd on 6 April 2006. On 1 June 2007, Northstar amalgamated with MetLife (formerly known as Citicorp International Life Insurance Company Ltd). Northstar then amalgamated with NFSB Investment Ltd on 14 November 2012. Northstar was registered as a segregated accounts company under the Segregated Accounts Companies Act 2000 ("**SACA**") on 4 April 2008.

5. Northstar's business involved the sale and management of investment and annuity products. Those products fall under three broad categories of business:

    (a) Investment business written under the Northstar Financial Services (Bermuda) Ltd Private Act 2008 (the "**Northstar Act**") (the "**Northstar Business**"). The Northstar Business postdates the company's registration under SACA and is the largest of Northstar's businesses.

    (b) Long-term insurance business issued prior to Northstar's registration under SACA pursuant to the Nationwide Financial Services (Bermuda) Ltd Act 1998 (the "**Nationwide Act**") (the "**Nationwide Business**"); and

    (c) Insurance business written by MetLife International Insurance Company Limited ("**MetLife**") under the private Act entitled Citicorp International Insurance Company, Ltd Act 1999 (the "**Citicorp Act**") (the "**MetLife Business**"). The MetLife Business included segregated and non-segregated products and predates Northstar's registration under SACA.

6. Omnia was incorporated in Bermuda on 15 May 2000 under the name of Sage Life (Bermuda) Ltd and has since undergone several name changes. Between 2003 and 2016, Omnia formed part of the Old Mutual Group of companies. On 30 June 2017, Omnia was acquired by PBX Bermuda Holdings Ltd.

7. Omnia was not registered under SACA, but instead established segregated accounts under two private acts: the Sage Life (Bermuda) Ltd (Separate Accounts) Act 1999 and the Omnia Bermuda Ltd (Segregated Accounts) Consolidation and Amendment Act 2004.

8. Omnia sold three main kinds of annuity products: The Universal Investment Plan ("**UIP**"), the Guaranteed Index Plan ("**GIP**"), and the Guaranteed Rate Plan ("**GRP**"). Omnia also sold a fourth product, the Sage Wealth Accumulation Policy ("**SWAP**"). Omnia discontinued writing new business from 9 March 2009 and has been in run off since that.

9. In relation to both Companies, investors' funds were initially advanced to a master trust before reaching the relevant company. In most cases, the trustee of the master trust would settle a sub-trust in relation to each policy. Contracts with Northstar and Omnia were purchased by the trustees of the sub-trusts and held on behalf of the beneficiaries nominated by each policyholder.

10. The JPLs have taken advice from English leading and junior counsel (Mr. Michael Todd QC and Mr. Andrew Blake of Erskine Chambers) ("**Counsel**") on the question of whether the various accounts maintained by Northstar and Omnia were segregated for the purposes of the SACA, any applicable private Acts and the contracts by which the segregated accounts were established.

11. As regards the Northstar Business and Nationwide Business it is the opinion of Counsel that:

    (a) Northstar has established segregated accounts for *each* of the investment and annuity contracts issued by those Businesses and that assets linked to a particular

account of those Businesses should only be used to meet the liabilities of that account.

(b) It is more likely than not that investments acquired by Northstar in mutual funds on instructions from *variable* investors and policyholders are linked to the particular account of the relevant investor or policyholder. As such, they are of the opinion that those assets may only be used to meet the liabilities of the account to which they are linked.

(c) The same does not apply to investments made by Northstar with the proceeds of *fixed investments* and counsel are of the view that investments made with such proceeds form part of the general assets of Northstar.

(d) The position regarding *indexed investments* is a mixture of the two: it is Counsel's view that certain of the assets are linked to segregated accounts and others are not.

12. As regards the MetLife Business, the position is apparently more complex. It appears that, rather than establishing a segregated account for each policyholder, Northstar has established a single segregated account for each of the three types of products it offered. The precise terms of segregation vary between the three segregated accounts but the overall position, in Counsel's view, is similar to the Northstar and Nationwide businesses, namely that assets acquired for *variable* investments are segregated, whereas investments made with the proceeds of *fixed* investments form part of the general assets of Northstar.

