

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2005 HCV 1267

In the matter of Dyoll Insurance
Company Limited.

And

In the matter of the Companies Act
2004

BETWEEN FINANCIAL SERVICES COMMISSION PETITIONER
A N D DYOLL INSURANCE COMPANY LIMITED RESPONDENT

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

Mr. Andre Earle and Miss Anna Gracie instructed by Messrs Rattray,
Patterson and Rattray for Panton Realty Ltd. a creditor.

Mr. Dave Garcia and Miss Tricia Gaye Watson instructed by Messrs Myers
Fletcher & Gordon for Dyoll Group Ltd. a contributor.

Mr. Allan Wood and Miss Daniella Gentles instructed by Messrs Livingston
Alexander and Levy for Kenneth Kryss and Christopher Stride, provisional
liquidators appointed by the Grand Court of the Cayman Islands.

Heard: 1st & 3rd June, 2005

Brooks, J.

In September 2004 Hurricane 'Ivan' devastated major portions of the
Cayman Islands and badly affected Jamaica as well. It was a wind that blew
ill for Dyoll Insurance Company Limited (the company), which had insured
a number of the properties affected by the hurricane.

The result of the extensive damage done was that policyholders were left with unsettled claims as the company lacked the financial base to settle all the claims made against it. The Financial Services Commission ('the Commission'), as part of its public duty, therefore intervened, appointed a temporary manager, ascertained that the company was unable to pay its debts and applied to the court for the company to be wound up. Its petition to wind-up the company was presented on 5th May 2005. This is the hearing of that petition.

None of the entities that have entered appearances to this petition to wind-up have opposed the application. The twist is that Panton Realty Limited one of the insured/creditors has applied for other parties to be appointed as provisional liquidators along with the Trustee in Bankruptcy ('the Trustee') to whom the appointment would automatically fall pursuant to the Companies Act.

The Commission has opposed the latter application as being improper as a matter of law. The issue for the court to determine is whether any other person may be appointed, upon a winding up order being made, as provisional liquidator either along with or instead of the Trustee.

Authority to apply

The Commission is authorized to petition the court to wind up the company if the value of the company's assets is substantially less than the amount of its liabilities. (See Section 8 (5) of the Financial Services Commission Act.)

In its petition the Commission alleges that the value of the company's assets is \$583,568,666.00 while its liabilities amount to \$2,160,968,906.00. On this allegation the requirement is clearly met to allow the presentation of the petition.

Mrs. Foster-Pusey for the Commission also sought to rely on Section 51 of the Insurance Act. This allows the Court to order the winding-up of an insurance company upon the petition of the Commission.

The appointment of a provisional liquidator

Section 236 (1) (a) provides that upon a winding up order being made the Trustee shall, by virtue of his office, become the provisional liquidator. He is to so act until he or another person becomes the liquidator. The issue raised by the two contending submissions is to be resolved by an interpretation of Sections 235 and 236 of the Companies Act.

The former section states as follows:

“235.-(1) Subject to the provisions of this section, the Court may appoint a liquidator provisionally at any time after the presentation

of a winding up petition, and either the Trustee or any other fit person may be appointed.

(2) Where a liquidator is provisionally appointed by the Court, the Court may limit and restrict his powers by the order appointing him.” (emphasis mine)

On the face of it the answer seems clear; that the court may appoint any person (including the Trustee) as the provisional liquidator at any time after the presentation of the winding-up petition.

Mrs. Foster-Pusey however submits that Section 235 must be read in the context of Section 236 (1) and particularly paragraph (a) of that subsection.

It reads:

“ 236. -(1) The following provisions with respect to liquidators shall have effect on a winding up order being made-

(a) the Trustee shall by virtue of his office become the provisional liquidator and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such;... ”
(emphasis mine)

She submits that upon the grant of the winding-up order the only person that the Act contemplates to perform as a provisional liquidator is the Trustee. Put another way, the effect of her submission is that the court’s power to appoint a provisional liquidator arises upon the presentation of a winding up petition and ceases upon the grant of a winding up order.

She relied, as authority for the submission, on the cases of In re North Wales Gunpowder Company [1892] 2 Q.B. 220 and In re John Reid and Sons Ltd. [1900] 2 Q.B. 634. In both those cases the United Kingdom Court of Appeal set aside the appointment by a lower court of a provisional liquidator other than the Official Receiver (the legislative counterpart of the Trustee) as being without authority.

Mr. Earle disagrees with Mrs. Foster-Pusey; he submits that Section 235 is not expressed to be subject in any way to Section 236, that indeed there is no restriction placed on the court in Section 235.

Mr. Earle went on to submit that the provisions on which the cases referred to above relied, were different from our legislation in an important respect.

