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3308 of 2003

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 22nd July 2003

BEFORE:

MR JUSTICE LLOYD

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PAN ATLANTIC INSURANCE COMPANY LIMITED
APPLICANT

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(Official Shorthand Writer's to the Court)

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MR GABRIEL MOSS Q.C. () appeared on behalf of the APPLICANT

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J U D G M E N T

MR JUSTICE LLOYD:

1. This is a petition for the sanctioning of a scheme under s.425 of the Companies Act in relation to an insurance company, Pan Atlantic Insurance Company Limited, to which I will refer as the Company.

2. The Company has not been taking on new business for a long time. It ceased all underwriting in March 1991 and has been in run-off since then. It had been carrying on a variety of insurance business since 1980, but it had run into a number of difficulties which led to its gradually ceasing its insurance business. In August 1996 the limitations of the financial resources of the Company, as compared with its liabilities and its cash flow problems, led the directors to present a petition for the winding up of the company and to apply for the appointment of provisional liquidators.

3. In those proceedings Mr Jacob and Mr Ruddock, of Grant Thornton, were appointed as joint provisional liquidators on 23rd August 1996, and the winding up petition was adjourned. The company remains subject to the provisional liquidation, so to speak, and the joint provisional liquidators have been managing the affairs of the company for the benefit of the creditors. They have made recoveries, they have managed the run-off, they have realised a number of assets, and they have done so in consultation with a committee of creditors.

4. They came to the conclusion that the best exit route for the creditors of the Company would be a scheme of arrangement rather than a compulsory

liquidation. Accordingly, after a number of delays, due to matters over which they had little, if any, control, they initiated the process for the approval of a scheme of arrangement, and they applied first in May of this year for an order for the convening of a meeting of scheme creditors.

5. The court made the order sought for the meeting to be convened. The meeting was convened and was held on 9th July, and of the creditors present in person or by proxy at that meeting, whose claims were valued in total at just under £17m, all but three voted in favour, and the three who voted against have claims worth £137,700. Thus, 98% in number and 99% by value of all those voting voted in favour of the scheme.

6. Among the difficulties which the company suffered from, in the conduct of its insurance business in latter years, was difficulty of access to proper records of the financial affairs and commitments of the Company. That arose because of a commercial relationship with an American company, Republic Insurance Company which, to speak colloquially, went sour. The situation is that Republic has retained books and records of the Company in the United States, and those books and records have not been accessible to the joint provisional liquidators at a reasonable cost.

7. Accordingly, the joint provisional liquidators do not know for certain whom the creditors of the Company are. There is a long list of creditors, and all known creditors, or persons who claim to be creditors, have been notified of the proceedings, and will be notified of the approval of the scheme, and the

steps necessary to be taken if they wish to claim under the scheme. But there is a possibility that there are creditors of the Company whose identity has not yet been made known.

8. In circumstances in which the Company has not been underwriting since 1991, and the Company has been subject to the appointment of provisional liquidators since 1996, it is perhaps becoming increasingly unlikely that there are creditors, at any rate of any significant value, who are still unknown to the Company, but it remains a theoretical possibility. Although the vote in favour of the scheme at the meeting was by a very substantial majority, as I have mentioned, that was of course only of those who did vote, and there may be many creditors who did not participate by voting at all.

9. I need not go into the details of the procedure, but I am satisfied that the procedure required under the court's earlier order as regards the meeting was properly followed through. I should say I am also satisfied that this is a case in which, having regard to the nature of the claims of creditors and to the nature of the way in which those claims would be dealt with under the scheme, there is only one class of creditors. It was therefore not necessary for separate meetings of different classes to be convened in order that the statutory procedure should be followed correctly.

10. Mr Moss, for the Company, has reminded me of the decision of the Court of Appeal in Re: Hawk Insurance Company Limited, [2001] 2 BCLC, starting

at page 508, on appeal from Mrs Justice Arden. He has taken me also, for a particular reason, to passages in one of the judgments of Mrs Justice Arden which was not affected by the appeal. I need not go through the passages in the judgment of Lord Justice Chadwick, dealing with the nature of the statutory process under s.425 and the role of the court. That is a matter which is familiar, and in relation to which, as it seems to me, no special issue arises on the facts of the present case.

