IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. HCV 1267 OF 2005

(NO. 2)

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

AND

IN THE MATTER OF SECTIONS 206 AND 241 OF THE COMPANIES ACT, 2004

AND

IN THE MATTER OF THE COMPANIES ACT

IN CHAMBERS

Debbie-Ann Gordon and Ivally McDonald instructed by Debbie-Ann Gordon and Associates for the Joint Liquidators

Symone Mayhew instructed by the Director of State Proceedings for the Financial Services Commission

Miss Ingrid Pusey for the Financial Services Commission

FEBRUARY 5 and 16, 2007

APPLICATION FOR APPROVAL OF COMPROMISE, WHETHER ONE GROUP OF CREDITORS SHOULD BE SUMMONED TO THE MEETING, PRESCRIBED DEPOSIT UNDER SECTION 21 OF THE INSURANCE ACT

SYKES J.

1. In the previous application I delivered judgment on August 3, 2006. The relevant statutory provisions as well as the applicable legal principles were cited in that judgment and shall not be repeated here. The joint liquidators have renewed their application and provided more information that I had on the last occasion. This application is supported by the affidavit of Mr. Lancelot Thomas. I should point out that Mr. Wilfred Baghaloo, Mr. John Lee and Mr. John Dean of the joint liquidators were in attendance and provided valuable information.

The compromise

2. The major terms of the compromise are:

   a. The original deposit, that is the JA$45,300,000.00, be treated as a deposit within the meaning of section 21 of the Insurance Act and be distributed among the local policy holders only.

   b. The additional deposit, that is JA$330,000,000.00, be treated as falling among the general assets of the Company and be distributed amongst all creditors generally.

   c. A consent order of this honourable court be entered between the Committee of Inspection and the liquidators approving this compromise and thereafter accordingly, Suit HCV 5223 of 2005, the application for judicial review will be withdrawn by agreement.

   d. That all the costs, charges and expenses of and incidental to the negotiations for and preparations of this compromise or scheme and of carrying the same into effect shall be borne by the company.

   e. The liquidators and the Committee of Inspection may consent to any modification or addition to this compromise which the court may think fit to approve or impose.

The affidavit

3. Mr. Lancelot Thomas in his affidavit dated January 29, 2007, stated that he is an agent of the joint liquidators of Dyoll Insurance Company Limited (In Liquidation) ("Dyoll") and is authorised to swear the affidavit. He then provides information which I shall summarise and supplement with the information provided by Messieurs Lee and Baghaloo. I should indicate that the figure representing the additional deposit stated above may have to be revised in light of the information below.

4. I wish to make it clear that the figures are approximations. These figures should not be used as reflecting the final outcome of this liquidation. The approximations, however, are valuable so far as they assist in determining whether there should be meetings of creditor, the number of meetings and the composition of the meeting.

5. It is now accepted that the prescribed deposit paid by Dyoll to the Financial Services Commission ("FSC") when it was granted its licence, under the Insurance Act, to sell insurance to the public was JA$45,300,000.00. This deposit was required by section 21 of the Insurance Act. According to section 59 of the said Act the prescribed deposit is ring-fenced for the use, first, of local policy holders. The

significance of the prescribed deposit and its importance in the insolvency of an insurance company is stated in greater detail in my judgment of November 24, 2005. For ease of understanding, I shall summarise the effect of that decision. On November 24, 2005, I held that local policy holders (an expression used in the Insurance Act) had first claim in the prescribed deposit to the exclusion of other creditors. It was only if the liabilities to the local policy holders were met then the residue of the prescribed deposit would be available to meet the liabilities of other creditors. The expression, *local policy holder*, does not mean Jamaican policy holders. It means those persons who submitted their applications within the geographical boundaries of Jamaica whether they are Jamaicans or not. This too was covered in the November 24, 2005. I need to reiterate this because there has been much unnecessary angst caused by using the expression, *Jamaican policy holders* as a synonym for *local policy holders*. This liquidation is not about nationality but about applying the law of Jamaica to an insolvency that is taking place primarily in Jamaica. It has nothing to do with pitting Jamaican nationals against any other nationality. The law applies to both sets of person equally.

6. In my November 24, 2005, judgment I stated that the FSC had the statutory authority to request Dyoll to increase the size of its prescribed deposit. Dyoll responded by producing to the FSC:

   a. securities denominated in Jamaican currency totaling JA$327,180,000.00;
   b. securities denominated in United States currency totaling US$600,000.00;
   c. Eurobond letter with a value of US$100,000.00;
   d. Certificates of deposit denominated in Cayman dollars totaling CID$1,598,564.62.

7. I understand from Mrs. Mayhew that the FSC does not regard the 6 (d) above as forming part of the prescribed deposit because those certificates were put to the Cayman Island regulators as part of the prescribed deposit that an insurer operating in the Cayman Island is required to give to the Cayman Island Monetary Authority.

