IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2005 HCV 1267

IN THE MATTER OF DYOLL INSURANCE COMPANY LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACT 2004

AND

IN THE MATTER OF THE PRESCRIBED DEPOSIT UNDER SECTIONS 21 AND 59 OF THE INSURANCE ACT 2001

IN CHAMBERS

Miss Hilary Phillips QC and Miss Debbie Ann-Gordon instructed by Grant, Stewart, Phillips and Company for the Joint Liquidators

Mrs. Nicole Foster-Pusey and Mrs Symone Mayhew instructed by the Director of State Proceedings for the Financial Services Commission

Mr. Andre Earle and Miss Anna Gracie instructed by Rattray, Patterson and Rattray for the Committee of Inspection

Mr. Emile Leiba instructed by Myers, Fletcher and Gordon watching for Dyoll Group Limited

November 14, 15, 17 and 24, 2005

SECTIONS 21 AND 59 OF THE INSURANCE ACT, SECTION 139 OF THE BANKRUPTCY ACT, SECTION 310 OF THE COMPANIES ACT, HOTCHPOT AND PARI PASSU

Sykes J

The directions sought

1. A properly conducted insolvency operation seeks to avoid the realisation of this famous aphorism, "Its every man for himself and God for us all". The liquidator is expected, in an orderly manner, to realise all the assets of the insolvent company and apply them in discharge of the insolvent's debts in accordance with the statutory regime that governs the liquidation. At times, the situation is complicated because one may have two or more statutes that impinge on the liquidation. The case before me raises the issue of the interplay between the Bankruptcy Act 1914, Insurance Act 2001 and the Companies Act 2004. The joint liquidators have applied by a Notice of Application for Court Orders dated October 24, 2005, for directions on

> *[t]he manner in which the prescribed deposit under section 21 of the Insurance Act (the Act), should be applied pursuant to section 59 of the Act and whether the said deposit should be applied to the liquidation estate of Dyoll and be distributed pari passu to the claims of all unsecured creditors.*

2. In particular they wish to know whether the phrase *application made in Jamaica* in the statutory definition of *local policy* means that the application for the policy has to be made within the geographical boundaries of Jamaica or whether it includes an application made to an agent of an insurer registered under the Insurance Act if that agent is located outside of Jamaica.

3. The joint liquidators have devised a plan that according to them is fair and equitable. They say that if all the assets in Jamaica and the Cayman Islands are

pooled, and all creditors of whatever description are allowed to participate then each person would receive what is due to them on a pari passu basis. The plan is called a Cross-Border Insolvency Protocol. The purpose of the Protocol is to acknowledge that the Jamaican liquidation is the principal one while the one in the Cayman Island is ancillary to it. The joint liquidators wish to avoid, if possible, conflicting rulings by the Courts in Jamaica and the Cayman Islands. The protocol speaks of the Cayman assets being remitted to Jamaica less an amount the liquidators deem sufficient for purpose there. The joint liquidators say that deposits are held by the Financial Services Commission (FSC) (the Jamaican regulator) and the Cayman Island Monetary Authority (CIMA) (the Caymanian regulator). The intention, as I understand it, is to pool all the assets, excluding those subject to secured credit, for distribution pari passu to all the unsecured creditors. This pooling includes the prescribed deposit held by the FSC. To achieve this, the liquidators insist that the phrase *application made in Jamaica* as used in the definition of *local policy*, includes an application made to an overseas agent of an insurer registered in Jamaica.

How the insurance industry is regulated

4. To understand this matter fully a word must be said about the regulation of the insurance industry in Jamaica. This brief overview will place in perspective the role of the FSC in this liquidation and the importance of what is called the prescribed deposit. After the financial sector crisis of the 1990's, which saw quite a number of financial institutions becoming insolvent the Government of Jamaica, revamped the regulatory framework for the providers of financial services. In 2001 the Financial Services Commission Act (FSCA) came into force. Under that Act the FSC was established to inter alia, supervise and regulate prescribed financial institutions. By section 2 of the FSCA a prescribed financial institution means an institution or person offering or providing financial services to the public. Financial services in section 2 of the FSCA, means, so far as is relevant to this case, services provided or offered in connection with insurance. The link between the FSCA and the Insurance Act is established by sections 2 and 4 of the Insurance Act. Section 2 of the Insurance Act defines Commission to mean the Commission appointed under section 3 of the FSCA while

section 4 of the Insurance Act states that the Commission shall be responsible for the general administration of the Act. The FSC is therefore charged with the responsibility of regulating the insurance industry through the medium of the Insurance Act.

5. Under section 21 of the Insurance Act a company cannot be registered to carry on any class of insurance business unless it deposits with the FSC the prescribed deposit. Regulation 8, made pursuant to section 144 of the Insurance Act, speaks to a minimum deposit with the FSC by a registered insurer. Two minimum amounts are set. In respect of entities carrying life or sickness and health insurance the minimum is JA$90m and in respect of general insurance the minimum is JA$45m. Regulation 8(2) empowers the FSC to request an increase in the deposit either before or after granting the licence to such an amount as it considers necessary. Regulation 8 (3) permits the insurer to voluntarily increase its deposit above the minimum.

6. Section 51 (2) (b) authorises the FSC to present a petition to wind up an insurance company. The FSC utilised this power when it filed the petition for winding Dyoll. Mention must now be made of section 59 of the Insurance Act which states

> *Notwithstanding anything in this Act to the contrary, upon the winding up of an insurance company, all moneys and securities for the time being held as a deposit in respect of that company, under section 21 shall be delivered to the liquidator and shall be applied by him, in the first instance, in the discharge of the liabilities of the company in respect of local policies.*

7. On the face of it, it seems that if an insurance company is being wound up, the section is directing the liquidator to satisfy the liabilities in respect of the local policy holders out of a specific fund. What is the effect of this? Is it affected by the principles of pari passu and hotchpot? These questions must be resolved in order to give appropriate directions to the liquidators. It is now appropriate to set out the statutory definition of local policy, the interpretation of which is the all-important issue in this application.