11. I have also been shown the decision of the Court of Final Appeal of Hong Kong in UDL Argos Engineering v. Heavy Industries Company Limited and related appeals. The judgment of Lord Millett, given on 3rd December 2001 is of assistance as regards the general nature of the process under s.425.

12. As I say, I am satisfied that the steps necessary and required by the court order have been followed through correctly, and that only one class of creditors exists. As I say, the result of the meeting was very substantially in favour of the scheme.

13. It therefore now falls to me to consider whether, as a matter of discretion, I should sanction this scheme, having regard to the fact that there is undoubtedly a number of creditors, some known and probably some unknown, who did not vote in favour of the scheme, as well, of course, as three creditors who did vote against it, none of whom, however, is represented before me to object.

14. I should say a little about the scheme, which as Mr Moss describes it, is a fairly simple scheme for the presentation of claims within a given time limit, and for their allowance, or, if they are disputed, for them to be determined in a way that is intended to be expeditious and economical.

15. The scheme applies to all claims against the Company, and is intended to provide a mechanism for quantification of claims, and for the payment of a dividend on those claims. I should say that although the scheme documentation, on the evidence, does not indicate the likely level of dividend, I am told that it is likely to be very modest. The funds available for distribution to creditors are limited, and one of the objectives of the scheme is to ensure that they are not wasted in further costs of litigation to establish the precise amount of creditors' claims.

16. The first step under the scheme is that once the scheme is effective, the Company is to send to each scheme creditor of whom the Company is aware a claim and certificate form. Those are to be sent by post unless it is possible to send them more expeditiously by electronic mail or fax. That may well be a good idea, especially given that there are a substantial number of international creditors.

17. The creditors are then to send in their respective claims and certificate forms duly completed, at their own expense, and they must be received by what is called the 'Bar date.' The bar date is five o'clock in the afternoon,

according to Greenwich Mean Time, on 18th September this year, so there is only a little less than two calendar months for that process to be undertaken.

18. The claim and certificate forms are then received. As regards certificate forms not received by the bar date, clause 1.2.5 provides that late claim forms will not be considered by the Company, and the creditor will be deemed to have waived its right to receive a dividend. But that is subject to an absolute discretion under clause 1.5 conferred upon the scheme officers, who will be the joint provisional liquidators, to allow the late submission of a form. Specifically, if it appears that a document has been incorrectly completed, or is subject to some manifest error, they may allow the creditor to amend and resubmit the claim form within such timescale as they may think fit.

19. The bar date is an important element in the scheme. It is a relatively short time ahead. But as Mr Moss submits, it is a short time, but in the context of a long pre-history and in the context in which it is likely that the very large bulk of the claims against the Company are known and have crystallised, and creditors are in a position to put in their claims in respect of that matter. This is not, as I mentioned, a company whose problems have arisen only recently, and may need a long time for their implications to be worked through. There is of course inherent in much insurance business an element of delay before claims arise, but given that the Company has not been underwriting for 12 years, it seems to me that what with that, and with the fact of the provisional liquidators being in place in August 1996, together

with the steps that have been taken this year to make creditors aware of the proposed scheme, the imposition of this bar date is a reasonable and appropriate element in the scheme. It is reasonable because unless things can be brought to finality at a reasonably early date, the vast bulk of creditors, whose claims are known, are likely to suffer disadvantage through the matter having to be kept open for an unnecessarily long time.

20. The scheme then proceeds, with provisions about valuation of scheme claims, and it may be that in many cases that the claims put in will be accepted by the scheme officers. Clause 1.4 of the scheme provides for adjudication of disputed claims, and this again is an important element of the scheme. If the scheme officers are of the reasonable opinion that a scheme creditor has submitted a claim and certificate form inflating the correct amount of the claim, they are to give notice to the relevant creditor that they object to the amount of the claim, or part of it. The scheme creditor must then submit written evidence by post, validating the submissions, and the parties are to endeavour to resolve or agree disputed matters. If they reach an agreement, then the amount of that agreed claim is to be treated as the creditor's claim for the purposes of the scheme. If written evidence is not submitted, a right to a dividend is deemed to be waived. But if all of that process is gone through, and the parties cannot agree the amount of the claim, the matter is to be settled by an independent adjudicator, whose decision is to be final and binding on the parties concerned.

