

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNIHCVAP2020/0020

BETWEEN:

KENNETH KRYSS & GREIG MITCHELL (JOINT LIQUIDATORS)

Appellants

and

FINANCIAL SERVICES COMMISSIONER

Respondent

Before:

The Hon. Mr. Trevor M. Ward
The Hon. Mde. Paula Gilford
The Hon. Mde. Cadie St. Rose-Albertini

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Ms. Anna-Kay Brown for the Appellants
Mrs. Sheree Jemmotte-Rodney for the Respondent

2025: October 01;
2026: January 14.

Civil appeal – Insolvency Law - Winding up order - Liquidation – Priority payments in winding up - Order of payment out of company assets on winding up – Section 457 of the Companies Act, Cap 11.12 – Whether the judge erred in fact and law in implying an agreement between the joint liquidators and the Government and then implying a term into that implied agreement to the effect that the first US\$147,661.64 realized from the sale of the assets of Montobacco Ltd. be paid to the Government – Whether the judge erred in directing that the first US\$147,661.64 realized from the sale of the assets of Montobacco Ltd. be paid to the Government - Whether the judge erred in identifying who should be liable for repayment of the sum advanced by the Government to the joint liquidators as liquidators’ fees

This is an appeal against part of the order of a judge of the High Court dated 31st August 2020, which formed part of a final winding up order of three Montserrat companies, namely Montobacco Ltd., 888 International Ltd., and Emerald Metal Co. Ltd. (“the Companies”). By this order, the appellants, who were joint liquidators of the Companies, were ordered to repay the sum of US\$147,661.64 to the Government of Montserrat (“the Government”). Montobacco Ltd., incorporated on 15th May 2012 under the Companies Act, was established to carry on the business of tobacco processing and authorized to issue 10,000 shares. 888 International Ltd. was incorporated on 10th May 2013 as a holding company and was authorized to issue 10,000 shares. Emerald Metal Company Ltd. was incorporated on 13th May 2013 to carry on the business of scrap metal harvesting and was also authorized to issue 10,000 shares.

By Order dated 15th March 2018, upon application by the Financial Services Commissioner/Registrar of Companies, the High Court ordered that an investigation be conducted into the business of the Companies and their Directors, pursuant to section 518 of the Companies Act. By further order dated 28th March 2018, Kenneth Krys, a partner of Krys and Associates (BVI) Ltd, trading as KRyS Global BVI, was appointed as Inspector to carry out the said investigation. By Order dated 12th April 2018 he was also appointed as Receiver-Manager over the assets of Montobacco Ltd. until 29th June 2018. It appears from the Petition that a 58-page report dated 18th June 2018 generated by Mr. Krys upon conclusion of his investigation revealed that the Companies were insolvent.

On 26th June 2018, the Registrar of Companies/Financial Services Commissioner presented a Winding Up Petition in relation to the Companies pursuant to section 377 of the Companies Act. The Petition averred that in relation to Montobacco Ltd., winding up was the most appropriate means in all the circumstances to protect its creditors. In relation to all three companies, it was said to be just and equitable and in the public interest that they should be wound up. Further, the affidavit in support of the Petition alleged that the Companies were in breach of various provisions of the Companies Act in that they failed to call annual general meetings of shareholders (section 106); failed to keep adequate accounting records (section 148); failed to produce to shareholders at annual general meetings comparative financial statements (section 149); and failed to keep corporate records (section 177). The petition also sought the appointment of a liquidator over the Companies, and other orders under section 66 of the Companies Act but these are not relevant for present purposes.

By Order dated 31st July 2018, the Court ordered, among other things, that the Companies be wound up ‘as being insolvent and in the public interest’. It was further ordered that ‘Kenneth Krys and Greig Mitchell of Krys & Associates (BVI) Limited (trading as KRyS Global) are jointly and severally appointed as joint liquidators of the three companies’; and ‘the fees for Kenneth Krys acting as the Inspector and Receiver-Manager are increased to \$112,000, to be paid by Montobacco.’

On 26th August 2020, the Court heard applications from the joint liquidators to finalize the liquidation and address related costs. After considering submissions, the Court issued its Order on 31st August 2020, which has been appealed, that the joint liquidators must repay to the Government of Montserrat US\$147,661.64 by 30th November 2020.

The grounds of appeal are that on the material before him, the judge erred in finding that as a matter of law he had a proper, or any basis, to find that there was an implied term that the sum of US\$147,661.64, paid in respect of certain of the joint liquidators' invoices could be repaid in priority to payment of the costs and expenses of the winding up, pursuant to section 457(4) of the Companies Act. The appellants also contend that the judge erred when he sought to imply this term of preferential repayment to the detriment of the joint liquidators, and to the priority which they enjoyed pursuant to section 457(4) of the Companies Act because the Government can enjoy no superior status to that of a creditor subordinated to the joint liquidators as per section 457(4). Secondly, the appellants contended that the judge erred when he purported to impose a repayment obligation upon a party not before the court (KRyS Global), and in circumstances where the office of a liquidator is a personal appointment. The judge also erred in ordering the appellants to repay the sum of \$US\$147,661.64 when that money had not been paid to them but to KRyS Global.

The central and determinative issue in this appeal is whether the judge erred in directing that the first US\$147,661.64 realized from the sale of the assets of Montobacco Ltd. be paid to the Government.

Held: allowing the appeal and ordering the respondent to pay the appellants' costs to be assessed if not agreed within 21 days of the delivery of this judgment, that:

1. A liquidator is an officer of the court and a fiduciary. Their role is not merely contractual but a matter of public duty. The remuneration is considered an expense of the winding up, which is essential because the liquidator is charged with securing, collecting, and realizing the company's assets for the collective benefit of all creditors. Without this guarantee of payment, the insolvency system would fail. This guarantee of priority payment provides the incentive for liquidators to discharge this onerous public duty, thus enabling asset distribution to other creditors. Without their work, there would be no assets for distribution. It is precisely because the fees enjoy this highest priority that the court has the primary, non-delegable power to set and approve a liquidator's remuneration. The remuneration fixed by the court should be fair and reasonable for the work properly undertaken. The overriding requirement is that the liquidators must be reasonable and proportionate on an objective basis. This is the court's mechanism to ensure the priority is not abused. The remuneration must be justified to prevent liquidators from dissipating the very fund they are appointed to create. The necessity for priority is thus tempered by the necessity for rigorous judicial oversight.
2. The judge's interpretation that the Government 'stepping into the shoes of the liquidator' created an implied term granting the Government creditor status over KRyS Global, and thus repayment priority over the liquidators' fees, is, with respect, misconceived. As an insolvency law concept, such a mechanism, whereby a third party "funder" or creditor 'steps into the shoes of a liquidator' on a winding up so as to take priority over the costs and expenses of the liquidation, is a legal fallacy. A liquidator is a court appointed officer with fiduciary responsibility. No person or creditor can simply step into the shoes of a liquidator and assume priority over other creditors. It makes no difference that the creditor is the Government.