He referred to Section 4 (5) of the Companies (Winding Up) Act 1890 (on which these cases were based) and submitted that because the subsection in that Act is framed thus:

“The official receiver may be appointed by the Court provisional liquidator of the company at any time after the presentation of the petition, and before a winding up order has been made” (emphasis mine)

the difference clearly distinguishes the English position from our legislation.

Mr. Earle went on to submit that Panton Realty Limited (Panton), which he represents, does not wish to oust the involvement of the Trustee; it wishes the Trustee to be involved. He submits however, that the peculiar nature of the company's operation as it affects both the Cayman Islands and Jamaica requires special attention. He further alluded to the fact that the Trustee may well benefit from having the proposed individuals as joint provisional liquidators, based on their experience in the insurance industry.

I do not agree with Mr. Earle's interpretation. I find that the words "and before a winding up order has been made" must be read into section 235 (1).

I find that Section 236 (a) is expressed in mandatory terms. The word "shall" appears thrice in the relevant portion cited above.

If the legislature stipulates that the Trustee shall be the provisional liquidator upon a winding up order being made, an appointment by the court of any other person to that post would result in a conflict. Which would have the authority, the court appointed official or that appointed by Parliament? The result would be unseemly.

I also find that Section 236 (1) (a) does not permit for a joint appointment with the Trustee. Parliament has designated the Trustee, and only the Trustee, to perform the function.

It is not without significance that the Act, in several places, refers to where “ a winding up order has been made, or a provisional liquidator has been appointed” (See SS. 229, 232 (1) & (8), 233.)

The framework is such that it is not expected that a provisional liquidator be appointed upon the grant of a winding up order.

The alternative to reading in the words as I have proposed, is to read into Section 236 (1) (a), the words, “subject to any other order of the court” or words with similar intent. I find that if Parliament intended to give the court that power it would have expressly so stated.

In the event that I am wrong in my interpretation of this section, I shall look at the effect of acceding to Panton’s application.

The main duties of the provisional liquidator is to take into custody the property of the company and to summon separate meetings of creditors and contributors to determine whether an application ought to be made to have a liquidator, and, if necessary, a committee of inspection, appointed.

It was pointed out In Re North Wales Gunpowder (supra) that in that country a provisional liquidator’s tenure would normally be for a very short time, and indeed “(u)nder ordinary circumstances, the court would not think of appointing a provisional liquidator....”.

I find that the duties and tenure described, do not justify the appointment of three joint liquidators. The cost, effort and necessary collaboration do not justify it. Mr. Earle expressed a concern that certain actions have been taken by the temporary manager, which raise questions, and any delay may be to the prejudice of the creditors.

The answer to that submission is that upon the appointment of the provisional liquidator taking effect the temporary manager would no longer have any authority other than that expressly given by the provisional liquidator, who would then be accountable to the court.

I raised with both Mrs. Foster-Pusey and Mr. Earle the matter of the liquidator being appointed simultaneously with the winding up order being made. There was some hesitation by both, with Mr. Earle indicating that perhaps the other contributors and creditors should be canvassed in that regard.

Although I have been presented with the credentials and proposal of both Mr. John Lee of Price Waterhouse Coopers and of Mr. Krys, I have no benchmark to guide me as to whether the fees quoted by the former are reasonable or justifiable in the circumstances.

I therefore shall not make any appointment of a liquidator at this stage, but will allow the creditors and contributors to collaborate on that matter.

Conclusion

I find that upon a winding up order being made section 236 (1) (a) precludes the appointment of any person other than the Trustee as the provisional liquidator of the company. I further find that even if section 235 did authorize such an appointment upon a winding up order being made, the cost of having additional persons being so appointed has not been justified on the evidence before me.

I shall allow the meetings of the creditors and contributors to make the recommendations for the appointment of a liquidator other than the Trustee. The order, therefore, is that:

1. Dyoll Insurance Company Limited be wound up by this court pursuant to the provisions of the Companies Act 2004.
2. The costs of the Financial Services Commission, Panton Realty Limited, Dyoll Group Limited, and Kenneth Krys and Christopher Stride, of this petition be paid from the assets of the company. The said costs are to be taxed.

3. The Trustee in Bankruptcy shall within thirty days of the date hereof, convene the meetings of the creditors and the contributors of the company for, among other things, the purpose of appointing a liquidator.
4. The Financial Services Commission shall deliver to Messrs. Krys and Stride, within seven days of the date hereof, a copy of the report which it has provided to the Trustee in Bankruptcy.
5. Liberty to apply
6. The Financial Services Commission is hereby released from the requirement to hold the sum of \$100,000.00 on account of Dyoll Insurance Company Limited as security for costs as was ordered by Pusey J. (Ag.) on 2nd May 2005.