Compulsory liquidation. Whether, and to what extent, a creditor of the company other than the Applicant Creditor should be entitled to be paid its legal costs as an expense of the liquidation. Principles discussed.

[2025]GRC103

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)
Civ 2641

IN THE MATTER OF PENSION SUPERFUND CAPITAL HOLDINGS LIMITED ("the Company")

AND

IN THE MATTER OF THE COMPANIES (GUERNSEY) LAW 2008 (as amended)

BEFORE:

Her Honour Hazel Marshall KC, Lieutenant-Bailiff

Decision handed down: 24th November 2025

Legislation referred to:

Companies (Guernsey) Law 2008 ss 374, 383, 406, 408, 418
Royal Court Civil Rules r 82

Authorities referred to:

England and Wales
Re New York Exchange Co [1893] 1 Ch 371
In re Bostels Ltd [1968] Ch 346

Textbooks referred to:

French *Applications to Wind Up Companies* (4th Ed) para, 5.181, 5.208

Supplementary J U D G M E N T
on costs, on papers

Introduction

1. On 9th June 2025 this Court delivered reasons for its judgment given on 29th May 2025 whereby it determined that Pension Superfund Capital Holdings Ltd (**"the Company**") should be placed forthwith into compulsory liquidation, pursuant to ss 406 and 408(1) of the *Companies (Guernsey) Law 2008* ("**the 2008 Law**"). This order was made on the Application issued on 24th April 2025 of EJF Funding DAC, ("**EJF**"), a major creditor of the Company.

2. The Company had unsuccessfully opposed such an order, urging, through its own Application previously made on 25th March 2025, that the Company should, instead, be placed into Administration pursuant to s 374 of the 2008 Law.

3. A third party also appeared by counsel at the hearing of the matter, on 29th May 2025, namely CIC GmbH ("**CIC**"), a creditor of the Company with a reasonably significant debt. However, CIC took no

part in the hearing except to inform the court that whilst it "*wanted something to be done"* it was neutral as to whether that should be compulsory winding up (as contended for by EJF) or administration (as contended for by the Company itself).

4. At the conclusion of the hearing, and with the Court's decision having been announced, CIC applied for its costs to be paid out of the Company's assets as costs in the liquidation, but with the lateness of the hour and since argument about that application appeared to be likely, CIC was simply given liberty to apply for its costs if so advised.

The application

5. By a formal application dated 23rd June 2025, CIC has therefore applied for an order that its costs of and incidental to both the Applications mentioned above, and also its costs of this Costs Application, should be ordered to be "costs in the liquidation" of the Company.

6. By a letter from its London solicitors, Norton Rose Fulbright ("**NRF**"), dated 8th July 2025 EJF indicated general opposition to any such order.

7. I indicated that I would be minded to deal with any such application on paper. There was some delay while the question whether any party wished to submit further evidence was canvassed, but in the end all interested parties agreed that the Court should make its decision on the existing written materials. For the record, therefore, these consist, essentially, of the judgment of 9th June 2025, this Costs Application of 23rd June 2025 with its supporting evidence and skeleton argument of Advocate Lyall, the letter from NRF dated 8th July 2025, and an email from Mr David Ramsaran of Mourant dated 1st July indicating his understanding of the general machinery and approach for determining costs to be recovered in a liquidation.

Background

8. For CIC, Advocate Lyall recited the procedural history. CIC had been served with the Company's Administration Application on 25th March and had attended court upon its first hearing on 1st April, supporting EJF's then application for an adjournment until 29th April 2025. I infer that this was to enable EJF (or itself) to put in evidence and/or consider its position. After initially resisting, the Company had eventually agreed to this adjournment.

9. CIC was then served with EJF's Winding Up Application issued on 24th April, and scheduled to be heard also on 29th April. The Company immediately requested both Applications to be adjourned. EJF opposed this. CIC was neutral. The judge granted a two week adjournment. Subsequently, and by consent, a further adjournment was granted, fixing the substantive hearing for 29th May.

10. At the hearing of 29th May, the Company argued for an Administration Order. EJF opposed this and argued for a Winding Up order CIC appeared at the hearing by Advocate Lyall who, as already mentioned, simply informed the court that whilst CIC wanted something to be done, it was neutral as to which form of relief was granted.