Attorney General v CL Financial Ltd (in liquidation) [2025] UKPC 41 applied.

3. It is a common feature of insolvency that third party funders or existing creditors sometimes play an important role in facilitating asset recovery during insolvency proceedings by funding the liquidation. It is also not an uncommon feature of an insolvent winding up that there is likely to be insufficient assets to satisfy all creditors, so priority payment is critical. In these situations, a funding agreement is usually entered into which details the priority of distribution of any recovered money among the funder and the various classes of creditors. Such agreements are court sanctioned and the Court can then prioritize certain creditors for recovered property over other creditors on account of the risks they undertook in supporting the recovery through funding. The rationale for this is rooted in the public interest. The public interest in encouraging assistance to liquidators in funding difficult and expensive litigation should be vindicated by giving a funding creditor an advantage over other creditors, which is just in consideration of the magnitude of the risk assumed. However, it is to be noted that the priority obtained in such circumstances is over other creditors.

Re Parkston Pty Ltd (in liquidation) (2000) NSWSC 764 applied.

4. The Government must be taken to have assumed the risk that there might be insufficient assets to satisfy creditors as there was no guarantee given that recovery would yield sufficient assets to cover the costs and expenses of the winding up with surplus for distribution to creditors. Indeed, the liquidators' first interim report dated 24th February 2020 foreshadowed that the amount to be recovered was likely to be less than originally anticipated. It is clear that the Government was actuated by its vested interest in seeing the liquidation through 'in the public interest', as stated in the winding up petition. That seems to be the reason they advanced money to partially fund the litigation fees and even the Inspector and Receiver-Manager fees, although the learned judge had ordered that the latter was to be recovered from the assets of the Companies. Having made a conscious choice to do so, despite knowing that the liquidators' fees were to be recovered from the assets of Montobacco in accordance with the Companies Act, the Government cannot be heard to complain if recovery of the funds they advanced is subjugated to the liquidators' fees. In the Court's view, having regard to all the circumstances, the order of priority of payment fell to be determined by the provisions of section 457(4), which accords priority to the costs and expenses of the winding up. This means that the liquidators' fees take priority. The judge therefore erred when he ordered that the first US\$147,661.64 realized from Montobacco's assets be paid to the Government.
5. As it stood, the assets realized from Montobacco amounted to only US\$320,000 while the outstanding liquidators' fees were approximately US\$650,000. The liquidators would obviously suffer a shortfall in fees of US\$330,000. The practical effect of the order is to further reduce the fees recoverable by diverting US\$147,661.64 into the hands of the Government. In other words, the effect of the

order is to accord priority payment to the Government over payment of the liquidators' fees, contrary to section 457(4) of the Companies Act, and indeed, priority over other creditors of Montobacco.

JUDGMENT

- [1] **WARD JA:** This is an appeal against part of the order of a judge of the High Court dated 31st August 2020, which formed part of a final winding up order of three Montserrat companies, namely Montobacco Ltd., 888 International Ltd., and Emerald Metal Co. Ltd. ("the Companies"). By this order, the appellants, who were joint liquidators of the Companies, were ordered to repay the sum of US \$147,661.64 to the Government of Montserrat ("the Government").

Background

- [2] Montobacco Ltd., incorporated on 15th May 2012 under the Companies Act,¹ was established to carry on the business of tobacco processing and authorized to issue 10,000 shares. 888 International Ltd. was incorporated on 10th May 2013 as a holding company and was authorized to issue 10,000 shares. Emerald Metal Company Ltd. was incorporated on 13th May 2013 to carry on the business of scrap metal harvesting and was also authorized to issue 10,000 shares.
- [3] By Order dated 15th March 2018, upon application by the Financial Services Commissioner/Registrar of Companies, the High Court ordered that an investigation be conducted into the business of the Companies and their Directors, pursuant to section 518 of the Companies Act. By further order dated 28th March 2018, Kenneth Krys, a partner of Krys and Associates (BVI) Ltd, trading as KRyS Global BVI ("KRyS Global"), was appointed as Inspector to carry out the said investigation. By Order dated 12th April 2018 he was also appointed as Receiver-Manager over the assets of Montobacco Ltd. until 29th June 2018. It appears from the Petition that a 58-page report dated 18th June 2018 generated by Mr. Krys upon conclusion of his investigation revealed that the Companies were insolvent.

¹ Cap. 11.12, Revised laws of Montserrat.

- [4] On 26th June 2018, the Registrar of Companies/Financial Services Commissioner presented a Winding Up Petition in relation to the Companies pursuant to section 377 of the Companies Act. The Petition averred that in relation to Montobacco Ltd., winding up was the most appropriate means in all the circumstances to protect its creditors. In relation to all three companies, it was said to be just and equitable and in the public interest that they should be wound up. Further, the affidavit in support of the Petition alleged that the Companies were in breach of various provisions of the Companies Act in that they failed to call annual general meetings of shareholders (section 106); failed to keep adequate accounting records (section 148); failed to produce to shareholders at annual general meetings comparative financial statements (section 149); and failed to keep corporate records (section 177). The petition also sought the appointment of a liquidator over the Companies, and other orders under section 66 of the Companies Act but these are not relevant for present purposes.
- [5] By Order dated 31st July 2018, the Court ordered, among other things, that the Companies be wound up ‘as being insolvent and in the public interest’. It was further ordered that ‘Kenneth Krys and Greig Mitchell of Krys & Associates (BVI) Limited (trading as KRyS Global) are jointly and severally appointed as joint liquidators of the three companies’; and ‘the fees for Kenneth Krys acting as the Inspector and Receiver-Manager are increased to \$112,000, to be paid by Montobacco.’
- [6] On 26th August 26, 2020, the Court heard applications from the joint liquidators to finalize the liquidation and address related costs. After considering submissions, the Court issued its Order on 31st August 2020. Part of this order (the underlined words below) form the subject of this appeal. To provide context for the impugned parts of the Order, a number of the other recitals in the order are included:
- “5. Noting a payment on 17.06.19 by the GoM [Government of Montserrat] to KRyS Global of \$296374.23us (Invoice FHQ03520, exhibit 6LQ), being a split payment –
- (a) The status of \$147661.64us (per para 7.1.1 of the JLs [Joint Liquidators] interim report of 24.02.20) raised by the CR and paid

by the GoM toward the JLs' liquidation fees ("the GoM liquidation payment");