8. I understand from Mr. John Lee that the security denominated in United States currency and the Eurobond are not fixed in value. What I have stated is the face value. The values fluctuate. As of the date of the hearing of this matter both together were valued at approximately US$842,985.00. However, using an exchange rate of JA$62.18:US$1.00, the Jamaican equivalent is approximately JA$43,429,324.66. I should add that the current value of the Jamaican securities listed at paragraph 6 (a) above is JA$261,000,000.00. I am not to be taken as indicating my agreement that the exchange rate used is correct. I simply state it as the exchange rate used by the joint liquidators.

9. If one adds all the securities listed at paragraph 6 one gets, in Jamaican currency, JA$305,429,324.66. This represents the additional prescribed deposit and if the original prescribed deposit of JA$45,300,000.00 is added to this figure the total prescribed deposit is JA$350,729,324.66.

10. I should mention that there is a legal challenge to the decision of the FSC increasing the prescribed deposit. I make no pronouncement on the legality or validity of this action by the FSC. Suffice it to say, until the decision is set aside it has to be regarded as a lawful exercise of power by the FSC.

Is there one class?

11. The test used to determine the number of classes is stated in ***Re Hawk Insurance Company*** [2002] B.C.C. 300. The test is whether the rights of the creditors are so dissimilar that they could not properly consider the proposed compromise if all attended one meeting. If yes, then one does not have a single compromise but a number of compromises as they are groups of creditors. The question of whether there is one compromise or several required an examination of the rights which are to be given up or varied under the compromise and those right which are to be substituted by the compromise. In the words of Lord Justice Chadwick at paragraph 30:

> *In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied. It is in the light of that analysis that the test formulated by Bowen LJ in order to determine which creditors fall into a separate class-that is to say, that a class 'must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'-has to be applied.*

12. When Chadwick L.J. speaks of rights it is important to understand that he is speaking about rights against the company. The authority for this is a judgment of Lord Millet while sitting as a judge of the Hong Kong Court of Final Appeal. This judgment was cited by Lewison J. in ***In the Matter of British Aviation Insurance Company Ltd*** [2006] B.C.C. 14. At paragraph 64 Lewison J. cites the following passage from Lord Millet:

> *In Re UDL Holdings Limited [2002] 1 HKC 172, 184 Lord Millett, sitting as a Judge of the Court of Final Appeal in Hong Kong, gave an overview of the court's approach as follows:*
>
> *(1) It is the responsibility of the company putting forward the Scheme to decide whether to summon a single meeting or more than one meeting. If the meeting or meetings are improperly constituted, objection should be taken on the application for sanction and the company bears the risk that the application will be dismissed.*
>
> *(2) Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting.*

(3) The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings.

(4) The question is whether the rights which are to be released or varied under the Scheme or the new rights which the Scheme gives in their place are so different that the Scheme must be treated as a compromise or arrangement with more than one class.

(5) The Court has no jurisdiction to sanction a Scheme which does not have the approval of the requisite majority of creditors voting at meetings properly constituted in accordance with these principles. Even if it has jurisdiction to sanction a Scheme, however, the Court is not bound to do so.

(6) The Court will decline to sanction a Scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected the views of the creditors concerned. To this end it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question.

13. Lord Millet's passage speaks of rights against the company. The local policy holders in this case do not have a right against the company. What they have is a right to the prescribed deposit. This right is conferred by section 59 of the Insurance Act. The local policy holders are unsecured creditors and in the normal course of things the right they would have is a right to prove in the insolvency. The right they now have is similar to that of secured creditors. In all the cases that I have examined to date, none has examined a situation in which a statute has intervened and created rights for unsecured creditor which they would not normally have.

14. It would seem to me, on principle, that the local policy holders, in respect of the prescribed deposit, should be treated as if they were secured creditors. If I were to take another view, then the intention of Parliament as reflected in section 59 of the Insurance Act would be frustrated. I therefore agree with Mrs. Mayhew when she says that the situation created by the Insurance Act, means that the interests of the local policy holders are sufficiently dissimilar to the interest of the other unsecured creditors. Miss Gordon submitted that the rights of the local policy holders and other unsecured creditors should be treated the same way, that is to say, they should have equal access to the additional prescribed without any priority being given to the local policy holders. This view does not give sufficient recognition to the fact that Parliament has altered the insolvency law in relation to insurance companies and has

created a special right for one group and not for others. That is the prerogative of Parliament; it can prefer whom it wishes and ignore whom it chooses to ignore.

15. Under analysis, the right that the local policy holders would be giving up is a right to considerably larger prescribed deposit than JA$45,300,000.00. The new right is a right to the JA$45,300,000.00 alone while the additional prescribed deposit. The other unsecured creditors would not be giving up any right because the FSC's decision stands until it is set aside. These creditors would be gaining an enlarged estate from which their liabilities would be satisfied. Thus on the face of it, it is the local policy holders who are giving up something of substantial value. The question then is, are these interests so dissimilar that it would be impossible for them to consult together with the other unsecured creditors with a view to their common interest?