21. The independent adjudicator is to be a person appointed under clause 5.2.1 of the scheme, whose appointment will be necessary only if a dispute does arise between the Company and the scheme creditor. If it does, then on each such occasion the scheme officer shall, as soon as reasonably practicable, ask the President of the Law Society to nominate a person who has extensive experience in the matter the subject of the dispute to be the independent adjudicator in respect of that decision. That clause goes on to make other provisions about the independent adjudicator. So it is not a case of one person being appointed as the independent adjudicator for all disputes, although it may be that if the disputes are similar in nature, one person will in fact, subject to the volume of cases, be able to act in the relevant respect, assuming there is no problem with regard to conflict of interest.

22. The point about the independent adjudicator is that as provided by clause 1.4.2 and the latter parts of clause 1.4, he is to reach a determination of the dispute in a manner that is fair, but also economical, and is to be reached as soon as it reasonably can be. The effect of his decision is prescribed by clause 1.4.6 in the following terms:

> "The decision of the independent adjudicator on any dispute referred to him in accordance with the scheme shall be final and binding insofar as the law allows, and for the avoidance of doubt there shall be no right to appeal therefrom, nor shall there be any right to make any claim against the independent adjudicator in respect thereof, save in the case of loss arising from any negligence, breach of duty or trust or wilful neglect or dishonesty."

The reference to 'insofar as the law allows,' derives from a passage in the second judgment of Mrs Justice Arden in the Hawk Insurance case, and

refers to the body of law dealing with the effect of expert determinations which are expressed to be final and binding, but which the courts have held are indeed final and binding, but subject to exceptions, one being fraud, and another being where the expert has gone beyond the terms of reference. I do not need to refer in any more detail to the exceptions to the final and binding effect of an expert determination, but it is that body of law that is brought into play by the words, 'insofar as the law allows.' Subject to that, however, the independent adjudicator's decision is binding, and will resolve the amount of the claim, if there is a claim at all.

23. As I say, clause 1.5 of the scheme allows for the scheme officers to allow the resubmission of a claim form. Clause 1.6 is another important safeguard, and I should explain one matter as background to this. The scheme officers have taken the view, particularly because of the limited resources of the Company, and the difficulty that they have in terms of access to books and records, that it was desirable and reasonable to require scheme creditors to validate their claim before or on submission of the claim by way of an auditor's certificate, thereby ensuring that there is a degree of independent objective assessment of the amount of the claim, in the absence of which, the Company and the joint provisional liquidators might very well have to undertake what might be substantial and extremely expensive and time consuming verification themselves. That simply is not feasible from their point of view, and would be highly disadvantageous to the body of creditors generally, because it would be likely to waste the limited assets that are available in costs of determination.

24. Accordingly, the approach is to require scheme creditors to submit their claim with the auditor's certificate as to the claim. However, it is recognised that there may be cases in which a particular scheme creditor cannot submit an auditor's certificate. That, for example, is said to have been the reason why two of the three opposing creditors at the meeting did vote against, because they are entities which are themselves the subject of insolvency procedures, and do not have auditors who can give such a certificate.

25. The approach of the scheme, and the stated approach of the scheme officers to that problem, is that the scheme gives, by clause 1.6, an absolute discretion to the scheme officers to accept some other documentary means evidencing the amount of the scheme creditor's claim, provided that whatever document it is is received prior to the bar date. The attitude of the scheme officers, which is to be communicated to creditors by a letter, the form of which I have seen, is that they will accept other appropriate documentary means evidencing the amount of the claim, if the scheme creditor has a good reason for not being able to submit an auditor's certificate, so long as there is some alternative verification, which the scheme officers can be reasonably confident has a degree of objectivity in the assessment of the claim. They can then, with reasonable confidence, rely on the document submitted, as being, in the circumstances, a reasonable alternative to an auditor's certificate. That is an important element in the scheme.