- (b) The status of \$113728.48us in inspector's fees and \$34984.11us in receiver-manager fees, totalling \$148712.59us, (per para 5 of the JLs submissions of 13.08.20), raised by the CR and paid by the GoM toward the JLs' pre-liquidation fees ("the GoM IRM payment");

6. The status generally of the scale of fees sought by Krys Global, in total from action inception in March 2018 to the close of liquidation, being \$647990.26us, arising from the work done by Kenneth Krys and Greig Mitchell as inspector, receiver-manager and then liquidators (including arising from recent litigation since 15.09.20 raised by Fagen et al and then Andrianakos), in light of how the total monies raised by the liquidation of Montobacco, being around \$320000us will not meet this sum...

5 - NOTING all parties now agree as at 26.08.20 there was no intention on the part of the CR to bind the GoM as underwriting the JLs fees, so that what was said by Counsel Morgan on 30.07.20 was in error, and then misunderstood;

NOTING it has always been the expectation of the GoM to recover the payment of \$296374.23us to Krys Global on 17.06.19, which was intended to assist the work of the liquidation, though regrettably no formal funding agreement was written;

NOTING the CR has conceded on 26.08.20 the fees for the inspector and receiver manager, totalling \$148712.59us, paid by the GoM on 17.06.19 render the GoM a creditor of Montobacco in that sum to be paid if at all under the liquidation scheme set out by **s457(1)(a) Companies Act**;

NOTING by correspondence from the JLs to the CR on 30.06.20 in exhibit DJ21, Greig Mitchell writes:

'The receipt of funds from the sale of the above assets [to Cigars Ltd for \$300000us] means that the question ... whether the GoM will step into the shoes of the liquidators to seek payment of the fees paid to the liquidators as a priority claim should now be addressed as a matter of urgency'. [Bracket added]

NOTING the 'fees paid to the liquidators' by the GoM on 17.06.19 were \$147661.64us;

NOTING Kenneth Kryz opined on 26.08.20 the GoM liquidation payment akin to a 'loan' to Kryz Global, implying in theory the GoM might be able to sue Kryz Global for its recovery;

CONSIDERING to characterise the GoM liquidation payment as a loan to Kryz Global is to concede of necessity an implied term of the implied funding agreement that on the JLs receiving monies from the liquidation the GoM could 'step into the shoes of the liquidators', as written on 30.06.20, meaning the first \$147661.64us received should be paid to the GoM, to repay the loan, so that as to this sum the GoM is not a creditor of Montobacco, but of Kryz Global, who by implication owe to the GoM the money loaned repaid once the monies for the sale to Cigars Ltd is received, which has already occurred;

RESOLVING Kryz Global must repay to the GoM the liquidation payment of \$147661.64us, while the GoM remains a creditor of Montobacco to the value of the IRM payment of \$148712.59us (which in current circumstances is unlikely to be paid); [emphasis added]

6 - NOTING the JLs fees sought are about \$650000us;

NOTING the fees allowed on 31.07.18 by the court as IRM payment was only \$112,000us at a time Montobacco was believed likely on liquidation to raise upwards of \$700,000us;

NOTING the liquidation has in fact raised only about \$320000us;

NOTING there will likely be no monies for any creditors (except Lopez, as above) as the fees sought of the JLs, which take priority under **s457(4) Companies Act**, are more than double what has been raised;

CONSIDERING there has been the regrettable absence of an express funding agreement, and it appears there has been little attention paid by the parties to the rate at which the fees have mushroomed, which ought to have been plain

when the GoM paid \$296374.23us on 17.06.19 when the liquidation was still ongoing, yet there seems no review of the billing with a view to reducing or challenging it at that time;

CONSIDERING it may have been little attention was paid to the mushrooming fees as it was believed at inception the liquidation would raise more than their value;

CONSIDERING it appears the paucity of the liquidation monies only became clear when the JLs interim report of 24.02.20 implied the likelihood of the liquidation raising less than the fees;

CONSIDERING the fees have mushroomed further owing to substantial litigation commencing on 15.06.20;

CONSIDERING s457 Companies Act says:

(1) In a winding up of a company there shall be paid in priority to all other debts-

(a) all rates, charges, taxes, assessments or impositions, whether imposed or made by the Government or by any public authority under the provisions of any Act, and having become due and payable within twelve months next before the relevant date;

(b) all wages or salary (whether or not earned wholly or in part by way of commission or for time or piece work) of any employee, not being a director, in respect of services rendered to the company during four months next before the relevant date; or

(c) all severance benefits, not exceeding the equivalent of forty-five days basic wages or salary, due or accruing to an employee, not being a director, whether retrenched by an employer, a receiver, a liquidator or some other person.

(2) Where any payment on account of wages, salary or severance benefits has been made to any employee of a company out of money advanced by some person for that purpose, that person shall in a winding up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which that employee would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

- (3) The debts and claims to which priority is given by subsection (1) shall-
- (a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and
 - (b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and paid accordingly out of any property comprised in or subject to that charge.
- (4) Subject to the retention of such sums as are necessary for the costs and expenses of the winding up, the debts and claims to which priority is given by subsection (1) shall be discharged forthwith so far as the assets are sufficient to meet them.
- (5) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by subsection (1) shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof, but in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made.
- (6) In this section, "the relevant date" means -
- (a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order; and
 - (b) in any other case, the date commencement of the winding up.