8. Section 2 of the Insurance Act defines local policies thus:

> *local policy means a policy issued, whether in or outside Jamaica, by or on behalf of an insurer, upon an* ***application made in Jamaica*** *to an insurer, broker, sales representative or agent; and –*

(i) *includes a life insurance policy issued outside Jamaica at the request of the policy holder, which the policy holder has agreed in writing shall be treated as a local policy for the purposes of this Act; but*

(ii) *does not include a life insurance policy made payable, after the date of its issue, outside Jamaica at the request of the policyholder, which the policyholder has agreed in writing shall not be treated as a local policy for the purposes of this Act;* (My emphasis)

9. The same section 2 of the Insurance Act defines policy to mean insurance policy. I now express my initial observations without embarking upon the construction of *applications made in Jamaica.* Generally, an insurance policy refers to the written contract of insurance that sets out the details of the contract. It is well known that the proposer completes a proposal or application and submits it to the insurer who then decides whether it will accept the risk and on what terms. If the insurer accepts the risk and the proposer as well as the insurer agrees to the terms and conditions, including the payment of the premium, then the contract of insurance is concluded. It is important to note as well that all the persons listed in the definition of *local policy* to whom an application may be made are defined in the Act and all of them are required to be registered in Jamaica before they can operate lawfully in Jamaica. There is no requirement for registration in Jamaica under the Insurance Act of any agent overseas acting for and on behalf of any registered insurer in Jamaica. *Jamaica* is defined in the Interpretation Act. These three facts, stated in the three immediately preceding sentences, tend to show that the expression means that the application is to be made within the geographical boundaries of Jamaica.

10. Just as a matter of language it is clear that Parliament is not tying the definition of *local policy* to the nationality of the applicant or the country of origin of the insurer. The Act makes provision for foreign companies (a term defined in the Act) to operate in Jamaica and who can issue local policies as long as the application is made to them in Jamaica. This means that a person ordinarily resident in a foreign state and a

national of a third state may possess a *local policy* and a Jamaican who is resident in Jamaica may have a policy that is not a *local policy*.

The history of Dyoll, its operation in the Cayman Island and the impact of Hurricane Ivan

11. Dyoll was incorporated on October 8, 1964, under the Companies Act of Jamaica as a limited liability company. Its registered office is at 40 – 46 Knutsford Boulevard, Kingston 5, St. Andrew. It was registered in the Cayman Islands on July 11, 1972, as a foreign company under the Cayman Islands Companies Law.

12. The Insurance Act became law in December 2001. Section 21 requires a registered insurer to pay a prescribed deposit before it can operate in Jamaica. In August 2002, Dyoll deposited at least JA$45,000,000. Even though the evidence was not explicit on the point, it seems that Dyoll was required to make a deposit with CIMA before it could operate as an insurer in the Cayman Islands.

13. On or about September 1988 Dyoll entered into an agency agreement with Cayman Insurance Centre Limited (CIC). The agreement authorised CIC to write insurance on behalf of Dyoll without reference to Dyoll if those policies were below a particular figure. The document before me evidencing the agreement is undated and there is no evidence, oral or written, indicating the precise date of execution. There is a conflict between the written agreement and the affidavit of Mr. Lynford Reece on what the limit was. Mr. Reece's unchallenged evidence is that between 1985 and 2005, he was employed to Dyoll. When he departed in June 2005, he was the Senior Marketing Officer. He deposed in his affidavit dated October 31, 2005, that CIC acted as agents for Dyoll and was authorised to issue policies binding Dyoll. He says that up to March 2005 the limits were in respect of motor vehicle insurance, CI$50,000 and in respect of property insurance, US$1,000,000. There is no other evidence before me concerning the limits other than perhaps what I call interrogatories administered at CIC by Mr. Kenneth Krys, one of the joint liquidators. We do not know to whom Mr. Krys spoke and whether the person or persons had the knowledge required to enable to speak to this issue. Similarly, there is no accompanying evidence explaining when and where the agency agreement was executed. On the other hand, there is the

affidavit of Mr. Reece who speaks authoritatively. He had been with Dyoll twenty years and he was the Senior Marketing Officer. All this enables him to speak from personal knowledge. I prefer and accept his testimony on the point concerning the monetary limits placed on CIC by Dyoll. For these reasons also I accept Mr. Reece's evidence over the document on the question the number of times CIC would report to Dyoll. The affidavits of Mr. John Lee as far as they might indicate something different on these point are based on hearsay and unexplained documentation that qualitatively are inferior to the specific and personal knowledge of Mr. Reece.

14. CIC, according to Mr. Reece had authority to

a. receive proposals/applications for insurance from persons applying in the Cayman Islands;
b. advise whether it was accepting the risk;
c. advise the client and receive the premium;
d. issue cover notes and policies.

15. He added that on a monthly basis CIC was required to submit via bordereaux the following information:

a. risks accepted by CIC on Dyoll's behalf;
b. premiums collected by CIC;
c. claims paid and reserved during the specified period.

He insists that if coverage was required for a risk that exceeded the limits set by Dyoll below which CIC could operate without reference to Dyoll, CIC had to contact Dyoll's risk department. Dyoll would then arrange for reinsurance overseas. CIC could not bind Dyoll above the stated limits until the reinsurance was in place and when that was accomplished, CIC would be informed by Dyoll and thereafter CIC could accept the risk. CIC retained the proposal forms. It would send a summary to Dyoll.

16. There seems to be some conflict between Mr. John Lee, one of the joint provisional liquidators and the Executive Director of the FSC concerning the precise figure of the initial deposit made in August 2002 by Dyoll with the FSC. Mr. Wynter says that the deposit was JA$45.8m. He refers to a letter dated July 31, 2002, signed by Mrs. Catherine Parker-Thwaites, Chief Financial Officer of Dyoll. According to Mr. Lee, he has examined Dyoll's records which show the deposit is JA$45.3m. Indeed, he

says that the Dyoll's audited accounts dated March 31, 2004, record the deposit as $45m. No cross-examination took place on this factual conflict. I am unable to say whether the initial deposit was JA$45.3m or JA$45.8m. What I can conclude and so conclude is that it is at least JA$45m. The precise figure does not affect the determination of the case. Mr. Wynter was cross-examined but not on this area. The evidence he gave under cross-examination does not assist with the question for determination.

17. In September 2004, Hurricane Ivan blew into the Caribbean. It not only took lives but also severely damaged property in both Jamaica and the Cayman Islands - the two relevant countries for the purposes of this application. Dyoll Insurance Company Limited (Dyoll) insured property in both countries. Unsurprisingly, the damage of Hurricane Ivan precipitated insurance claims in Jamaica and the Cayman Island under insurance policies issued by Dyoll. Between September 2004 and late January to early February 2005, it became apparent that Dyoll would be hard pressed to make all the payments due under the various policies. In response to this possibility on February 15, 2005, FSC asked Dyoll to inject capital of not less than JA$375,000,000 by February 18, 2005 to meet the Minimum Asset Test of at least one hundred percent (100%). Dyoll failed to meet the increased capital requirements.

18. The continued anxiety of the FSC led it to request, by letter dated March 4, 2005, that Dyoll increase the prescribed deposit by JA$1,000,000,000. Dyoll responded by handing over the following to the FSC:

a. Securities denominated in Jamaican currency with a face value of JA$327,180,000;
b. Securities denominated in United States of America currency with a face value of US$600,000;
c. Euroletter with a face value of US$100,000;
d. Debentures totalling JA$575,260.