26. The scheme then proceeds with a section dealing with the setting and payment of dividends, and I do not think that I need to deal with anything arising from that. It then proceeds to deal with other provisions of a fairly normal nature about third party funding, and secured creditors, and administrative provisions and expenses.

27. Then at section 5 it deals with the office holders and their powers, and provisions for vacation of office and substitution and so on. At 5.2 comes to the provisions about the independent adjudicator, to which I have referred.

28. Section 6 requires the scheme creditors to cooperate with, and render assistance to the scheme officers. Section 7 contains a number of normal, general provisions, one of which, 7.3, says that if there is any conflict or inconsistency between any provision of the scheme and any statutory provision, the terms of the scheme shall prevail. That is a provision which Mr Moss tells me is common form, but has not yet been the subject of any judicial decision, nor do I propose that it shall be today. The scheme is governed by English Law, and the High Court has exclusive jurisdiction to hear and determine any dispute arising out of it in all related matters.

29. The scheme seems to me, in principle, an entirely proper scheme. There are two matters which Mr Moss has drawn to my attention as requiring particular thought in the exercise of the discretion. I propose to say

something very briefly about each of them, although the authority of what I say is necessarily limited by the fact that although Mr Moss has helpfully addressed me on them, I have of course not heard any argument to the contrary.

30. The first is a point which arises from the fact that scheme creditors are bound, to the extent that I have mentioned, by the provisions of the scheme, and by the determination of the independent adjudicator. This question arises under Article 6 of the European Convention of Human Rights. This was touched on by Mrs Justice Arden in the Hawk case, and she concluded that a somewhat analogous provision in the scheme in that case would not infringe Article 6. The matters on which she relied in that case speak for themselves. It was an element of her decision that there were no adverse votes at all at the meeting of creditors that had been held in that case. Here, as I say, there was a small adverse vote. But nevertheless it seems to me that, looking at the matter on the basis of the submissions made to me by Mr Moss, Article 6 is not infringed by the proposed restriction of the creditor's right of access to the courts.

31. In particular, Mr Moss referred me to Ashingdane v. United Kingdom, a decision of the European Court of Human Rights in 1985, reported at 7 EHRR 528. The subject matter of that case was very different indeed, but there was a complaint against the government of the United Kingdom of, among other things, a violation of Article 6.1. The court had this to say at

paragraph 57, about the right of access to a court which is required by Article 6.1, and I quote:

> "Certainly the right of access to the courts is not absolute, but may be subject to limitations. These are permitted by implication, since the right of access by its very nature, calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community, and of individuals."

And then passing over a few sentences the court continued:

> "Nonetheless, the limitations applied must not restrict or reduce the access left to the individual, in such a way, or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6.1 if it does not pursue a legitimate aim, and if there is not a reasonable relationship in proportionality between the means employed, and the aim sought to be achieved."

In that case what was at issue was the effect of primary legislation. In the present case what would be at issue is the effect of the scheme, which is of course effective pursuant to a court order under primary legislation, but is dealing with a much more limited and ad hoc situation.

32. It seems to me that Mr Moss is right to say that the right of access to the courts is not entirely limited. It is not excluded altogether, because although there is the independent adjudicator procedure, as I have said, under clause 1.4.6 that is final and binding, but only insofar as the law allows. That, as I said, brings in the body of law that has already been developed in relation to the limitations on such a clause in relation to an expert determination in a private contract. That seems to me to be an entirely legitimate approach. It does not restrict the access left to the individual creditor so much that the very essence of the right is impaired.