CONSIDERING the only operable subsection as arising here is the first clause of **s457(4) Companies Act**, being 19 words, and all else regrettably appears redundant despite the intention of the section, in that the JLs can expect to recover from the liquidation first what they can of their fees;

CONSIDERING parties may well feel indignant all value in Montobacco has gone to the JLs, including a likely inadvertent loss to the GoM or the IRM payment of \$148712.59us;

CONSIDERING the JLs have done timely, well presented, and comprehensive work to high standard, so that a retrospective review of the reasonableness of the fees, the rates being already accepted when paid on 17.06.19, would now be inappropriate;

NOTWITHSTANDING this order will make no finding as to whether fees charged, legal or accountant, are unreasonable, as it would be academic in that less than half of the fees sought can be recovered;

RESOLVING in any further liquidation the CR working with liquidators must together closely monitor progress, fees, and likely liquidation outcome, with an overview letter to the court from the CR, of not more than two pages, every three months, outlining fees sought, for what work, with what timeline to liquidation, for what sum, to ensure as best may be achieved that creditors are paid, at least to some appreciable extent;

7 - NOTING the JLs believe the liquidation complete;

RESOLVING it shall be so declared;

IT IS ORDERED that:

...

5. The JLs must repay to the GOM \$147661.64 us by 30.11.20.” [emphasis added]

The grounds of appeal

- [7] The appellants contend that on the material before him, the judge erred in finding that as a matter of law he had a proper, or any basis, to find that there was an implied term that the sum of US\$147,661.64, paid in respect of certain of the joint liquidators’ invoices could be repaid in priority to payment of the costs and expenses of the winding up, pursuant to section 457(4) of the Companies Act. The judge erred when he sought to imply this term of preferential repayment to the detriment of the joint liquidators, and to the priority which they enjoyed pursuant to section 457(4) of the Companies Act because the Government can enjoy no superior status to that of a creditor subordinated to the joint liquidators as per section 457(4).

- [8] Secondly, it is said that the judge erred when he purported to impose a repayment obligation upon a party not before the court (KRyS Global), and in circumstances where the office of a liquidator is a personal appointment. He also erred in ordering the appellants to repay the sum of \$US\$147,661.64 when that money had not been paid to them but to KRyS Global.

The appellants' submissions

- [9] On behalf of the appellants, learned counsel, Ms. Anna-Kay Brown, submitted that the judge erred when he found that there was a proper basis to imply a term that the US\$147,661.64 paid by the Government as part of the liquidators' fees could be repaid in priority to the payment of the costs and expenses of the winding up. The effect of the repayment order is to subordinate the costs and expenses of the insolvent estates to payment to the Government, in breach of section 457(4) of the Companies Act, which accords priority to the costs and expenses of the liquidation. Ms. Brown further argued that the judge erred in inferring both a funding agreement between the appellants and the Government, and an implied term allowing the Government to recover the first US\$147,661.64 received from liquidation as repayment for its "loan", since it is only in very rare circumstances that a term may be implied, in the absence of express agreement. In this case, there was no prior agreement between the joint liquidators and the Government to the effect that the part payment of the joint liquidators' fees made by the Government would take priority over the costs and expenses of the liquidation. Furthermore, there was no strict necessity for such a term to be implied. The judge should have held that in making the payment to the joint liquidators, the Government was simply an unsecured creditor and was therefore subordinated in priority to the costs and expenses of the liquidation, pursuant to section 457(4) of the Companies Act.
- [10] In relation to the second prong of the grounds of appeal, Ms. Brown submitted that the judge erred in law and fact by fixing the joint liquidators, who were personally appointed, with liability to make the payment when the funds were paid to, and received by KRyS Global, a separate corporate entity. The judge erred in fixing

KRyS Global with the liability to repay the sum of US\$147,661.64 when KRyS Global was not a party to the proceedings and was not the office holder. The court therefore lacked jurisdiction to make the order over KRyS Global.

The respondent's submissions

- [11] On behalf of the respondent, Mrs. Sheree Jemmotte-Rodney submitted that the appeal is based on a misinterpretation of the High Court's finding. The respondent takes issue with the contention that the judge found that the Government or the Registrar of Companies enjoyed priority over the joint liquidators under section 457(4) of the Companies Act. It was submitted that the appellants' argument presents a false dichotomy between the funds to be paid to the liquidator as costs and expenses of liquidation under section 457(4) of the Companies Act, and the US\$147,661.64 to be repaid to the Government. Based on the Court's Order, the sale proceeds would still go towards first satisfying the costs and expenses of the liquidation in accordance with section 457(4) of the Companies Act. However, among these costs and expenses are those first incurred to June 2019, in the sum of US\$147,661.64, which the liquidators were to satisfy from the sale proceeds of Montobacco Ltd, but which the Government loaned to the liquidators. The order of the court is that effectively, once the money is in the hands of the liquidators, the costs and expenses already paid for should be repaid to the Government.
- [12] Mrs. Jemmotte-Rodney further submitted that the judge was justified in finding that there was an implied funding agreement and that it was an implied term of that agreement that the joint liquidators would repay the sum of US\$147,661.64 advanced by the Government as part payment of the liquidators' fees. The submission was that this was a case where there was a mostly unwritten contract. The judge was required to find almost all the terms of the contract itself from his assessment of the facts before him. These facts were, among others, that: (i) before the appointment of the liquidators in 2018, the liquidators had indicated that they intended to recoup their costs and expenses from the sales of the assets of Montobacco Ltd. This was contained in their initial proposal to the Registrar of

Companies/Financial Services Commissioner and in their Terms of Reference submitted to the court; (ii) in 2019, at a time when the liquidators had done work but there was as yet no sale of assets, the Registrar of Companies procured the Government to pay the liquidation fees incurred from 2018 to June 2019 in the sum of US\$147,661.64; (iii) there was no written agreement in respect of this payment of the liquidation fees; (iv) in relation to this payment only, at the conclusion of the sale in June 2020, the joint liquidators had written to the Government asking whether they would “step into the shoes of the liquidators” to recover this sum; a suggestion which the Government accepted; (v) during the hearing in August 2020 the liquidator, Mr. KryS, had accepted that the US\$147,661.64 paid to KRyS Global was a loan in respect of the liquidation fees and expenses which they were supposed to recoup from the sale of Montobacco Ltd.’s assets.

[13] Mrs. Jemmotte-Rodney submitted that with knowledge of these matters, it was clear to the trial judge that the US\$147,661.64 paid by the Government to KRyS Global in 2019 was a loan in respect of fees to be received later as liquidation fees from the eventual sale of the companies. The implied term found by the court was with respect to the terms of repayment of the loan and was really the judge’s interpretation of what the parties meant by the Government “stepping into the shoes of the liquidator”. The judge found that this meant that upon the sale and the receipt by the liquidators of the funds which were to be applied to the costs and expenses of the liquidation, the US\$147,661.64, which represented the first part of the cost and expenses of the litigation, was to be repaid. The implied term accords with the reasonable bystander test.

