

BERMUDA SUPREME COURT

BNY AIS Nominees Limited, Gottex ABL (Cayman) Limited, Gottex ABI Master Fund Limited, Gottex Matrix Asset Focused Master Fund Limited, Hudson ABL Fund Limited, GVA ABL Portfolio Limited -v- New Stream Capital Fund Limited [2012] SC (Bda) 66 Civ

COMPANIES - SEGREGATED ACCOUNTS
COMPANY - COSTS - SECTION 18, 19 AND 20 OF
THE SEGREGATED ACCOUNTS ACT 2000 (THE
"ACT")

The Defendant in this case was New Stream Capital Fund Limited, a segregated accounts company ("the Company"). On 27 May 2010, a Judgment was delivered in favour of the Plaintiffs to this action which determined that a Receiver should be appointed in respect of two share classes of the Company (of which the Plaintiffs owned 100%). The Judgment awarded costs to the Plaintiffs to be taxed if not agreed on the standard basis. An 'Interim Declaratory Order' was then signed on 18 June 2010, which provided that Costs: "*were reserved, with liberty for the Plaintiffs to apply for costs in their favour, in the event that these are not agreed with the Defendant*".

The Plaintiffs subsequently issued a Summons for costs on 21 June 2012 with argument surrounding whom the costs order should be made against having regard to the fact that the Company is a segregated accounts company. The choices were between: a) the Company's (presumably illiquid) general account; or b) all or some of the Company's segregated accounts in which all of the Company's real value lies.

The Judge noted that the case called for an analysis of the central question of whether the liability for costs in relation to the litigation (unsuccessfully contested by the Company) may be said to be linked to one or more of the Company's segregated accounts. If this question is answered in the negative, then the Plaintiffs are only entitled to enforce the costs order to which they are entitled against the Company's general account. If the

costs liability is linked to one or more segregated accounts, a subsidiary question is whether the Plaintiffs' own accounts are liable to contribute to paying their own costs.

It was noted that the usual principle is that the assets of segregated accounts are protected from liabilities which are not linked to the relevant account. However, Counsel for the Plaintiff stated that the governing instruments of the Company contemplated that expenses incurred by the Company would be shared, *pro rata*, by all account owners unless the relevant expenses were only linked to one or more specific account and that the Directors were empowered, without being required to obtain Shareholder consent, to allocate liabilities among the various segregated accounts. In light of this, the Judge determined that whether the costs liability in respect of the present action was in fact linked to all, some or none of the segregated accounts ultimately turned on an analysis of the nature of the claims asserted in the litigation in question. In this respect the Judge held that the claims asserted by the Plaintiffs in the present action were linked to all of the Company's segregated accounts.

The Plaintiffs' Counsel further contended that any costs order should achieve the result that no costs should be levied against any interest owned by the Plaintiffs in a segregated account. However, the Joint Receivers submitted that if it were held that any costs order was enforceable against the assets in a

segregated account, the costs should be payable on a *pro rata* basis by all accounts (including the Plaintiffs' own segregated accounts). In particular, it was argued (by reference to Section 18(10) of the Act) that the Court had no jurisdiction to apportion liability within a segregated account.

The Judge held that the Plaintiffs costs were payable by the Company out of the assets of all segregated accounts on a *pro rata* basis, including (without any diminution) those accounts in which the Plaintiffs were beneficially interested. The Judge held that the Court has no jurisdiction, on the facts of the present case at least, to award costs in favour of the Plaintiffs by imposing a liability only on that portion of the accounts which they do not own outright. It was noted that only where liabilities are incurred which are not linked to any segregated account will the claim be enforceable solely against the company's general account.

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