Arguments

11. Against this background Advocate Lyall referred, in his skeleton argument, to this Court's wide discretion as to costs conferred by Rule 82(1) of the Royal Court Civil Rules 2007, but reminded the Court that, nevertheless, it was customary to look to English case law and practice for guidance. He observed that the starting point was that costs ordinarily followed the event, but that the court had a wide discretion to make a different order where the circumstances demanded it. He then referred to s 418 of the 2008 Law, which provides that

> "*All costs, charges and expenses properly incurred in the compulsory winding up of a company, including the remuneration of the liquidator, are payable from the company's assets in priority to all other claims.*"

12. He points out that a "petitioner's" costs of a successful petition for winding up [this will be an "applicant" in Guernsey procedure], including its costs of any interim applications, will presumptively be ordered to be paid out of the assets of the Company as an expense of the liquidation, and that, similarly, creditors who appear in support of a (successful) petition for winding up will be awarded one set of costs between them, payable as an expense of the liquidation, citing French *Applications to Wind Up Companies* (4th Ed) at 5.181, and *In re Bostels Ltd* [1968] Ch 346 at 351.

13. Relying, therefore on s 418, Advocate Lyall submits that CIC, who was the only other creditor of the Company to appear on either matter, ought to be paid its costs of and incidental to all the Applications (Administration, Winding Up and Costs) as an expense of the liquidation.

14. Elaborating on this, he submits that CIC, as a creditor of the Company, was properly served with both substantive Applications, and was entitled to be represented so that it could be heard on each Application, since the Court would be obliged to take its position into account. The position which CIC ultimately took was perfectly proper; its representatives submitted that the Company should be placed into an "insolvency process" but it had no preference as to the form of such relief. In essence, CIC needed to review all the materials served upon it and relied on by both the Company and EJF in order to decide on its attitude, the attitude which it in fact took was perfectly reasonable and in that situation there was no good reason why it should have to bear those costs personally.

15. For EJF, NRF's letter objects, first, that CIC's professed neutral position as to the form of relief sought (ie wanting something to be done but not minding which process) was first adopted only at the 29th May hearing itself and NRF characterises this as an attempt to "ride two horses" and enable CIC to claim, after the event, that it had supported whichever Application was successful and should therefore be entitled to its costs with priority.

16. Second it submits in any event, that, in practice, CIC only ever adopted the role of spectator, making no attempt to put any propositions to the Court, and that if it had actually adopted a positive approach to support a winding up, which is the basis of its claim in costs, it might even have persuaded the Company to abandon its own application for Administration and save costs.

17. Third it submits that since Advocate Lyall made no contribution to the proceedings at all, his attendance all day throughout the one day hearing was quite unnecessary, pointing out that this was even commented on by the Court itself at the time.

18. Fourth it points out that the effect of an order for costs "in the liquidation" such as CIC seeks, would be that those costs would rank ***pari passu*** with the costs of EJF itself - the creditor which had actually done all the work to gain the Winding Up order - in the case of any shortfall, and generally in priority to the ordinary unsecured debts of all the Company's creditors including that of EJF itself, as to which there clearly would be a shortfall. It objects that that result is unfair because CIC's costs, which produced no wider benefit at all to the Company's creditors, would push those creditors' debts "further down the waterfall" of dilution of any recoveries in CIC's liquidation.

19. For those reasons, therefore, EJF urges that CIC's Costs Application should simply be dismissed.

Discussion and decision

20. I do not find the broad proposition that costs usually "follow the event" to be of any great assistance on the issue whether any particular costs should be deemed to be costs "in the liquidation" in a compulsory winding up.

21. First, that proposition is aimed at the simple case of ordinary party-and-party litigation. The purpose and effect of the winding up jurisdiction is different from that of the court's determining the appropriate incidence of costs in a straightforward adversarial contest as to their respective rights between two litigants.

22. The winding up jurisdiction is different from the general context of RCCR r 82 because it is concerned, rather, with status (that of the corporate entity), has a general public interest element (namely that of clearing off the scene an insolvent company which ought not to be continuing to operate), and is viewed as the applicant creditor's seeking a remedy for the benefit of all those with an interest in the company's solvency - creditors and contributories": see *Re New York Exchange Co* [1893] 1 Ch 371 at 374. These features make it reasonable that the applicant creditor should get its costs of a successful winding up application in priority to any distribution of the company's assets. Such costs are analogous to the costs of effecting the proper administration of a fund, ie the assets of the Company.

23. (Although the point does not arise here, and I have heard no argument directed at it, the terms of s. 418 would suggest that those costs should even be assessed on the indemnity basis, rather than merely the recoverable basis, because they are akin to administrative costs, but I emphasise that I have not heard argument on that point and am not conversant with any current practice.)

24. The second difference is that the recovery of costs as costs of the liquidation is expressly provided for by s 418 of the Companies Law, which is therefore the primary guide. This refers generally to

> "*costs, charges and expenses properly incurred* **in** *the compulsory winding up of a company,…"* (emphasis added)

without specifying by whom, though also expressly recording that these included the liquidator's remuneration, in case that were thought not to fit naturally into the concept of a cost "incurred". It is therefore anyone's "costs", which are to be so recoverable, provided they are identifiable as being costs properly incurred "in" the relevant winding up itself.