[14] Additionally, Mrs. Jemmotte-Rodney submitted that it would not be thought by reasonable business people that a person would know that the liquidators proposed to receive their fees from the sale of assets, would then pay part of the liquidation fees and be invited by the liquidator to “step into the shoes of the liquidator” and not intend to recover the money at all. Further, reasonable business people would not expect that the party paying those fees would risk not recovering the lent funds due

to litigation expenses exceeding the company's assets, unless such a risk was clearly agreed upon.

- [15] In relation to the contention that the judge erred in ordering repayment by the appellants, Mrs. Jemmotte-Rodney submitted that any sums paid in respect of the liquidation were made to KRyS Global on the instructions of the liquidators. The liquidators are the principal and employee respectively of KRyS Global. Due to the liquidators' relationship with KRyS Global, the role played by KRyS Global in the proceedings below, and the surrounding circumstances, it should not be thought strange that the court would fix the liquidators with personal responsibility for the repayment of the funds. Furthermore, CPR 42.12 and 43.8 provides that a person who is not a party to a matter may be bound by the terms of the court order made therein and provide for enforcement of the court order against that person. The commonsense approach to this matter recognizes that the liquidators arranged for the fees of the liquidation to be received by KRyS Global; therefore, the liquidators should be responsible for repayment of the funds through the instrument of KRyS Global.

Discussion

- [16] The appeal is essentially based on two main contentions (i) the judge erred in fact and law regarding the implication of a term into an implied agreement between the joint liquidators and the Government, which has the effect of undermining the priority accorded to liquidators pursuant to section 457(4) of the Companies Act; and (ii) the judge erred in identifying who should be liable for repayment of the sum advanced by the Government to the joint liquidators as liquidators' fees.
- [17] Before turning to the law, however, I should briefly summarise how the issue of whether the Government should be repaid the sums it had advanced as part payment of the liquidators' fees became a live wire in the proceedings below.
- [18] At a hearing convened on 14th August 2020 for consideration of an application by two of the former directors of Montobacco Ltd., and an application by the joint

liquidators to close the liquidation, the judge posed a number of questions concerning the fees being sought by the joint liquidators, which totalled approximately US\$650,000.00. Having received confirmation that the Government had previously paid a total of US\$296,374.23 to KRyS Global comprising fees for inspection, Receiver-Manager and partial payment of joint liquidator fees, the judge posed the following question to counsel for the Government, Ms. Morgan:

“When it was agreed to underwrite the liquidators’ fees and we’re now looking at a circumstance where the fees are going to be more than twice as much as is raised by the liquidation itself, roughly speaking. What was it, if I may ask you, that persuaded you and Ms. James to persuade the local government to underwrite the liquidators’ fees so that all of this is being paid for potentially by the UK taxpayer...What made you think it was a good idea to underwrite the liquidators’ fees and create a local check(sic) book?”²

[19] Ms. Morgan answered as follows:

“Well, as I understand the discussions with the various persons who we reached out to, no one was going to do any work in any capacity on this matter unless they knew that the fees would be paid. There being the idea that potentially money had been put into the company and moved out through fraudulent means that there was the possibility that there was no money in the company. And all of those who made their estimates and said that they were willing to do the work, they say that they are not going to do it unless there was some understanding.”³

[20] The learned judge pressed the point:

“I want to know what thought was given by the Government of Montserrat as represented by the companies’ registrar and you as legal counsel to how the fees have increased to \$650,000 U.S. dollars beyond the \$112,000 which was discussed in July of 2018 and have been underwritten by the government to an open cheque book. I just want to understand how, what the thinking process was at the time the decision was made to underwrite against what was an asked for fee of \$112,000⁴ in July of 2018.”⁵

[21] Counsel answered in the following terms:

² Hearing Bundle Vol. 2, Part 2, p. 449, lines 5-10; 12 -13.

³ Hearing Bundle Vol. 2, Part 2, p. 449, lines 14 – 21.

⁴ This was for payment of the fees of Kenneth Kryss acting as Inspector and Receiver-Manager, and were to be paid by Montobacco, according to the Order dated 31st July 2018.

⁵ Hearing Bundle Vol. 2, Part 2, p. 450 lines 21 -25; p. 451 lines 1-4.

“Well, what I have been saying to the court is that we had a public duty to carry out. We had person (sic) in front of the registrar and in front of the court, I think that a company was set up to move money out, investors’ money out. There is a public interest in ensuring that things such as money laundering don’t go on. As it turned out, no money was actually moved in the way that was alleged but that was the allegation that was brought to us and we saw it as a public interest, a matter where inspection had to be done and then when the investigation was done in the public interest, that too had to be done. And the persons, every single firm that was contacted said that this was a condition.”⁶

[22] That answer did not seem to assuage the judge’s concern, and he expressed his thoughts candidly on the matter that seemed to be exercising him most:

“It is an extraordinary feature of this case that the cost of liquidation is going to be more than twice the amount of money that the liquidation has raised against Montobacco assets. So that all of what has been raised, I anticipate, will go first and foremost to the liquidator. And on top will come a further \$350,000 from the UK taxpayer, paying money as a budget to Montserrat. This isn’t money I anticipate is going to be raised by a tax revenue from the good people of Montserrat it’s going to be asked for from London. So it’s like you’ve opened a tap, which isn’t a tap of Montserrat, it’s a tap of London. And I want to know what thought was given to how much water was going to run through that tap.”⁷

[23] The issue relating to the liquidators’ fees was eventually adjourned to 17th August 2020 for further consideration. On that occasion, the Government resiled from the position seemingly indicated by Ms. Morgan that the Government had agreed to underwrite the liquidators’ fees. The true position was said to be that, as far as the Registrar of Companies was concerned, any fees due to the liquidators were expected to come from any assets realised from Montobacco. The judge was then in possession of affidavits filed by Dulcie James⁸ and the joint liquidators and email correspondence, all aimed at shedding light on what, if anything had been agreed in relation to the joint liquidators’ fees.

[24] Ms. James averred:

⁶ Hearing Bundle Vol. 2, Part 2, p. 451, lines 5 -14.