Other assets sent to the FSC, which proved unacceptable, were

e. Certificate of deposit denominated in Cayman dollars totalling CID$1,598,564.62 at face value;
f. Four Certificates of Title;

g. Five (5) sets of share certificates.

19. The descriptions of the assets just named were taken from the affidavit of Mr. Brian Wynter, the Executive Director of the FSC. It is dated October 31, 2005. It is not clear whether certificates of title were referring to land or some other form of property. I do not know what is meant by five sets of share certificates. Is it five certificates or is it five different sets with a set constituting more than one?

20. By March 7, 2005, the FSC took over the management of the insurance company temporarily. On the same day, Mr. Kenneth Tomlinson was appointed temporary manager. So parlous were the state of Dyoll's finances that within the first week of appointment the temporary manager recommended the sale of Dyoll's insurance portfolio. Grace, Kennedy & Company Limited purchased the portfolio on March 14, 2005. The bell had not only tolled for Dyoll but the last rites were not far off.

21. On May 5, 2005, the FSC petitioned the Supreme Court to wind up the affairs of Dyoll. Brooks J granted the petition on June 3, 2005. A meeting of creditors and contributors was held on June 28, 2005, at which Kenneth Krys and John Lee were nominated as Joint Liquidators. These two gentlemen were appointed as joint liquidators of Dyoll's Jamaican operation on August 18, 2005. They were also appointed joint liquidators of Dyoll's Cayman operations by the Grand Court on September 30, 2005. The Jamaican liquidation is the primary liquidation.

The law applicable to statutory interpretation

22. I shall start with an obvious principle. The judicial function is to interpret the law enacted by the legislature. It is no part of the judicial function to question why the legislature made a particular policy choice. This is what is implied by Viscount Dilhorne in ***Maunsell v Olins*** [1975] A.C. 373, at 384 D, when he said that the job of the courts is to interpret the sections according to the intent of them that made it and not to decide whether it was sensible or wise that a subtenant with a protected tenancy on a farm (in the context of that legislation) should be placed in the same position as a subtenant of a dwelling-house. There is good reason for this stance. Legislation, particularly in modern times, is usually the product of dialogue and consultation

between the legislators, advisors to the policy makers and stakeholders in the area to be affected by the legislation.

23. Lord O'Hagan expresses the same idea as Viscount Dilhorne, with pristine clarity in ***River Wear Commissioners v Adamson*** (1876-77) 2 App. Cas. 743, 756 where he said

> *Your Lordships, exercising your appellate jurisdiction, act as a Court of construction. You do not legislate but ascertain the purpose of the Legislature; and if you can discover what that purpose was, you are bound to enforce it, although you many not approve the motives from which it springs or the objects which it aims to accomplish.*

Lord O'Hagan maintained this view despite his jaundiced view of nineteenth century English Parliamentarians (see page 756). Some would say that his view applies to legislators wherever they may be found.

24. Lord Reid in ***Maunsell's*** case summed up the position accurately when he said that the rules of construction are not rules in the sense of having binding force but are merely aids to construction. One rule may point one way and another rule points another way. What the judge has to do is to look at all the circumstances and then decide what weight, as a matter of judgment, to give to any particular rule (see page 382 E).

25. Learned Queen's Counsel relied on certain passages of the dissenting judgment of Lord Simon of Glaisdale found at pages 391 – 392. I have considered those even though they are from a dissenting judgment because they correctly express the modern approach to statutory interpretation.

26. Viscount Simonds in ***Attorney General v HRH Prince Ernest Augustus of Hanover*** [1957] A.C. 436, 461 said that words and in particular general words derive their meaning from their context and so cannot be read in isolation. Therefore, according to the Viscount, the judge should examine every word of a statute in its context. Context for him meant the existing state of the law, other statutes in pari materia, the preamble and the mischief of the statute. I would add that Viscount Simonds added a salutary warning when he said (responding to the Attorney General's submission of the absurdity that would be arrived at if the words of the statute in that case were not restricted) that the Attorney General's submissions rested on two

assumptions. First, being that Parliament foresaw the eventuality that has occurred and second, would regard it as absurd (see page 461). This led Viscount Simonds to state, emphatically, that he rejected "the argument in favour of restricting [or expanding] the meaning of the enacting words so far as it is based on any other consideration than that of the words of the statute itself" (see page 461). I fear that the joint liquidators have ignored this warning and advice. Another point I wish to make here is that simply because a particular interpretation produces what some consider unpleasant is no basis for saying that the result is absurd.

27. Miss Phillips drank deeply from the words of Lord Blackburn in the ***River Wear*** case and urged upon me that I should adopt his analysis and methodology. In particular, he said that if a particular construction leads to an absurdity or inconvenience so great that which seems improper then the court should avoid that construction and adopt the one that seems consistent with reason. However, Lord Blackburn said "it is to be borne in mind that the office of the Judge is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious" (see page 764). Lord Blackburn had to have resort to some meaning other than the literal or primary meaning in the ***River Wear*** case because the section under consideration in that case proved unusually difficult to interpret. His Lordship said of the section and the statute at page 762 – 763

> *I do not think any other clause in the Act throws light on the construction of those section [i.e. the sections for interpretation]; nor do I think that the construction put upon these section will have any legitimate bearing on the construction of sections in other parts of the Act.*

28. What I gather from this is that if there are other sections in the statute that can shed light on the meaning of a section then a Judge should consider them in trying to determine the intention of Parliament. When Lord Blackburn's judgment is properly understood, it is obvious that he was not advocating any departure from the cardinal principles of interpretation. In the case before Lord Blackburn, the sections were, to use the language of computing, stand-alone sections that did not connect with other provisions in the Act. As I hope to be able to demonstrate that is not the situation here. The definition is used in other sections of the Insurance Act. This has assisted me towards the proper construction of the expression *local policy.*

29. At the risk of repetition, I say again that it is not the duty of the courts to become secret and unelected legislators by giving effect to its own notion of fairness under the guise of statutory interpretation. The judicial function is to glean the intention of Parliament from the whole Act and declare that intention. With these principles in mind, I now assess the submissions of eloquent Queen's Counsel.

Miss Phillips QC's submissions

30. Learned Queen's Counsel embarked on an intricate analysis of the statute in order to demonstrate that the phrase *application made in Jamaica* means a concluded agreement between the insurer and the proposer once the insurer is a company operating from or in Jamaica. In order to provide some traction for her submission Miss Phillips submitted that in the law of insolvency there are two fundamental principles. These are pari passu distribution among unsecured creditors and the hotchpot principle that is designed to prevent one or more creditors gobbling up more than their fair share of the estate.