13. In relation to the policies issued by Omnia it is the opinion of Counsel that:

(a) Omnia has established segregated accounts relating to *each* of the annuity policies issued. Some of those segregated accounts were established for individual policyholders. In other cases, Omnia established a single segregated account for a group of policyholders.

(b) Assets forming part of a particular segregated account should only be used to meet the liabilities of that account. Counsel considers it more likely than not that the investments acquired by Omnia in mutual funds on instructions from *variable* policyholders form part of the relevant segregated account.

(c) The same does not apply to investments made by Omnia with the proceeds of *fixed* and *indexed* investments. The investments made with such proceeds form part of the general assets of the Company.

14. It is emphasised by Counsel that the analysis is not straightforward, and, in their opinion, there are a number of issues of construction and of fact upon which views may reasonably differ. Accordingly, it is the advice of Counsel that the JPLs seek directions from the Court so that any parties who disagree with Counsel's analysis may ventilate any arguments they may have.

15. In relation to both Companies, there are a large number of policyholders. The Second Report of the JPLs of Northstar dated 23 July 2021 shows that there are 1230 *fixed* account holders with potential claims with a value of US $305,576,351 and 603 *variable* account holders with potential claims with a value of US $121,249,243. There are 60 instances where a policyholder falls into more than one category (i.e., a policyholder is allocated to both the fixed and variable classes). The actual total number of policies issued by Northstar is 1,773.

16. The Second Report of the JPLs of Omnia dated the 22 July 2021 shows that in relation to policies which have been redeemed but not yet paid, there are 30 *fixed* policies valued at US $3,635,522.51, 51 *variable* policies valued at US $6,427,839.09 and 8 *fixed and variable* valued at US $1,657,149.05. The total number of redeemed policies is 89 and valued at US $11,720,510.65.

17. In addition, there are several hundred policies which currently are not redeemed. There are 115 *fixed* policies valued at US $25,132,305.30. There are 557 *variable* policies valued at

US $117,534,364.43 and 129 both *fixed and variable* policies valued at US $31,595,383.00. The total number of policies which currently are not redeemed is 801 and are valued at US $174,262,052.73.

18. The Segregation Issues have a significant impact upon the recoveries made by the various policyholders. In relation to Northstar the JPLs estimate that:

    (a) If both the *variable* and *fixed* investment accounts are segregated from the general non-segregated account, policyholders with *variable* investment accounts will most likely receive 100 cents on the dollar (net of VAC and MFR fees, surrender charges and expenses of the liquidation) and policyholders with fixed investment accounts would likely receive 13 cents on the dollar.

    (b) If *variable* investment accounts are segregated, but the *fixed* investment accounts are not considered segregated and added with the general account, policyholders with *variable* investment accounts are most likely to receive 100 cents on the dollar (net of the surrender charges and the expenses of the liquidation) and policyholders with fixed investment accounts are likely to receive 13 cents on the dollar.

    (c) If there is no segregation of *variable* and *fixed* investment accounts all policyholders may potentially receive a dividend of up to 39 cents on the dollar (net of the expenses of the liquidation).

19. In relation to Omnia the JPLs estimate that:

    (a) If there is no segregation of the *variable* and *fixed* investment accounts, and added to the general account, all policyholders may potentially receive a dividend of up to 79 cents on the dollar (net of the expenses of the liquidation).

    (b) If there is segregation of each of the *variable* and *fixed* investment accounts from the general account, policyholders with *variable* investment accounts will most likely receive 100 cents on the dollar (net of VAC and MFR fees, surrender charges

and the expenses of the liquidation) and it is not possible to estimate the dividend to *fixed* policy should segregation occur.

(c) If *variable* investment accounts are segregated, but the *fixed* investment accounts are not considered segregated and are added to the general account, policyholders with *variable* investment accounts will most likely receive 100 cents on the dollar and the fixed investment accounts will most likely receive 10 cents on the dollar (net of surrender charges and the expenses of the liquidation).

20. It is in these circumstances that the JPLs have determined that it is essential that the Segregation Issues be determined by the Court at a substantive hearing.

21. In their Second Report for Northstar and Omnia, the JPLs explain that working alongside their legal counsel, they have formed the view that these issues are not straightforward and have been advised that they raise difficult and uncertain points law. The JPLs have therefore brought these applications to allow the issues to be considered by the Court, for the Court to receive full argument on all the relevant points from interested parties, and to enable the JPLs to obtain the Court's directions on how the assets of Northstar and Omnia should be applied.