Equally, it seems to me, that the limitation pursues a legitimate aim, and pursues it with a reasonable relationship, with proportionality between the means employed and the aim sought to be achieved. In that, the adoption of the independent adjudicator procedure is highly desirable, and, as it seems to me, entirely proportional in the interests of avoiding having to spend an unnecessary, and unreasonable, and certainly disproportionate amount of the limited resources available for creditors on the expenses of determining the amount of creditors' claims. It is also to be remembered that in an insolvent liquidation the general law restricts the right of access of creditors to the courts, for good reason, by requiring permission before proceedings can be brought against the company. I do not believe that anyone has ever suggested that this is inconsistent with Article 6. That seems to me to be **relevantly why of contest.**

33. Although it is not for me, as I see it, to decide in a binding way that the scheme does not infringe Article 6.1, it seems to me that I can take the view that, so far as appears, it is entirely legitimate, having regard to the human rights of the creditors under Article 6, and that the limitation of access to the courts that is inherent in the scheme is not a reason for refusing to approve it.

34. The second point is a point of an entirely different character, and a novel one in that it arises under the Insurers' Reorganisation and Winding Up Regulations, 2003 which have come into effect fairly recently, on 20th April, so as to implement a directive 2001 17EC, relating to the

reorganisation and winding up of insurance undertakings. This Directive will distinguish in terms of priority in the winding up of a UK insurer, between insurance creditors, and other creditors. It is not necessarily clear that if that applied to this company, it would have a different effect from the previous law, because it is not clear that there are any creditors who are not insurance creditors.

35. However, the point on which Mr Moss has addressed me, is on the one hand, the fact that such a distinction in terms of priority would be a relevant matter for the court to consider in approving the scheme arrangement, if the Company were one which, if it then went into liquidation instead of it being the subject of the scheme, would attract the provisions, the special priority provisions of the regulations. But on the other hand, he has also shown me that there are transitional provisions which, in his submission, have the effect that if there were to be a winding up of the Company in future, the special priority would not in fact apply. He has shown me regulation 18 which starts off by saying that subject to paragraph 2, regulations 19 to 27, which are those that deal with the special priority, apply in the winding up of a UK insurer where (a) in the case of a winding up by the court, the winding up order is made on or after 20th April 2003.

36. Clearly, if a winding up order were made by the court on the winding up petition, which I understand is adjourned, it would be made after 20th April 2003. But Article 18.3 provides that regulations 20 to 27 do not apply to a winding up falling within paragraph 1, where in relation to a UK insurer (b)

a provisional liquidator was appointed before 20th April 2003, and that appointment is not discharged until the commencement date. The commencement date is defined by Article 18.4 as the date on which the UK insurer goes into liquidation, within the meaning of section 247(2) of the 1986 Act, or Article 6.2 of the 1989 order. So the commencement date here would be likely to be the date of the winding up order. In the present case of course, provisional liquidators were appointed before 20th April 2003, so that exception will apply, unless their appointment is discharged before a winding up order is made.

37. It seems to me, as Mr Moss submits, that it is extremely unlikely that the order would be discharged before liquidation. It is also extremely unlikely in practice that a liquidation will take place. It seems to me that the scheme being a sensible scheme in itself and one approved by the vast majority of the creditors who have taken part by voting at the meeting, the only likelihood of the provisional liquidator being discharged, or for that matter if anyone applied for a winding up order, would be in order to subvert the scheme, whereas in fact, the scheme provides a much better remedy for any creditor, other than one who for some reason is unable to comply with the bar date provisions, than would be afforded by a liquidation.

38. Accordingly, bearing in mind that, and bearing mind in particular, the fact that the scheme is not intended to have any very long duration, because of first of all the early bar date, secondly the reasonably expeditious provision for the adjudication of disputes such as there may be, and thirdly, for

provisions, that I have not mentioned, but which are set out in the scheme, for as early as possible a declaration and payment of dividend, and for the scheme to last only for 30 days beyond the payment of dividend, it is reasonable to approach the matter on the basis that the special priority provisions set out by these new regulations will not apply to the Company in practice. Accordingly I need not consider whether, as a matter of discretion, there ought to be any separate consideration given to insurance creditors and non-insurance creditors, even though in a case which is not subject to the transitional provisions, that may well introduce an element for the future in relation to other companies whereby there may necessarily have to be two classes of creditors and different treatment.

39. For that reason, it seems to me, that the new regulations should not deter me from approving the scheme, and I will therefore give my sanction to the scheme and make the appropriate order.