31. Miss Phillips pointed to the "evils" that would result if a particular creditor were able to recover first from the deposit, second from the residue of Dyoll's estate in Jamaica and third in the Cayman Islands. She railed against the "inequity" that would result from restricting the meaning of *local policy* to mean a policy submitted within the geographical boundaries of Jamaica. Miss Phillips sought to reinforce her submissions by pointing out what she called the absurdities that would flow from a conclusion that *application made in Jamaica* means that the application has to be made within the geographical boundaries of Jamaica. She says that when one reads section 59 of the Insurance Act any interpretation that restricts the meaning to geographical boundaries could mean that a person from another country who was in Jamaica for a few hours could make an application in Jamaica and so fall within the definition of local policy but a Jamaican or person ordinarily resident in Jamaica who made an application to the overseas branch or agent in a foreign country in which a Jamaican registered insurer operated would not fall within the definition of local policy. This she said could not have been Parliament's intention because this position is absurd. This submission misses the point that the definition of local policy is not tied

to location of applicant, location of risk or nationality of the applicant or even for that matter whether the company is Jamaican or not. There is nothing inherently irrational with using the place where an application is submitted to determine the type of policy that is issued.

32. In response to questions from the court she pressed in to service sections 2 (2) (b) and 82(1) of the Insurance Act. She submitted that these provisions make it abundantly clear that *application made in Jamaica* could not mean making the application in the geographical boundaries of Jamaica. I shall set out section 2 (2) as far as is relevant.

> *For the purposes of this Act*
>
> *(a)....*
>
> *(b) any of the following activities effected in any manner by an unregistered insurer or any person acting with the actual or apparent authority of the insurer or on his behalf, shall be* ***deemed*** *to constitute the carrying on of insurance business in or from Jamaica –*
>
> > *(i)....*
> >
> > *(ii).....*
> >
> > *(iii) taking or receiving an application for insurance;*
> >
> > *(iv)...*
> >
> > *(v) issue or delivery in Jamaica of contracts of insurance to persons resident in Jamaica or authorised to do business in Jamaica;* (my emphasis)

Section 82 (1) says

> *An agent, a broker or sales representative shall, for the purpose of receiving any premium for a contract of insurance, be deemed to be the insurer's agent and, notwithstanding any condition or stipulations to the contrary, the registered insurer shall be deemed to have received any premium received by the agent, broker or sales representative.*

33. This is how the argument developed. Miss Phillips submitted that the effect of these provisions is that there is no geographical restriction on where the person who is doing any of the acts described in section 2 (2) (b). Receiving applications for a policy

of insurance is part of the business of insurance. One can receive application both inside and outside of Jamaica. Therefore, Parliament could not have intended to restrict the expression *applications made in Jamaica* to applications made within the geographical boundaries of the island. Miss Phillips then proceeded to apply her construction to the facts in this case in this way: the result of the deeming provisions is that CIC was carrying on insurance business for and on behalf of Dyoll. Therefore, the argument goes, what CIC did, Dyoll did. Dyoll is in Jamaica so CIC's acts were done in Jamaica with the result that the policies issued by CIC were issued upon applications made in Jamaica. My only response at this point is that I wonder why would Parliament direct us down the path to find this elaborate argument that Dyoll was carrying on insurance business in the Cayman Island through CIC when section 3 (2) covers the point. The section states that a body corporate incorporated under the Companies Act that carries on insurance business in any other country shall be deemed to be a company carrying on such business in Jamaica.

34. I profoundly disagree with all the submissions made by learned Queen's Counsel so far. In my view section 2 (2) is simply saying that an unregistered insurer who engages in any of the described acts is deemed to be carrying on insurance business even though it is unregistered. It also says that if any person doing any of the acts described with the actual or apparent authority of the unregistered insurer or on behalf of the unregistered insurer then that person on whose behalf the acts are done is deemed to be carrying on an insurance business. All that this does is to cast a wide net to catch persons who may wish to engage in insurance related activities without being registered who if questioned could simply say, "I am not issuing policies or assuming any risk. I am not engaging in insurance business". There may well be consequences that flow from the conclusion that the person is carrying on insurance business but, respectfully, that conclusion cannot and does not assist with interpreting *local policy*.

35. By applying ordinary rules of English grammar, I shall show that Miss Phillips' interpretation is not sustainable. The phrase *application made in Jamaica* can be analysed in this way, *in* is a preposition establishing the relationship between the noun *application* and the pronoun *Jamaica. In Jamaica* is a prepositional phrase indicating

where the application is made. The expression *made in Jamaica* qualifies the noun *application.* The words *made in Jamaica* are functioning like an adjective telling or if one prefers, qualifying *application.* It is not just any *application* but an *application* which is made in Jamaica. Miss Phillips' interpretation requires one to delete the words *made in Jamaica.* On a close reading the relative pronoun *which* and the verb *is,* though not stated, are understood, so that the expression could properly read, *application which is made in Jamaica.* The phrase *upon an application made in Jamaica* is a conditional prepositional phrase that is linked to the subject of the definition, *local policy.* It expresses the condition that makes the policy a local one. *Jamaica* is a geographical expression that is defined in the Interpretation Act which in turn draws up on the Jamaica Independence Act of 1962. Section 4 of the Jamaica Independence Act 1962 says that Jamaica includes the islands known as Morant Cays and Pedro Cays and any other territories which at the passing of this Act are dependencies of the Colony of Jamaica but does not included the Cayman Islands or the Turks and Caicos Islands.

36. If one takes the whole definition and with a bit of rewriting this is what it is saying: a local policy

a. may be issued in or outside of Jamaica;
b. may be issued by or on behalf of an insurer;
c. is issued upon an application; but
d. must be applied for in Jamaica to
    (i) an insurer registered in Jamaica; or
    (ii) a broker registered in Jamaica; or
    (iii) a sales representative registered in Jamaica; or
    (iv) an agent registered in Jamaica.

In the case of life insurance policies, a policy issued outside of Jamaica at the request of the policy holder shall be treated like a local policy for the purposes of this Act if the policy holder agrees in writing but does not include a life insurance policy made payable outside of Jamaica at the request of the policy holder, after the date of issue, which the policy holder has agreed in writing shall not be treated as a local policy for the purposes of this Act.

37. The difficulty with Miss Phillips' argument is that, one could have arrived at her definition by simply saying any policy issued pursuant to an application made to an insurer registered in Jamaica, whether or not the application is made within the geographical boundaries of Jamaica, is a local policy. If this is what Parliament intended, why didn't Parliament say so? That would have been much easier than leaving the courts to embark upon a labyrinthine and tortuous route to end up at a position that could have been established by much easier phraseology. While this is not necessarily conclusive and I appreciate that in some contexts an elaborate analysis is required, I have seen nothing in the Insurance Act that would cause me to think that there is some reason why Parliament would have buried its intention so deep that the meaning of *application made in Jamaica* could only be unearthed by Miss Phillips' interpretation. Parliament must be taken to know that companies operate in different countries. Section 3 (2) of the Act bears this out. I say this to say that when one is looking at a statute and the interpretation advanced is contrary to the ordinary meaning of the words and there is no reason to be found in the statute to depart from the plain meaning, that is usually a good indication that the unusual meaning is not the one intended by Parliament.