22. The JPLs consider that this approach would have a considerable number of advantages, and would create a fair, binding, and efficient process for the resolution of the issues. The JPLs therefore believe that the approach proposed is in the best interests of the creditors of Northstar and Omnia as a whole. In particular, the JPLs believe that the representative proceedings are appropriate for the following reasons:

(a) As noted above, there are a significant number of individual policyholders and investors. Since the issues to be determined in these applications will arise in respect of each of the Segregated Accounts, it is entirely possible that (absent the orders sought in these applications) such issues would otherwise be raised in separate proceedings by individual creditors. The procedural directions sought here would create a controlled and orderly process by which these issues can be

determined and avoid the need for multiple individual claims to be brought separately before the Court. The JPLs consider that this is likely to reduce costs, complexity, and overall delay in the conduct of the liquidation of the Companies.

(b) These directions and representation orders will ensure that all relevant creditors of the Companies are bound by the Court's determination. This will provide maximum certainty for the JPLs throughout the process of ascertaining and distributing the assets of the Companies.

(c) The JPLs consider that representative proceedings will best assist the Court in providing the directions sought in these applications and in resolving issues arising under the SACA. Representation orders and the procedural directions sought would mean that all interested creditors would be represented before the Court, and therefore all creditors' interests could be properly advanced (including small creditors, who might not otherwise have the means or ability to make representations to the Court).

23. Counsel for the JPLs, Mr. Todd QC, relies upon the general rule governing representative proceedings, as set out in RSC Order 15, Rule 12. He submits that the jurisdictional requirements under this Rule have been met in this case and the Court should exercise its discretion to allow proceedings to continue as representative proceedings. The jurisdictional requirements for representative proceedings are that:

(a) there are "*numerous persons*";

(b) who have the "*same interest in any proceedings*"; and

(c) those proceedings are not mentioned in Order 15, Rule 13 (dealing with classes of individuals who cannot be ascertained).

24. Mr. Todd QC also relies upon Rule 111(2) of the Companies (Winding-Up) Rules 1982, which provides the power to order representative proceedings in the context of insolvency proceedings. Rule 111(2) provides:

> *"The Court may from time to time appoint any one or more of the creditors or contributories to represent before the Court, at the expense of the company, all or any class of the creditors or contributories, upon any question or in relation to any proceedings before the Court, and may remove the person so appointed. If more than one person is appointed under this rule to represent one class, the persons appointed shall employ the same attorney to represent them."*

25. By way of illustration, Mr. Todd QC referred to *Sinclair v Brougham* [1914] AC 398, where the House of Lords heard an appeal which raised issues over the priority of certain creditors and representatives were appointed to argue for the interest of the different classes of creditors (see per Lord Dunedin at p. 428 and pages 399-400). Counsel also referred to *In Re Islington Metal & Plating Works Ltd* [1984] 1 WLR 14, where the Court heard from representative parties in circumstances where the Department of Employment would represent all unsecured creditors other than tort claimants, other respondents would represent tort claimants, and a third respondent would represent all contributories (see p. 18A-C).

26. In the circumstances, Mr. Todd QC submits that this is an entirely appropriate course, and that the Court should accede to the JPLs' application for substantive directions on the Segregation Issues given that:

    (a) The final determination of the Segregation Issues is of fundamental importance to enabling a distribution of assets in the Companies' liquidations;

(b) The Segregation Issues involve difficult and untested questions of law, which are also of significance to the operation of segregated account companies in Bermuda generally;

(c) As was recognised by Kawaley J in *UBS Fund Services (Cayman) Ltd v New Stream Capital Fund Ltd* [2009] Bda LR 74 at [21], there is very little judicial authority on the interpretation of SACA. It is therefore appropriate for the JPLs to seek the guidance of the Court, rather than solely relying on Counsel's reasoning; and

(d) Obtaining the directions of the Court at this stage will facilitate a more efficient resolution of the process of determining proofs and ultimately distributing the Companies' assets. Resolving the Segregation Issues following representative proceedings would avoid the potential for a multiplicity of individual claims coming to the Court which would raise substantially similar questions.