⁷ P. 451, lines 21 -25; p. 452, lines 1 - 6.

⁸ AHB, Vol.2, Part 1, p.245.

“6. There was an arrangement concerning fees that the Government of Montserrat would, if necessary, support the costs of the inspection. However, it was always understood that the fees for the liquidation would come out of the assets of the company.

7. The Government of Montserrat met the costs of the outstanding inspector's fees and the Receiver-Manager's fees and, at the time, met some [of] the cost of the joint liquidators' fees presented in 2019 as an advance part of the joint liquidators' fees as a retainer bearing in mind that the Companies Act makes provision for the liquidator to be paid out of the assets.

7. The payment for liquidator's fees was made with the understanding that at the winding up [of] the company the Government of Montserrat would stand in the shoes of the joint liquidators and be repaid from the assets. This was the result of discussions between the Governor, the Financial Secretary, and the Attorney-General.”⁹

[25] In view of this, the learned judge identified the four issues which he thought arose for resolution. He stated:

“I think we need to know what the position is (sic) Krys and Mitchell on what the Government of Montserrat agreed on and therefore whether or not they are expecting the extra 350,000 U.S. dollars to come from the Government of Montserrat. I think we need to know about that as part of the discussion and I decide whether there is nothing to do with me; it's between them and the Government of Montserrat but I think it needs to be on the table. I think we need to know what the position is. ...we'll set aside a substantial time so everybody can be heard on what has happened with regard to the fees and the liquidation of Montobacco...

First of all, I think we have to decide what is the relationship, the agreement, which has arisen between the joint liquidators and Government of Montserrat. Secondly, we have to decide whether that's any of my business. Thirdly, we have to decide whether all the monies which have been released by the liquidation of Montobacco inevitably it goes as fees to the liquidators. And fourthly, we have to decide whether that's my decision. Is it inevitable from the statutory framework the Companies Act that they take the money out of the, I think it's, is it section 457(4) or is it something that the Judge has to order?”¹⁰

⁹ Affidavit of Dulcie James filed on 17th August 2020 located at AHB, Vol.2, Part 1, p.245.

¹⁰ Vo. 2, Part 2, p. 539, lines 21-26; p. 540 lines 1-4.

[26] Those issues were eventually ventilated at a hearing conducted on 26th August 2020. For their part, the liquidators answered by affidavit sworn by Kenneth Krys filed on 24th August 2020.¹¹ Their position was that in January 2019, the registrar of companies (the “ROC”) requested a summary of the liquidators’ fees and expenses to date, together with an estimate of future costs to be incurred. The liquidators obliged. The ROC made further requests for detailed breakdown of tasks performed, At the same time, the ROC requested documentation in relation to the Inspector’s and Receiver-Manager’s costs and expenses incurred. The liquidators supplied the relevant invoices. Mr. Krys further averred:

“On 27 July 2019 the Registrar emailed me informing me that the Government had made a payment of “outstanding invoices”. The Government had made the decision to make a payment in respect of the Inspector’s and Receiver Manager’s fees and in addition the liquidator’s costs and expenses of the Company 888 International Limited and Emerald Metal co Limited as at 31 January 2019.”¹²

[27] Mr. Krys further averred that it was only after the liquidators provided an update to the Registrar on 30th June 2020 that they learnt for the first time on 7th July 2020 what the Registrar’s position was when she replied to their 30th June 2020 letter via email.

[28] The Registrar’s email stated, so far as is relevant:

“With regard (sic) the question as to whether the Government of Montserrat would wish to step into (sic) shoes of the Liquidators to seek payment of the fees paid to the Liquidators as a priority claim, we are of the view that the Liquidators should this is (sic) course of action.

As you are aware the Government of Montserrat has expended significant financial resources over this matter and is this (sic) of grave concern. In this matter, unless this course of action would have some negative impact, i.e., further court actions, please register the Government of Montserrat’s claim as a priority. This would go towards meeting the costs of liquidation. With regard to the question as to whether it is the intention of the Government to cover future liquidation fees and expenses, this is a matter that we would have to take (sic) the Financial Secretary. However, before we approach the Government with the question, could you please provide us with

¹¹ AHB, Vol.2, Part 1, p. 249-267.

¹² Paragraph 16 of the affidavit of Kenneth Melvin Krys filed on 24th August 2020 located at AHB, Vol.2, Part 1, page 252.

estimates of future fees and expenses. This will be a question that will be asked.”¹³

[29] There are quite a few typographical errors in the email, but I understand the Registrar to be saying that they would indeed like to step into the shoes of the liquidator and that the liquidators should register the Government’s claim as a priority claim.

[30] In this state of affairs, the judge determined that on the evidence there was an implied funding agreement between the Government and the liquidators, and that an implied term of that funding agreement was that the first US\$147,661.64 received should be paid to the Government to repay what he described as the “loan” of US\$147,661.64 in liquidation fees, which the Government had made. This implied term seems to have been derived from the underlined words (my emphasis) in the letter dated 30th June 2020 sent by Greig Mitchell on KRYs Global’s letterhead to the Registrar of Companies. The relevant paragraph reads:

“The receipt of the funds from the sale of the above assets means that the question raised in the Report¹⁴, whether the government of Montserrat will step into the shoes of the Liquidators to seek payment of the fees paid to the Liquidators as a priority claim, should now be addressed as a matter of urgency. The liquidators would also seek the Government of Montserrat’s intention as to whether it will cover future Liquidation fees and expenses. The result of these deliberations will determine whether or not there are any funds available for the creditors of Montobacco Limited and will also determine what process the Liquidators will pursue to close this Liquidation, that is whether or not to adjudicate the creditors’ claims and to distribute the assets to admitted creditors, and also how the Liquidators will deal with the Liquidations of the other entities, 888 International Limited and Emerald Metal Co Limited which at present have no assets to distribute.”¹⁵
[emphasis added]

Issue

[31] The central and determinative issue in this appeal is whether the judge erred in directing that the first US\$147,661.64 realised from the sale of the assets of

¹³ AHB, Vol.2, Part 1, p. 560.

¹⁴ See AHB, Vol.2, Part 1, p.103, para 9.1.1.

¹⁵ AHB, Vol.2, Part 1, p. 563-564.