38. Mrs. Foster-Pusey made the point, which I accept, that there is nothing inherently wrong with Parliament singling out any particular group of unsecured creditors for special treatment. She submitted that this has been done in other countries that subscribe to the pari passu and hotchpot principles. One of the judgments to which I shall refer extensively later has passages that indicate this (see Richards J in ***McMahon v McGrath*** [2005] EWHC 2125 (Ch) (delivered October 7, 2005). In his long and thorough judgment, Richards J referred to legislative regimes in Australia, the United States of America and recent developments in England and Wales that give priority to some unsecured creditors. In some cases the legislative regime directed the preferred class of unsecured creditors to a specific asset. These regimes all relate to insurance companies. This shows that there is nothing intrinsically wrong if the Jamaican Parliament chooses to exercise its powers to give priority to local policy holders. Indeed it may well be that it is because it is recognised that all unsecured

creditor may not benefit from the estate of the wound up company just by applying the well established insolvency principles why Parliament has seen it fit to intervene.

39. I shall look to see if there is anything in the Act that suggests that the plain meaning ought to be rejected. The expression *local policy* or its plural form *local policies* appears seven times in the entire legislation. Other than in the definition section the words *local policy* appear at sections 26 (7) and 129 (1). The plural *local policies* appears five times. These are section 29 (a) and (b), 51 (6), 59 and 89 (1).

40. These provisions strongly suggest that the definition of *local policy* means the application must be made within the geographical boundaries of Jamaica. Section 26 (7) requires an insurer liable under a *local policy* to make the last audited financial statements available to the policy holder and furnish him with a copy if the policy holder requests. If *local policy* meant, as Queen's Counsel has submitted, a policy issued by a Jamaican registered insurer regardless of where the application is made all section 26 (7) needed to have said was that the insurer shall make financial statements available to any policy holder up on request.

41. Section 129 (1) makes Jamaican law applicable to every contract of insurance evidenced by a *local policy*. This section is one of the strongest yet that point in the direction that the application must be made in Jamaica. This section is directed at resolving a conflict of laws issue of which law would be applicable to insurance contracts. Parliament was using a criterion that is obviously territorially based as distinct from one based on nationality or any other criterion.

42. Sections 29 (a), (b) and 89 (1) require the keeping of a register in Jamaica of a record of all *local policies* issued by a registered insurer, registered broker or corporate agent respectively. Section 51(6) states that a company referred to in section 51 includes a company that is no longer registered but remains liable in respect of *local policies*. Again, if *local policies* had the meaning contended for by Miss Phillips defining local policies in the manner done would have been unnecessary. Why not say all policies issued by insurance companies need to be kept in the manner indicated by the Act?

43. What Miss Phillips has done is to interpret the definition out of existence. Miss Phillips' submissions in effect mean all policies issued by an insurer registered under

the Insurance Act are local policies. It is a cardinal principle of statutory interpretation that if Parliament, on the face of it, intends to establish a restricted class, any interpretation that in effect removes the restriction is likely to be incorrect.

44. Miss Phillips then made what I shall call the prudent regulator submission. It goes like this: *local policy* has to be interpreted in the way proposed by her because the purpose of the statute is to enhance and promote safe, sound and prudent management of insurance companies. She said it is known that insurers registered in Jamaica operate overseas. The implication, for the prudent regulator, in this case the FSC, is that it must be taken to be aware of the fact that there is nothing in the Act that prohibits a registered insurer from operating overseas. If a Jamaican registered insurer operates overseas, accepts risks through agency arrangements where the application is not made within the geographical boundaries of Jamaica, this would mean that the potential exposure of the insurance company could be increased without the necessity for the applications to be made within the geographical boundaries of Jamaica. The prudent regulator, the argument goes, is not to prefer any group of policy holders to another. That is to say, the prudent regulator in oversight of the insurance industry cannot say to himself, "I shall look out more for the interest of those policy holders whose applications were made in Jamaica's geographical boundaries". The prudent regulator is concerned with all risks assumed by the insurer. It is said, by her, that where the insurer accepts the risk from overseas through an agent operating outside of Jamaica, the Jamaican registered insurer's liabilities increase and this fact alone would be of interest to the prudent regulator. Therefore, such policies are *local policy* because the ultimate responsibility for the risk is the insurer in Jamaica. It is for this reason why *application made in Jamaica* must mean where the risk is located and not where the application is geographically made.

45. Miss Phillips submitted that an application made in Jamaica is not concluded until the risk is accepted. If it were otherwise, she says, then it would mean that a "mere proposal" is given a significance that it would not ordinarily have and it would be absurd to attach such weight to a "mere proposal" (for that is what an application in its ordinary meaning is) in the context of the Insurance Act. She added that no liability on the part of the insurer arises unless and until a contract is concluded.

Consequently, *application made in Jamaica* could not possibly mean simply submitting the application within the geographical boundaries of Jamaica but must mean something more.

46. The prudent regulator submission by Queen's Counsel proves too much. It falls under its own weight. The ease of saying, a *local policy* is any policy issued pursuant to a risk accepted by an insurer registered in Jamaica proves that Parliament could not have intended the meaning divined by Queen's Counsel.

47. A sub-argument of the prudent regulator submission is this: to interpret *local policy* in the way proposed by the FSC would unfairly discriminate between persons who happen to make the application in Jamaica and those who did not. The distinction is arbitrary. To understand the submission I must refer to section 59 of the Insurance Act. It will be recalled that it says that the prescribed deposit shall be applied in the first instance to discharge the liabilities of local policy holders. It is true that regulators are required to be prudent but prudential regulation has nothing to do with who gets what first in an insolvency. No well thinking regulator wants to see failures of regulated entities on his watch but insolvencies do happen, have happened and will continue to happen. This is the free market equivalent of Charles Darwin's, survival of the fittest. The policy choices made by Parliament for distribution of an insolvent's estate is not a matter for the regulator.

48. Miss Phillips then made her final effort to cross her Red Sea to get to the Promised Land. She said that the Companies Act (section 310) and the Bankruptcy Act (section 139) enshrine what she calls the fundamental principle of pari passu. She also relies on the principle of hotchpot. Parliament, it is said, still expects these principles to apply to insolvent insurance companies. If this is so then I should as far as possible strive for an interpretation that keeps those principles in tact. This submission over states the case. It is true that the provisions in the Bankruptcy and Companies Acts speak to pari passu and the order of payment from the insolvent's estate but that is no reason to massage the words of a statute to defeat the intention of the law makers.