27. On the face of it this is a compelling submission in the context of the liquidations of the Companies. However, UNFCU and Cititrust Group urge the Court that, for reasons which have changed over time, the Court should decline to give the directions sought by the JPLs.

28. First, UNFCU and Cititrust Group contend that the JPLs should follow the normal course and invite proofs, adjudicate on claims, provide creditors with accounting information and documentation, invite creditors to respond to the JPLs' position and if there is any dispute between the JPLs and the creditors, then those disputes can be resolved by the Court in the normal way.

29. I accept the submission made on behalf of the JPLs that this proposed solution by UNFCU and Cititrust Group does not sufficiently take into account that the JPLs have been advised by leading counsel that issues relating to the Segregation Issues are not straightforward and that there are matters of construction and fact upon which views might reasonably differ. It is inappropriate for the Court to direct the JPLs that they should formally determine proofs of debt even though they have been advised that there is a legal uncertainty in

relation to fundamental issues. In these circumstances it is entirely appropriate for the JPLs to seek the Court's direction in relation to these fundamental issues and such a course accords with Rule 111(2) of the Companies (Winding-Up) Rules 1982 as illustrated by cases such as *Sinclair v Brougham* [1914] AC 398 and *In Re Islington Metal & Plating Works Ltd* [1984] 1 WLR 14.

30. In the event the Court is required to determine these issues, it is in principle appropriate that the Court should hear from representatives of those groups with competing interests in the estates. There is no reason in principle why representative proceedings should not be available in winding up proceedings to resolve difficult legal issues affecting the administration of the winding up of a company in a cost-effective way. Such a course is consistent with RSC Order 15, Rule 12, Rule 111(2) of the Companies (Winding-Up) Rules 1982 and with the overriding objective in RSC Order 1A.

31. Secondly, UNFCU and Cititrust Group complain that the basis upon which the JPLs divide the classes appears to be entirely premised on the conclusion, in Counsel's opinion, that the issue of segregation will ultimately fall to be determined solely according to the type of interest rate under the individual policy: either *fixed* or *variable*. They point out that this assumes that Counsel's opinion is in fact correct. They contend that the division of classes is arbitrary.

32. It is indeed the case that Counsel's opinion is qualified in terms that the analysis is not straightforward and that there are several issues of construction and of fact upon which views may differ. However, the written opinions, which the court has reviewed, provide detailed analysis of the factual background and the legal issues. In the Court's view, the analysis carried out by Counsel would appear to be sufficient for the purposes of determining classes at this stage. Of course, the Court keeps an open mind in relation to the issue of classes if the factual position or legal analysis materially changes.

33. Thirdly, UNFCU and Cititrust Group assert that the Court cannot be satisfied that the members of the proposed classes share the same interest. They contend that the limited evidence that is available strongly indicates a likelihood of conflict considering:

(a) The inclusion of all creditors of both Northstar and Omnia;

(b) The fact that the MetLife Business was established in an entirely separate company which amalgamated with Northstar;

(c) The fact that the MetLife Business is subject to a potential guarantee;

(d) The fact that there are essentially three businesses under the Northstar umbrella, with multiple different products offered within each of these three businesses; and

(e) Some investors have both variable and fixed policies and other investors have a fixed investment component within the variable policy.

34. Counsel for UNFCU argues that the requirement of "*same interest*" has been strictly interpreted such that Prof. Zuckerman noted that following the English Court of Appeal decision in *Emerald Supplies Ltd and another v British Airways PLC* [2010] EWCA Civ 1284 "*the rule cannot be used in cases where many persons have individual substantive rights arising out of related circumstances but whose interests are not identical*." Counsel contends that in *Emerald* it was held not to be surprising that "*the use of this procedure has so far been confined to situations where the interests of the representatives and represented were virtually the same."*

35. In the Court's judgment the submission on behalf of UNFCU places too much emphasis on potential differences in members of a class rather than considering the central issue whether there is a sufficient community of interest so that it is appropriate to constitute a class. The fact that the interests of individual members of the class may differ on subsidiary matters (e.g., the existence of additional claims or additional defences or additional security on the part of some members of the class) is not a bar to representative proceedings. The fundamental issue is whether they have a community of interest which is capable of constituting a class in the context of proceedings pending before the Court. This emerges from several cases relied upon by Counsel for the JPLs.