25. The applicant creditor's costs of making the winding up application plainly fall within that description in principle. Allowing the costs of a supporting creditor in the same way must therefore require justification on a similar basis. This is because promoting such costs to rank in priority as an expense of the liquidation, rather than being simply, at best (but I observe that there might well be argument about this), an unsecured debt of the company ranking alongside the ordinary debts incurred in its business, must require some such justification.

26. As to this, it is notable that (i) it is only the costs of supporting creditors which attract the benefit of being treated as costs in the liquidation itself, and (ii) the courts are cautious even in allowing this, because it depletes the availability of assets for *pari passu* distribution to unsecured creditors. This is underlined by the fact that it is only one "set" of such costs which is allowed as an expense of the liquidation itself, even though there may be several supporting creditors; they must decide between themselves how the costs allowed are to be distributed between them: see French (*supra*) which notes, at 5.208, that this rule is adopted to discourage appearances being made merely for the sake of recovering costs, as well as to protect the interests of creditors in the assets of the Company. (Quite how one assesses what constitutes one "set" of costs when there are more than one supporting creditors may not be clear in the absence of a fixed fee regime, but that is not a point which arises here.)

27. I therefore determine this Application in the light of this general background, doing the best I can on the agreed materials before me.

28. There are two distinct aspects to EJF's objections to CIC's costs application. The first is the general one, that it objects to any such order being made in principle. The second is its specific argument that it objects to any such costs including the costs of Advocate Lyall's attending the 29th May hearing, on the grounds that such attendance was unnecessary and therefore unreasonable, having regard to CIC's attitude to the two Applications.

29. As to the first point, CIC's Application is ambitiously broad-brush. It does not distinguish between its costs attributable to the Administration Application, to the Winding Up Application and to this Costs Application itself, but claims them all.

30. However s 418 only authorises costs properly incurred "in" the compulsory winding up to be given such priority. This means first, in my judgment, that CIC cannot recover any of its costs incurred before service upon it of EJF's Winding Up Application, which I understand was on 24th April 2025. Before that date, there was no compulsory winding up process in train to engage the operation of s 418 at all. Those earlier costs were incurred in relation to the prior Administration Application.

31. As such, they would potentially have been within the ambit of s 383, of the 2008 Law, which makes provision in similar terms to those of s 418 in relation to costs properly incurred "in" a company administration. But that requires such application to have succeeded, so that such an administration actually takes place. That did not happen in this case; the Administration Application failed. There is therefore no administration enabling s 383 to be invoked, and as to those earlier costs there was no compulsory winding up process under which s 418 could operate. There is no other available basis on which those costs could be deemed to be costs in the compulsory liquidation which ensued, and it follows that they cannot be included in any order such as that sought.

32. Moving to the next period in time, it is possible in principle that CIC's costs from the time of service on it of the winding up Application could qualify as being incurred "in" the ensuing successful winding up process. The next question is therefore whether they can factually be so regarded and thus to fall within the scope of s 418.

33. EJF argues that the practice as to this provision is that it is supporting creditors, and only supporting creditors, who are accorded the benefit of this priority entitlement to their costs of participation in the winding up process. This privilege does not extend to opposing creditors, even though they may have appeared, argued the matter and incurred costs. It submits, however, that CIC cannot be argued to have been a "supporting" creditor, because their express position was neutral They did not support the winding up any more than they supported the administration application, which failed. They cannot claim to be entitled to their costs as costs in the liquidation on the grounds of being supporting creditors, because they simply were not.

34. I have more than a little sympathy with this argument. I bear in mind that the grant of priority for supporting creditors' costs denotes implicit recognition that they have propounded a point of view which it was in the public interest that they should express, and presumptively which has prevailed in the face of opposition. CIC has not done this.

35. However, in the end, but only on balance, I think that is too harsh a view, and not consistent with the policy that creditors should not be discouraged from participating in a winding up process at least so far as to indicate their attitude to the Court. CIC did participate in the general process which resulted in the making of the compulsory winding up order here, and their general stance of not opposing such a course was a matter the Court properly took into account in making its decision. As CIC's neutral stance involved no active opposition, it did not increase the costs of obtaining a winding up order. In those circumstances I think it right to allow CIC's costs properly incurred in considering their position on the winding up, and making that known to the Court, as costs in the compulsory liquidation.

36. However, that consideration extends only to such costs as were properly incurred in the compulsory winding up. This leads, therefore, to the specific objection raised by NRF's letter, that the costs of Advocate Lyall's attendance at the hearing of 29th May should be disallowed because he made no contribution to the processes of that hearing at all. That objection is an aspect of the test for costs being "properly" incurred in the winding up within the meaning of s 418 of the 2008 Law.