49. The reasons put forward by Queen's Counsel why I should not give the words *application made in Jamaica* their ordinary meaning have ultimately failed to convince me and so I decline to accept her interpretation. I find that the words mean that

which has been advanced by Mrs. Foster-Pusey, namely, that the application has to be made within the geographical boundaries of Jamaica.

The interpretation of section 59 of the Insurance Act and its interaction with section 310 of the Companies Act and section 139 of the Bankruptcy Act

50. Section 59 has already been set out above. I now proceed to say what I believe it means. It is vital to note that section 59 does not say that the local policy holders are secured creditors. Secured creditors who wish to realise their security may do so without fear of being unable to prove in the insolvency should the security not satisfy the debt in full. This conclusion necessarily leads to a further conclusion that the hotchpot principle does not apply to secured creditors who after realising their security wish to prove in the insolvency (see ***Cleaver and Another v. Delta American Reinsurance Co (In Liquidation)*** [2001] 2 A.C. 328). The basis for this is that the secured property does not form part of the debtor's estate.

51. It is my opinion that Parliament must know that there are two classes of creditors in an insolvency, the secured and the unsecured. The secured creditor, for reasons already mentioned, in the normal course of things, will not have sleepless nights if his debtor becomes insolvent. The unsecured creditors look to the estate for satisfaction of their debts. It is the rare insolvency that satisfies all the debts owed to the unsecured creditors. It is not unknown that many unsecured creditors go away empty handed. Policy holders of insurance companies are unsecured creditors. If Parliament wanted **all policy holders** and not just local policy holders to benefit from the prescribed deposit section 59 would have been worded differently. The Insurance Act would have simply said, the liquidators shall apply the prescribed deposit, in the first instance, to meeting the liabilities of all policy holders. What Queen's Counsel, wants to do is to get to this position, not by virtue of the words of the legislation but by an appeal to the suggested tribulations that may result if I do not adopt her interpretation. This submission is a breach of Viscount Simonds admonition in ***HRH Prince Ernest Augustus*** that only the words of the statute should determine whether words are given a restricted or expanded meaning.

52. The fact that a statute provides that a part of a debtor's estate is to be used in favour of a particular class of unsecured creditors does not necessarily mean that the legislature was equating that class of creditors with a secured creditor. To conclude that this specific class of unsecured creditors is like a secured creditor should not be readily made unless, of course, the words of the statute compel that conclusion either by saying so expressly or by unavoidable implication. Unless the court proceeds in a careful step by step analysis in the analogy, there is the ever present danger of serious errors of analysis with consequential faulty conclusions.

53. Barrett J in ***HIH Casualty & General Insurance Ltd*** [2005] NSWSC 240 (delivered March 29, 2005) in examining the Australian scheme for winding up insolvent insurance companies came to the conclusion that the class of unsecured creditors protected by the Australian legislation had the effect of giving them a charge over the ring-fenced assets. Mrs. Foster-Pusey submitted that since section 59 of the Insurance Act in Jamaica ring-fenced the prescribed deposit there might be a case for following Barrett J's analytical framework. As I have already stated I cannot come to this position unless the words of the statute direct that conclusion. The implication of this would be, as I understand it, that the local policy holders would be able to prove with the other unsecured creditors in Dyoll's estate if the prescribed deposit does not satisfy them in full and like secured creditors hotchpot would not apply to them.

54. Queen's Counsel on the other hand submitted that I should say

a. local policy holders are unsecured creditors;
b. that the prescribed deposit forms part of Dyoll's estate and should be held for the depositors as a whole;
c. the local policy holder are placed at the head of the queue when distributions are made

55. According to Miss Phillips unless I adopt this approach the following "ills" would result: (a) it would provide a precedent for the Cayman Courts and (b) the Caymanian creditors would receive a much higher pay out than the Jamaican creditors.

56. Queen's Counsel has strongly urged that I adopt the approach of Richards J in ***McMahon v McGrath*** [2005] EWHC 2125 (Ch) (October 7, 2005). She submitted that Richards J's judgment demonstrates how ingrained in English insolvency the pari passu

principle is. She submits that Jamaican law is the same on this point. Consequently, I should not interpret section 59 in such a manner to diminish the effect of that sacred principle. This submission requires an analysis of both cases which unfortunately will prolong this judgment longer than I had anticipated. If I may say so respectfully, learned Queen's Counsel is giving pari passu a controlling influence over a legislatively determined order of priority that is unwarranted. Pari passu rests upon the equitable maxim that equality is equity. I shall show that Richards J was giving effect to the English statutory regime and that regime did not give any class of unsecured creditor preference over the others. Further I shall show that at the time when the issues in ***McMahon*** came before Richards J England did not have a special regime applicable to insurance companies. He pointed out that the position has now changed because of a Directive applying in the European Union that requires all member states to adopt either of the two insolvency schemes set out in the Directive.

57. The submissions of Queen's Counsel raise the seemingly intractable problem of cross border insolvency operations. It is this concern I believe has driven Miss Phillips to approach the matter in the way that she did. She is attempting to achieve judicially what is properly the function of Parliament.

58. Having read some of the cases including Sir Richard Scott Vice Chancellor's judgment in ***In re Bank of Credit and Commerce International S.A. (No. 10)*** [1997] A.C. 212 I have concluded the following:

a. cross border insolvencies increase costs with possible consequential reduction in the estate available for distribution;
b. English courts proceed on the theory that their orders regarding the distribution of the insolvent's estate take effect worldwide although it is recognised that their effectiveness overseas will in large measure be determined by the willingness of foreign courts to recognise and give effect to these orders;
c. if the principal liquidation is taking place overseas the English courts as far as possible cooperate with the foreign court;
d. English courts have ordered the transfer of assets located in England to the foreign state;

e. there is a number of factors that the English courts take into account when deciding whether to transfer assets overseas.

f. one of the factors is whether the foreign insolvency procedures will allow creditors (I deliberately avoid the term English creditors) who would be entitled to prove in the insolvency in England to prove in the same manner taking into account the principles which would have applied in England of which pari passu is one;

g. if the foreign state permits this then the case would be an appropriate one for remitting the assets in England to the overseas jurisdiction. The effect of this is that the assets would be going to a country where a creditor entitled to prove in England would be operating under, more or less, the same conditions he would have been operating in England had he been proving in England. The Courts of Equity seemed to have concluded that if this were so, then they would not insist on the creditor proving in England and then going overseas to prove his debt with the attendant increase in costs with no readily apparent advantage.

59. This review shows that the primary concern of the English courts is whether the English scheme would be applied in the overseas insolvency. This means that if English law gave preference to any unsecured creditor, as it now does in relation to insurance companies, any decision to transfer of assets overseas would have to take this into account.