36. In *The Duke of Bedford v Ellis and others* [1901] AC 1 Lord Macnaghten stated the relevance as follows:

> "*If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity. They are none the better for that and none the worse. They would be competent representatives of the class if they had never been near the Duke; they are not incompetent because they may have been turned out of the market.* ***In considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members***." [Page 7]

37. Lord Shand dealt with claims of financial loss suffered by the individual growers which were not common to all members of the representative class and held:

> *"There is one head of the claim (the seventh) as to which there was not much said in the appellant's argument, which is no doubt in a different position; I mean a claim by each of the plaintiffs for repayment to him of alleged excess charges for six years for market accommodation.* ***This is a subsidiary matter, and it is not a claim made "on behalf of all other the growers of fruit, flowers," &c., to which alone the appellant's objection to the representative character of the action applies****. The real cause or matter in dispute and raised by the statement and claims is the nature and extent of the privileges of the plaintiffs to the use of the market stands, and to the effect of determining this the action is competent.* ***This being so, it will be found convenient to both parties to have the subsidiary matter of excessive charges made against each plaintiff determined in the same cause; and I do not see any ground for holding that it is incompetent to do so."*** [Page 17]

38. In *Irish Shipping Ltd v Commercial Union Assurance Co PLC* [1992] 2 QB 206, shipowners sued on a policy that had originally been taken out by charterers who had gone

into liquidation. The policy was subscribed by 77 insurers on identical terms, which included a leading underwriter clause whereby each insurer undertook to be bound by acts of the leading underwriter and to be held liable for its share of all decision taken against the leading underwriter. The shipowners issued proceedings against the leading underwriter and one other subscribing insurer "*on their own behalf and on behalf of all other liability insurers*" claiming an indemnity under the policy from them "*and those they represent in the respective proportions due from them as subscribing underwriters*". The Court of Appeal held that all insurers were held to have the same interest in the proceeding, notwithstanding that there were separate contracts of insurance with each subscribing insurer, since all the contracts were on identical terms, and each insurer was bound by the leading underwriting clause. This conclusion was reached although the Court of Appeal recognised that there might be defences available to some insurers that were not available to all. In relation to the issue of separate defences being available to different insurers, Staughton LJ held at 228A:

> *"I do not regard that circumstance as showing that all the insurers do not have "the same interest" in the English action, or that it is not within the rule; all defend because they say that the benefit of their obligation has not been transferred to the shipowners, and the foreign insurers merely have, or may have, an additional ground for arguing that defence. As I have said, I have no qualms about a proceeding which allows that ground argued on their behalf by others, if they do not wish to join in the action."*

39. In *Re Islington Metal & Plating Works Ltd* [1984] WLR 14, the liquidators, seeking to do their duty to all claimants, joined the second and third defendants who were tort claimants to represent all tort claimants against the insolvent estate of the company. Even though potential tort claims against the company may substantially differ from each other it was not a bar to a representation order.

40. The authorities emphasise that the rules governing representative proceedings are to "*be treated as being not a rigid matter of principle but a flexible tool of convenience in the*

administration of justice" and the Court should "*be slow to apply the rule in any strict or rigorous sense*": Megarry J in *John v Rees* [1970] Ch 345 at 370.

41. The modern summary of principles relating to the application of RSC Order 15, Rule 12 appears from the recent judgment of Stuart-Smith J in *Harrison Jalla v Shell International Trading and Shipping Co. Limited* [2020] EWHC 2211 (TCC), where the learned judge summarised the current position at [60]:

   1. *"I shall apply the principles identified above; but it may be convenient to draw some of the salient strands together at this point:*

      i) Representative proceedings are not the only vehicle for multi-party litigation: see the citation from Zuckerman at [52] above;

      ii) The requirement in CPR r. 19(6)(1) that persons have "the same interest" is statutory and is not to be abrogated or substituted by reference to the overriding objective. That said, the rule is to be interpreted having regard to the overriding objective and should not be used as an unnecessary technical tripwire: see [44]-[45], [53] above;