Montobacco Ltd. be paid to the Government. Notwithstanding the undue focus the parties seem to have placed on principles of contract law in relation to implied terms, in my respectful view this issue falls to be resolved by the application of settled principles and practices of insolvency law. The starting point is section 457 of the Companies Act, which governs the order of payment out of the assets of a company on a winding up. So far as relevant, the section provides:

“Preferential payments

457. (1) In a winding up of a company there shall be paid in priority to all other debts—

(a) all rates, charges, taxes, assessments or impositions, whether imposed or made by the Government or by any public authority under the provisions of any Act, and having become due and payable within twelve months next before the relevant date;

(b) all wages or salary (whether or not earned wholly or in part by way of commission or for time or piece work) of any employee, not being a director, in respect of services rendered to the company during four months next before the relevant date; or

(c) all severance benefits, not exceeding the equivalent of forty five days basic wages or salary, due or accruing to an employee, not being a director, whether retrenched by an employer, a receiver, a liquidator or some other person.

(2) Where any payment on account of wages, salary or severance benefits has been made to any employee of a company out of money advanced by some person for that purpose, that person shall in a winding up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which that employee would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

(3) The debts and claims to which priority is given by subsection (1) shall—

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and paid accordingly out of any property comprised in or subject to that charge.

(4) Subject to the retention of such sums as are necessary for the costs and expenses of the winding up, the debts and claims to which priority is given by subsection (1) shall be discharged forthwith so far as the assets are sufficient to meet them.”

[32] These provisions set the order and priority of payment on a winding up, commonly referred to in insolvency jargon as “the waterfall”. When a company is wound up, those debts identified in sub section (1) must be paid before all others. However, this is subject to subsection (4), which mandates that after setting aside necessary amounts for winding up costs and expenses, the prioritised debts and claims listed in subsection (1) must be settled immediately, provided there are sufficient assets. This means that payment of the liquidation costs and expenses take priority. The liquidators’ fees form part of the costs and expenses of the winding up. This order of priority is a common feature of insolvency legislation throughout the Commonwealth and elsewhere.

[33] It is important to understand why such high priority is accorded to liquidators’ remuneration and expenses. A liquidator is an officer of the court and a fiduciary. Their role is not merely contractual but a matter of public duty. The remuneration is considered an expense of the winding up, which is essential because the liquidator is charged with securing, collecting, and realizing the company’s assets for the collective benefit of all creditors. Without this guarantee of payment, the insolvency system would fail. This guarantee of priority payment provides the incentive for liquidators to discharge this onerous public duty, thus enabling asset distribution to other creditors. Without their work, there would be no assets for distribution.

[34] It is precisely because the fees enjoy this highest priority that the Court has the primary, non-delegable power to set and approve a liquidator’s remuneration. The remuneration fixed by the court should be fair and reasonable for the work properly undertaken. The overriding requirement is that the liquidators must be reasonable and proportionate on an objective basis. This is the court’s mechanism to ensure the priority is not abused. The remuneration must be justified to prevent liquidators

from dissipating the very fund they are appointed to create. The necessity for priority is thus tempered by the necessity for rigorous judicial oversight.

[35] The parties do not differ in their understanding of the effect of the provisions of section 457 of the Companies Act. What the respondent says is that the judge's order does not violate the order of priority established by section 457 because it merely gave effect to the parties' agreement that the Government would 'step into the shoes of the liquidator.' I will address this assertion presently.

[36] Suffice it to say, based on the email correspondence and affidavit evidence adduced before the judge, it was common ground that there was no written agreement in relation to the liquidators' fees. It was also common ground that on or about 27th June 2019 the Government made a payment to KRyS Global in the sum of US\$296,374.23.¹⁶ Of this sum, US\$147,661.64 was allocated to partial payment of the liquidators' fees, which was for work already done. The Registrar's email to Mr. KryS clearly stated that the funds had been paid into his account as per his instructions. The obvious inference to be drawn from these facts was that there must have been an agreement that Government would pay these fees. It seems reasonably clear also that there was evidence before the judge from which he could properly infer that the Government intended to recover these sums so far as it related to the liquidators' fees. The Registrar's email of 7th July 2020 makes it clear that they wished the liquidators to register their claim for this sum as a priority claim. Indeed, I would go so far as to say that the liquidators were the ones to first float this idea in their interim report dated 24th February 2020¹⁷ when they introduced the metaphor of stepping into the shoes of the liquidators. They raised this again in their 30th June 2020 letter to the Registrar.¹⁸

¹⁶ Email from FSC to Kenneth KryS dated 27th June 2019; receipt of which was acknowledge by Kenneth KryS via email dated 2nd July 2019.

¹⁷ AHB, Vol.2, Part 1, p. 115 at para 9.1.1.

¹⁸ AHB, Vol.2, Part 1, p. 563-564.

[37] However, what emerged clearly from both sides – confirmed at the hearing of the appeal – was that there was no written agreement that the Government would recoup this money in priority to the liquidators' fees. This enquiry on 30th June 2020 was not the first time the liquidators posited the notion of 'stepping into the shoes of the liquidator.' They first did so in their Interim Report at paragraph 6.1.4:

“The Liquidators do not know whether the Government of Montserrat will step in the shoes of the liquidators to seek payment of the fees as a priority to the realized assets of Montobacco before unsecured creditors or will defuse such payment. The liquidators also have no knowledge whether the Government of Montserrat intends to cover future liquidators fees and expenses. Depending on the Government of Montserrat intentions in this regard, there may be assets available for distribution to creditors.”¹⁹
(emphasis added)

[38] This helps to shed light and provide context for their letter of 30th June 2020. Clearly, according to what was said in the interim report, any Government priority contemplated was in relation to unsecured creditors.

[39] In the letter of 30th June 2020 there was at the highest an enquiry from the liquidators as to whether the Government intended to step into the shoes of the liquidators in an effort to recover the sums advanced as part payment of the liquidators' fees. Pausing there, the inference to be drawn from the liquidators' query is that the liquidators were aware, or, at the least, had considered that the Government intended to recover these sums. The Registrar's response to that enquiry was to request that the liquidators 'register the Government of Montserrat's claim as a priority.'