60. The learned judge made it clear in his judgment the English law applicable to the case before him had no provision similar to section 562A of the Australian Corporations Act (see ***McMahon*** at para 49) and neither were there special provisions applicable to insolvent insurers which would affect the priority of ordinary debts and principles of pari passu distribution (see ***McMahon*** at para 50). His Lordship noted that there is now in place the *Insurers (Reorganisation and Winding up) Regulations 2004 (SI 2004/353)* which replaced an earlier Regulation both of which were designed to implement Directive 2001/17/EC of the European Parliament and of the Council of March 19, 2001. It is significant to note that paragraph 23 of the recital to the

Directive encapsulates the underlying principle in these words (see ***McMahon*** at para 50):

> *It is of the utmost importance that insured persons, policy-holders, beneficiaries and any injured party having a direct right of action against the insurance undertaking on a claim arising from insurance operations be protected in winding up proceeding... In order to achieve this objective Member States should ensure special treatment for insurance creditors according to one of two optional methods provided for in this Directive. Member states may choose between granting insurance claims absolute precedence over any other claim with respect to assets representing the technical provisions or granting insurance claims a special rank which may only be preceded by claims on salaries, social security, taxes and rights in rem over the whole assets of the insurance undertaking.*

61. According to Richard J, the United Kingdom adopted the second method. He noted that the priority provisions of the Regulation would have applied had the liquidators been appointed on or after April 20, 2003. This suggests to me that had the ***McMahon*** case been subject to the Regulation the claims, which were insurance claims, would have been given a special rank. This only serves to reinforce the point that at the end of the day Judges have to apply the statutory regime enacted by the legislature. Judges have no power to search for abstract notions of cosmic justice and apply that notion in the name of fairness and equity. Richards J puts it well when he said at paragraph 89

> *The experience of BCCI illustrates that there are limits to what courts can achieve. Necessarily this is so, because they are bound by the legislative framework in which they operate, as shown by decision of both the English and Luxembourg courts. The statutory framework in which the English courts make little concession to these international considerations, with the limited exception of section 426, and the courts have developed some flexibility within the confines of that framework.*

62. The conclusion then is that Judges have to give effect to Parliamentary priority choices in an insolvency. The pari passu principle does not and cannot control this choice. This would be giving the pari passu principle a power it has never had. What pari passu can do and which I have applied in this case is determine the basis of the distribution among the preferred class of unsecured creditors in the absence of legislative directions on this point.

63. Section 59 of the Insurance Act is a specific statute and to that extent effect must be given to it notwithstanding anything said in the Companies Act 2004, which is

a general Act applying to all companies. Section 59 demands that when an insurance company is being wound up the prescribed deposit shall be delivered to the liquidator. After the liquidator receives this money, he is not free to use it as he sees fit. The Act restricts him. In the first instance, he must apply it to discharge the liabilities of the insurance company in respect of local policies. The statute does not say that this is the only use to which the deposit can be put, but it must be the first use to which it is put. This means that I do not accept Queen's Counsel's submission that the effect of the section is simply to place the local policy holders at the head of the queue. What learned Queen's Counsel is suggesting is that the prescribed deposit forms part of the estate and from the whole estate the local policy holders are paid first. The effect of this interpretation would be to deny the intention of Parliament. What Parliament has said is that the local policy holders are the first ones to be paid out of the prescribed deposit not that they are to be the first of all unsecured creditors to be paid. Parliament has given the local policy holders priority in respect of the prescribed deposit. This is what the liquidator must do. To this extent the deposit is ring fenced and set apart, first, for the local policy holders. It seems to me that the liquidator can only use the deposit for other liabilities or debts if and only if either (a) there are no holders of local policies or (b) the deposit has met the full liabilities in respect local policy holders and there is an excess. It follows from this that the liquidator is to attempt to meet the liabilities in respect of the local policy holders in full from the prescribed deposit. If the liabilities are all met then the issue of whether the local policy holders can look to the rest of the estate does not arise.

64. What I have said so far does not indicate whether there is any priority among the local policy holders as a distinct class of creditors. The Insurance Act is silent on the matter. So too are the Companies and Bankruptcy Acts. None of these Acts states whether the exhaustion of the prescribed deposit without all the liabilities being met means that the local policy holders can look to the residue and if they can whether they have to bring in to hotchpot what they received from the prescribed deposit. These are serious gaps in the legislation that ought to be addressed so that everyone is clear on what happens in the event that the local policy holders are not satisfied out

of the prescribed deposit. Be that as it may the question is, what if the prescribed deposit is insufficient to meet the liabilities of local policy holders?

65. Before answering this question I need to say whether I accept Mrs. Foster-Pusey's submission that I should adopt the analytical framework of Barrett J and look at the local policy holder as if he was akin to a secured creditor with some of what that implies. This requires that I conclude my analysis of the judgment of Barrett J in ***HIH Casualty & General*** that I began earlier.

66. The reason why Barrett concluded at paragraph 100 of his judgment that the effect of section 562A of the Australian Corporations Act (Cth) was akin to a secured creditor is, to use his words, "a statutory provision which, in a winding up, requires a particular class of claims to be met out of a particular property in priority to all claims not within the class might be regarded as creating a charge or have the effect of a charge upon the property." He continued at paragraph 101 by saying that "the creditor with the claim thus preferred ... [may] ... be regarded as the equivalent of (or, at least, analogous) that occupied by a creditor with a debt secured by a charge upon that asset." His Honour concludes at paragraph 102 and 103

> ***102.*** *For reasons I have stated, a s. 562A case bears a much closer conceptual similarity to the situation where a secured creditor realises the security and, that after that source of satisfaction is exhausted, joins with the unsecured creditors generally in seeking the balance of the debt from the common pool.*
>
> ***103.*** *I therefore accept and endorse the conclusion of Windeyer J that the balance of a proved debt covered by s. 562A that remains after exhaustion of the net insurance recoveries applicable to that proved debt "should be treated in a conceptually similar way to a secured creditor under s 554E", so that the balance is "treated proportionately with all other creditors in accordance with s. 555 of the Act".*

67. It was this reasoning that led Barrett J to conclude that the hotchpot principle did not apply to an insolvency of an insurance company in Australia, bearing in mind what is said below about hotchpot. It seems to me as well that section 562A (6) of the Australian Corporations Act (Cth) also influenced the decision of Barrett J. Section 562A (6) that stated that if a receipt of payment under section 562A only partially discharges the liability nothing affects the rights of the person in respect of the balance of the liability. The wording of the provision suggests that it was placed to

answer the questions, what if the preferred unsecured creditors have only received partial satisfaction? Are they at liberty to prove along with the other creditors? If yes, do they wait for the others to receive a distribution up to what they received? The question for me is whether I can come to the same conclusion despite the absence of the equivalent of section 562A (6).