16. I turn to the judgment of Lord Justice Bowen observed in ***Sovereign Life Assurance v Dodd*** [1892] 2 Q.B. 573, 582-583 to answer the last posed question:

> *It makes the majority of the creditors or of a class of creditors bind the minority; it exercises a most formidable compulsion upon dissentient, or would-be dissentient, creditors; and it therefore requires to be construed with care, so as not to place in the hands of some of the creditors the means and opportunity of forcing dissentients to do that which it is unreasonable to require them to do, or of making a mere jest of the interests of the minority. If we are to construe the section as it is suggested on behalf of the plaintiffs it ought to be construed, we should be holding that a class of policy-holders whose interests are uncertain may by a mere majority in value override the interests of those who have nothing to do with futurity, and whose rights have been already ascertained. It is obvious that these two sets of interests are inconsistent, and that those whose policies are still current are deeply interested in sacrificing the interests of those whose policies have matured. They are bound by no community of interest, and their claims are not capable of being ascertained by any common system of valuation. Are we, then, justified in so construing the Act of Parliament as to include these persons in one class? The word "class" is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.*

17. The case in which the Lord Justice said these words was one in which one of the creditors had an insurance policy that had matured and the other policy holders' policies had not. The Court of Appeal held that the policy holder with the matured policy had a different interest from the others and so in an insolvency should have

been called to a different meeting. The passage from the Lord Justice indicated caution on the question of classes. If summoned to one meeting when they ought to have been in a different meeting there is the risk, depending on the actual facts of the case, that those who have much to gain by a particular decision may use their majority in number and value to override the rights of those who might lose much. Bowen L.J. was therefore alive to the necessity to ensure that not only meetings were called but that each meeting was constituted of the proper class lest there was the tyranny of the majority. This is the underlying reason why in many of the cases, issues are fought over the composition of the meetings. The warning of Bowen L.J. has to be bourne in mind despite the liberating test developed by Chadwick L.J. in ***Hawk's*** case. It seems to me that there is a risk that the local policy holders if placed in the same meeting with other unsecured creditors may face confiscation of their rights to larger pool of funds. The role of the court at this stage is not to consider the merits of the scheme. My role is simply to decide whether the creditors should be called to a meeting and if so, whether there is more than one class. Matters of fairness or otherwise of the proposed scheme can be considered at the third stage when the court is asked to sanction the decision of the meeting, assuming the creditors approve the scheme.

18. The current legal position is that other unsecured creditors have no claim on the prescribed deposit unless the local policy holders are paid first and a residue is left. Applying the test laid down by Chadwick L.J. in ***Re Hawk Insurance Company*** [2002] B.C.C. 300, I conclude that the rights of the local policy holders and the other unsecured creditors are sufficiently dissimilar and therefore, they cannot be in one meeting.

19. There is the further issue of whether there should be one meeting or more meetings. I have come to the conclusion that there should be one meeting and that meeting should comprise the local policy holders alone. My reasons are as follows. The other unsecured creditors have no right to the prescribed policy and under the compromise the other unsecured creditors are not giving up any right. Indeed they have no right to the prescribed deposit at all. I therefore see no reason why there should be a meeting of these creditors. I cannot, at this point, see any utility in depleting the estate by requiring a meeting of the other unsecured creditors when those creditors have nothing to lose under the proposed compromise. In fact, they stand to gain if the local policy holders approve the compromise but would lose nothing if the compromise is rejected. To put it another way, the other unsecured creditor's position do not improve if the compromise is rejected.

20. I have been provided with the approximate costs of holding meetings. These costs are based on the first meeting of creditors held on July 28, 2005. The joint liquidators have made allowances for inflation. The figures I am about to give do not have a figure for legal fees. This is undesirable. The creditors must know this information if they are going to make an informed decision. The previous application suffered from this defect which has not been remedied. The cost of the meeting for local policy holders alone is US$13,010.00. The cost of the meeting of other creditors alone is US$16,774.00. The combined meeting costs US$23,777.00. These totals include the

costs of rental of venue, media advertisement (print and electronic), refreshments, traveling and accommodation for the joint liquidators and the committee of inspection and administration of the voting process. Included in the totals are incidental costs security for the venue, stationery and such like. I have taken these figures into account and also the need to dispense with unnecessary expenditure from the estate.

21. I am aware that at this stage I am not required to consider in too great detail the merits of the compromise. That consideration arises at the third stage.

Conclusion

22. Based on the information provided I would direct that only meeting be held. The members of this class are the local policy holders. In giving this direction I would strongly suggest that the joint liquidator go through the list of creditors to ensure that possible creditor issues are brought to the attention of the court so that they can be resolved rather than have them arise at the third stage when much money and time would have been spent, possibly in vain. I have in mind the possibility of sub-groups within the two broad groups I have outlined. This is in keeping with paragraph four of the Practice Statement issued by Vice Chancellor Morritt at [2002] 1 W.L.R. 1345 The joint liquidators are to prepare a meetings order for approval in accordance with these directions. The legal fees should be included in the information presented to the local policy holders.