[40] At the hearing below, Ms. Morgan explained to the judge that no claim was filed because the liquidators had advised the Registrar of Companies via email dated 28th July 2020 that it was not necessary for the Government to file a claim. At the appeal, the respondent sought leave to admit that email as part of the Record of Appeal. The appellants resisted the application. We admitted it de bene ese. We

¹⁹ AHB, Vol.2, Part 1, p. 113.

are satisfied that it is relevant to an important issue in the case, it was adverted to by Ms. Morgan in the Court below during the hearing, and a copy of it sent to the judge and counsel for the appellants after the hearing. The appellants are not taken by surprise or prejudiced by its admission in the appeal. Accordingly, we treat it as forming part of the Record of Appeal.

[41] The material part of that email stated:

“The claim that you indicated would be made for the payment of the Liquidators fees would not be a claim that you would enter as a creditor of Montobacco Limited. You indicated that you would wish to “step into the shoes of the liquidator” by make (sic) a subrogated claim for this payment. I would suggest that you send the joint liquidators a request on behalf of the government formally making this claim. If you need to discuss this please do not hesitate to contact me.”

[42] There are two problems with this arrangement even if it could be said that the liquidators and the Government had reached agreement on this course. The first is that if the meaning and effect of the email exchanges of 30th June 2020 and 7th July 2020, is that they are construed as constituting an agreement that the liquidators would be obliged to surrender the first US\$147,661.64 recovered to the Government, any such agreement would run afoul of the priority payments established by section 457(1) and (4) of the Companies Act. The idea that the first US\$147,661.64 recovered in liquidation must be paid to the Government for its advances of liquidators' fees lacks support from section 457's "waterfall" provision and from insolvency law principles. Such recovery would only be possible if the company's assets yielded enough funds to permit its recovery in whole or in part.

[43] The second problem is that if these exchanges mean, as the respondent contended on appeal, that the Government would take priority over other unsecured creditors, it encounters the Privy Council's forceful and emphatic dicta in **Attorney General v CL Financial Ltd (in liquidation)**²⁰ that Government enjoys no special status as a creditor on a winding up. In the Board's words:

²⁰ [2025] UKPC 41.

“In dealing with the Government as a creditor, the court and liquidators must treat it in the same way as other creditors. There is no basis in law for according a special position to the Government as a creditor.”²¹

[44] The judge’s interpretation that the Government ‘stepping into the shoes of the liquidator’ created an implied term granting the Government creditor status over KRyS Global, and thus repayment priority over the liquidators’ fees, is, with respect, misconceived. As an insolvency law concept, such a mechanism, whereby a third party “funder” or creditor ‘steps into the shoes of a liquidator’ on a winding up so as to take priority over the costs and expenses of the liquidation, is a legal fallacy. A liquidator is a court appointed officer with fiduciary responsibility. No person or creditor can simply step into the shoes of a liquidator and assume priority over other creditors. It makes no difference that the creditor is the Government as the Privy Council made clear in **Attorney General v CL Financial**.

[45] It is of course a common feature of insolvency that third party funders or existing creditors sometimes play an important role in facilitating asset recovery during insolvency proceedings by funding the liquidation. It is also not an uncommon feature of an insolvent winding up that there is likely to be insufficient assets to satisfy all creditors, so priority payment is critical. In these situations, a funding agreement is usually entered into which details the priority of distribution of any recovered money among the funder and the various classes of creditors. Such agreements are court sanctioned and the Court can then prioritize certain creditors for recovered property over other creditors on account of the risks they undertook in supporting the recovery through funding. The rationale for this is rooted in the public interest as explained in **Re Parkston Pty Ltd (in liq)**²².

“[T]he public interest in encouraging assistance to liquidators in funding difficult and expensive litigation should be vindicated by giving [a funding creditor] an advantage over other creditors which is just in consideration of the magnitude of risk assumed”.

²¹ Paragraph 24 of the judgment.

²² [2000] NSWSC 764, para 66.

- [46] However, it is to be noted that the priority obtained in such circumstances is over other creditors. No case was cited to us where a creditor, and an unsecured one at that, took priority over the liquidator's fees.
- [47] The Government must be taken to have assumed the risk that there might be insufficient assets to satisfy creditors as there was no guarantee given that recovery would yield sufficient assets to cover the costs and expenses of the winding up with surplus for distribution to creditors. Indeed, the liquidators' first interim report dated 24th February 2020 foreshadowed that the amount to be recovered was likely to be less than originally anticipated. The report stated that "the costs of the liquidation to date exceed the expected realization of assets. As is discussed below, the Government of Montserrat have paid a portion of the liquidators fees and expenses (including those of the inspector and receiver manager)"²³.
- [48] It is clear that the Government was actuated by its vested interest in seeing the liquidation through 'in the public interest', as stated in the winding up petition. That seems to be the reason they advanced money to partially fund the litigation fees and even the Inspector and Receiver-Manager fees, although the judge had ordered that the latter was to be recovered from the assets of the Companies. Having made a conscious choice to do so, despite knowing that the liquidators' fees were to be recovered from the assets of Montobacco in accordance with the Companies Act, the Government cannot be heard to complain if recovery of the funds they advanced is subjugated to the liquidators' fees.
- [49] In my view, having regard to all the circumstances discussed above, the order of priority of payment fell to be determined by the provisions of section 457(4) of the Companies Act, which accords priority to the costs and expenses of the winding up. This means that the liquidators' fees take priority. The learned judge therefore erred

²³ AHB, Vol.2, Part 1, p. 113 at paragraph 6.1.4.

when he ordered that the first US\$147,661.64 realised from Montobacco's assets be paid to the Government.

[50] The respondent's contention that this order did not breach the order of priority established by section 457 of the Companies Act is untenable. As it stood, the assets realised from Montobacco amounted to only US\$320,000 while the outstanding liquidators' fees was approximately US\$650,000. The liquidators would obviously suffer a shortfall in fees of US\$330,000. The practical effect of the order is to further reduce the fees recoverable by diverting US\$147,661.64 into the hands of the Government. In other words, the effect of the order is to accord priority payment to the Government over payment of the liquidators' fees, contrary to section 457(4) of the Companies Act, and indeed, priority over other creditors of Montobacco.

[51] Accordingly, I would uphold the appeal on ground 1, making it unnecessary to consider the second aspect of the appeal that challenges the Order requiring repayment by the liquidators.

Disposition

[52] The appeal is allowed. The respondent shall pay the appellants' costs to be assessed if not agreed within 21 days of the delivery of this judgment.

I concur.

Paula Gilford

Justice of Appeal [Ag.]

I concur.

Cadie St. Rose-Albertini

Justice of Appeal [Ag.]

By The Court

Chief Registrar