37. I had formed the provisional view, from early on in the hearing itself, that the attendance of an Advocate as senior as Advocate Lyell, simply to record his client's indifference to the outcome as

between the two cross-applications for relief, ought not to be allowed as costs of the liquidation. Advocacy skills were not required for such purpose. At most a junior advocate could easily have done that, and in fact there is considerable force in the point that even this was not necessary, as it could in practice have been achieved at virtually no cost at all, by a letter to the Court.

38. The only consideration which might justify the attendance of an Advocate (and even then I doubt it would justify an advocate of the seniority of Advocate Lyall) on CIC's behalf at the hearing would have been some *realistic* concern (ie other than fanciful) that, despite CIC's having received and had the opportunity to review all the materials being presented on either side of the dispute between the Company and EJF as to the relative merits of administration or winding up, and as to which CIC had decided it was neutral, some point might emerge only in the course of the hearing itself which would be of sufficient significance as to cause CIC to need to change its mind and advocate strongly in favour of one outcome or the other. This has not actually been suggested to have been the case in fact, and indeed, any such possibility would seem to be very remote. Advocate Lyall's argument as to the reasonableness of his attendance has simply been asserted as a vague general proposition, in effect resting solely on the fact that his client was served, and properly served, with notice of the Application hearings.

39. However CIC's reasonable entitlement to the opportunity to consider and make known its position does not equate to it being reasonable to do so by attendance with senior Counsel at the hearing, and still less, then, to claim an entitlement to have its costs of doing so paid out of the assets of the Company as a priority expense of the ultimate winding up.

40. I will therefore not allow the costs of CIC's attendance at the hearing of 29th May as costs in the liquidation. I agree with NRF's submission that it was unnecessary and that CIC's position could have been conveyed to the Court at negligible cost by writing a letter to that effect. The attendance of counsel on their behalf was a luxury of no tangible benefit to the winding up process at all. Whatever their own view of the desirability of representation at the 29th May hearing, in all the circumstances it is not reasonable for them to expect their costs of such attendance to be defrayed to the potential disadvantage of other creditors.

Disposal

41. In the order I propose to make, I bear in mind the principle that cost orders should be made in clear terms, sufficiently precise that they do not involve assessments or evaluations, but can be identified and quantified by reference to clear facts. In principle, this means that where partial costs orders are appropriate, these should avoid being "issue based" if possible and should, rather, relate to specified periods of time or to percentages of a total bill of costs, as far as possible.

42. In my judgment, therefore, the correct order is that CIC shall have its costs of the matter (by which I mean both the Administration and the Winding Up Applications) properly incurred from 24th April 2025 (when these began to be costs incurred "in" the successful compulsory winding up proceedings) until the date by which they must reasonably have formed their view that they were neutral as to whichever form of relief should be granted, and could and should have conveyed such neutral view cost-effectively to the Court.

43. I am minded to put this at the date of the Consent Order which finally adjourned the matter to be heard on 29th May 2025 (see para [9] above) because I would assume that all the materials in the matter had been prepared and served before then. If, in fact, further materials were served by either side of the dispute after that date, then I would instead, for simplicity, simply exclude the costs of CIC's attendance at the hearing of 29th May 2025 and there will expressly be no order as to CIC's costs of attendance at the 29th May hearing.

44. For the avoidance of doubt, I do not differentiate, during this period, between costs referable to considering the materials in the Winding Up Application and in the Administration Application

because, after the winding up Application was issued, it had to be considered by CIC in the light of the materials relevant to the Administration Application as well.

Costs of this Costs Application

45. As to CIC's costs of this Costs Application, which it has also claimed to have treated as costs in the winding up, I will make no order on that issue.

46. Whilst the dispute on that point is the nearest thing to a r. 82 situation, as it was simply a dispute between CIC and EJF as to the incidence of CIC's costs, CIC has been far from totally successful in that application. I do not think it appropriate that any portion of CIC's such costs (ie of pursuing this application) should be given the priority of costs incurred "in" the liquidation, which is the order which has actually been sought by CIC, but I should add for completeness that even if CIC had sought its costs against EJF itself, I would still think it appropriate simply to make no order.

General

47. Finally, I should make it clear that nothing in this judgment is intended to, or should, have any bearing on the separate question whether any costs incurred by CIC and not provided for in this Order can, or should, be treated as a debt of the Company capable of being proved in the Company's compulsory liquidation. I have not heard any argument on that point, and it is a matter which it would be for the Liquidator of the Company to determine.

48. Counsel will please liaise with the Greffe to draw up the necessary Order.

Hazel Marshall KC
Lt Bailiff

24th November 2025