      iii) The purpose of a representative action is to accommodate multiple parties who have the same interest in such a way as to go as far as possible towards justice rather than to deny it altogether. This is done by adopting a structure which can "fairly and honestly try the right": see the citation from page 10 of the Duke of Bedford case at [31] above;

      iv) It is for this reason that representative proceedings may be appropriate where the relief sought is in its nature beneficial to all whom the lead claimants propose to represent: see the citation from page 8 of the Duke of Bedford case at [31] above and see [47] above;

      v) The "same interest" which the represented parties must have is a common interest, which is based upon a common grievance, in the obtaining of relief that is

beneficial to all represented parties: see [47] above. It is not sufficient to identify that multiple claimants wish to bring claims which have some common question of fact or law;

vi) It is not necessary that the claims or causes of action of all represented parties should be congruent, provided that they are in effect the same for all practical purposes: see [39] and [49] above;

vii) The existence of individual claims over and above the claim for relief in which the represented parties have the same interest does not necessarily render representative proceedings inapplicable or inappropriate: see [38] above. The question to be asked is whether the additional claims can be regarded as "a subsidiary matter" or whether they affect the overall character of the litigation so that it becomes or approximates to a series of individual claims which raise some common issues of law or fact: see [33] above;

viii) Similarly, while the court will pay little attention to potential individual defences that are merely theoretical, the existence of potential defences affecting some represented parties' claims but not those of others tends to militate against representative proceedings being appropriate. One reason for this is that it may be procedurally difficult or impossible to accommodate individual defences in representative proceedings, though the rules make provision for affected parties to be protected: see [53] above. Another is that if a defence is available in answer to the claims of some but not others of the represented class they have different interests in the action: see [56] above. Adopting slightly different language, I would add that the existence of individual defences calls into question whether the action really is a claim for relief that is beneficial for all or is a collection of individual claims sharing some common issues of fact or law;

ix) If the criterion of "the same interest" is satisfied the Court's discretion to permit representative proceedings to continue should be exercised in accordance with the overriding objective."

42. In the circumstances, the Court is satisfied that the matters referred to in paragraph 33 above fall into the category of "*subsidiary matters*" and are not a bar to representative proceedings. The Court is satisfied that the policyholders have a "*common interest"* in advancing arguments that, if accepted, would generate a greater return for their class of creditors than would otherwise be the case. They have a "*common grievance*" of both the risk of a reduced return in the distribution of the Companies' assets if their arguments are not accepted, as well as the nature of their proof in the Companies' winding up more generally.

43. Fourthly, UNFCU and Cititrust Group understandably expressed concern over the cost of representative proceedings. It is proposed that the costs of the representatives would be met by the relevant Company. I am satisfied that this proposal is in accord with Rule 111(2) of the Companies (Winding-Up) Rules 1982 and the practice of the Court (see: *Sinclair v Brougham* [1914] AC 398 at 427, 451, and 460 and *Re Islington Metal & Plating Works Ltd* [1984] 1 WLR 14 at 18D and 22B).

44. Fifthly, counsel for UNFCU expressed concern in relation to the absence of any proper discovery obligations on the part of the JPLs. It is said that there is a real risk in the circumstances that the representative order would be rendered meaningless. I accept the assurance given by counsel for JPLs that all relevant material would be provided to the representatives and in any event, it would be open to the representatives to apply to the Court seeking additional material.

45. Sixthly, by its letter of 20 July 2021, UNFCU proposes the appointment of two class representatives: one "*for*" segregation, and another "*against*" segregation. I accept the submission made on behalf of JPLs that this proposal is unlikely to capture the issues for determination by the Court: (a) is there segregation; (b) which assets, if any, are linked; and (c) what (other) claims exist against the Companies?

46. In conclusion, the Court is satisfied that the applications for representation orders complies with the requirements of RSC Order 15, Rule 12 and Rule 111(2) of the Companies (Winding-Up) Rules 1982 and in the circumstances, it is appropriate for the Court to

exercise its discretion to grant the relief sought by the JPLs. Accordingly, the Court grants the relief in terms of paragraphs 1 to 14 of the *ex parte* Summonses dated 1 June 2021 and paragraphs 2(b) and (c) as amended by the insertion of the word "indexed" as shown in paragraph 2 above.

47. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 26th day of August 2021.

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NARINDER K HARGUN
CHIEF JUSTICE