68. I would say that we have arrived at a similar position in Jamaica in respect of the prescribed deposit despite the absence of the equivalent of section 562A of the Australian Corporations Act. I have come to this conclusion for the following reasons:

a. the insurer's ability to use the deposit is restricted. It is not available to the insurer to use as he sees fit;
b. the Insurance Act gives the local policy holders first claim on the deposit in the event of an insolvency;
c. the claim to the deposit by local policy holders arises by operation of law;
d. there is no outright transfer of the deposit to the FSC but it is held to be used in quite specific ways if certain eventualities come to pass;
e. the deposit only becomes available for other creditors after the liabilities in respect of local policy holders have been met in full and a balance is left;
f. there is no indication that the local policy holders are barred from proving for the balance owed to them. I hesitate to say that the local policy holders are barred from proving for any balance owed to them because in law they are still unsecured creditors albeit creditors with priority in respect of the prescribed deposit.

69. It would seem to me that if Parliament has given priority to a specific group of unsecured creditors without at the same time limiting their rights as unsecured creditors in relation to the rest of the estate, a court should be slow to find that they are barred from proving for any unpaid balance due to them. Miss Phillips wishes to limit my conclusion at paragraph 68 (f) by relying on the hotchpot principle. In essence, the principle states that if a creditor recovers in an overseas insolvency and he wishes to claim in an English insolvency then he must bring in to account that which he received overseas. No authority has been presented to me that shows that the principle applies to recoveries under the law of one country.

70. At paragraph 17 of ***Cleaver*** Lord Scott of Foscote said this of the hotchpot principle

> *The authorities establish the principle that if a company is being wound up in an English liquidation and also in a liquidation in a foreign country, a creditor who has proved and received a dividend in the foreign liquidation may not receive a dividend in the English liquidation without bringing into hotchpot his foreign dividend.*

71. From the research done in the time available, the term hotchpot when used in the world of insolvency seems to have acquired a specific understanding. I could not help but note that each time Lord Scott was describing the principle he kept referring to an English insolvency and an overseas insolvency in relation to the same company. This suggests that the principle does not arise in insolvencies unless there is liquidation in at least two countries and the creditor has recovered part of his debt overseas and is seeking to prove in the English insolvency. This is so even if the estate is regarded as a single one (see Lord Justice James in ***Ex parte Wilson, In re Douglas*** [1872] 7 L.R. Ch. App. 490, 492).

72. In ***McMahon*** Richards J noted at paragraphs 164 and 165 of his judgment that Barrett J held that the priority created by section 562A of the Australian Corporations Act is more like a charge than a proof in winding up. Richards J then goes on to say that "statutory provisions for the administration and distribution of particular classes of assets in a liquidation do not create a security over those assets for the purposes of English law of hotchpot" (para. 165). Miss Phillips sought to rely on this to deflect my conclusion that the local policy holders were similar to secured creditors in respect of the prescribed deposit. However, Richards J could only have meant that the creditor who benefited under the Australian insolvency who wished to prove in England was subject to hotchpot principles and not the other way round. I have looked at the case of ***Selkrig v Davies*** 2 Dow 231, 3 ER 848 cited by Lord Scott of Foscote in ***Cleaver***. The reported version of the case I read is different from that cited in ***Cleaver*** but the effect of the passage I am about to cite is the same. The Lord Chancellor is reported as saying at 3 ER 854 - 855

> *But independent of other considerations, if a Scotch creditor thought proper to come in under an English commission, he was to be considered, to all intents and purposes, as an English creditor who must deliver up, for the benefit of the*

general creditors, all securities for his debt before he could be permitted to prove. If an English creditor attached the bankrupt's property abroad, he must account to the assignees. This did not rest merely on the principle of equality in the distribution, but on the ground that the law passed the property. The assignees said, "If you claim anything here, you shall not keep for your own exclusive use what you have got by force of law of another country." If he refused at all on these terms, the Chancellor could not compel him to do so.

73. This passage is consistent with all the insolvency cases I have seen in which the term hotchpot is used, namely, that there is a foreign insolvency and a domestic insolvency. The creditor proves in the foreign insolvency and now wishes to prove in the local insolvency. Applying this understanding to this case, the local policy holders would not have recovered because of the law of an overseas country but by virtue of Jamaican law. This being so there is nothing to prevent them still proving under Jamaican law to recover any amount outstanding if the prescribed deposit has been exhausted without full settlement. I therefore conclude that the hotchpot principle does not apply on the specific facts before me. That is to say I conclude that a local policy holder who remains unsatisfied out of the prescribed deposit does not have to bring into hotchpot what he received from the prescribed deposit.

74. There is nothing in the Insurance Act, the Companies Act and the Bankruptcy Act that prescribes any order for the satisfaction of the liabilities of local policy holders when they are being paid out of the prescribed deposit. The law does not say what is the ranking of debts of local policy holders as between themselves. I conclude that the intention of Parliament is that as many local policy holders as possible should look to the prescribed deposit. This is best achieved, in the absence of legislation, on the basis that all local policy holders rank equally and none has priority of the other in respect of the prescribed deposit.

75. I conclude by noting that Professor Roy Goode, that eminent academic, observed in this text, ***Commercial Law*** (3rd ed) (2004) Penguin Books, at page 833-834, "the principle of pari passu distribution which has been a feature of bankruptcy law... since 1542 has been gravely diminished,... by a massive expansion of the range of debts made preferential by statute."

76. I have not forgotten the submission made by Mr. Earle on behalf of the Committee of Inspection but he abandoned his written submissions and aligned

himself to the vision of Queen's Counsel on the interpretation of local policy as well as the hotchpot and pari passu principles. He made independent submissions on the effect of section 2 (2) (b) of the Insurance Act. Those submissions were quite similar in effect and scope as those advanced by Miss Phillips. I have already indicated my views on the effect of that section.

77. Before stating my conclusions I must express my gratitude to all counsel in this matter who made my job easier because of their research, care and skill displayed in the presentation of both oral and written submissions. This enabled the judgment to be delivered within a relatively short time.

78. Mr. Gregory Bell, a member of the Committee of Inspection, also filed an affidavit. The matters addressed by him do not affect my decision which was largely one of law.

Conclusions

79. Local policy in section 2 of the Insurance Act means that the application for insurance must be made within the geographical boundaries of the island as defined in the Interpretation Act. Any application made within the geographical boundaries of another country is not an application made in Jamaica. It follows therefore that the prescribed deposit when in the hands of the liquidator **must (not may)** first be applied to the discharge of the liabilities of the company in respect of local policies. The local policy holders as between themselves in respect of the prescribed deposit rank equally.

80. If the local policy holders are completely satisfied from the deposit then the balance, if any, can be used as part of the estate to satisfy the other creditors. If the deposit is exhausted and the local policy holders are not fully satisfied they may still prove in the insolvency but at this point they rank equally with the other creditors.

81. I invite counsel to submit, after consultation with each other, a draft order for approval. Each party to bear its own costs. Leave to appeal granted to the joint liquidators.