



Neutral Citation Number: [2005] EWHC 2485 (Ch)

Case No: 4138 of 2004

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2005

Before :

MR JUSTICE MANN

IN THE MATTER OF THE HOME INSURANCE COMPANY

AND

IN THE MATTER OF THE COMPANIES ACT 1985

MR. R. KNOWLES Q.C. and MS. LUCY FRAZER (instructed by Clifford Chance LLP)
for The Home Insurance Company.

MR. R. HACKER Q.C. (instructed by Messrs. Lovells) for the Ace Companies.

Hearing dates: 3rd November 2005

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE MANN

Mr Justice Mann :

1. This is the hearing of a petition seeking the court's sanction of a scheme of arrangement proposed under S.425 of the Companies Act 1985 in respect of the affairs of The Home Insurance Company, a corporation incorporated in New Hampshire, U.S.A. It is the company's petition. For the purposes of bringing it, the company acts by provisional liquidators appointed in the circumstances appearing below.

Factual Background

2. Home Insurance was incorporated in 1973. Its business was conducting various types of insurance. Amongst the business that it transacted was contracting to reinsure certain risks, those contracts being in favour of a group of companies which can be described for present purposes as the AFIA Claimants. In its turn, Home Insurance reinsured those risks with a number of companies which can conveniently be described as the ACE Companies. The nature of the arrangements between the AFIA Claimants, Home Insurance and the ACE Companies is that no claim can be made against the ACE Companies on the outward reinsurance until a proper claim has been made on Home Insurance by the AFIA Claimants. That insurance and reinsurance business was carried on in this jurisdiction.
3. In March 1997 the New Hampshire Insurance Department placed Home Insurance and its insurance subsidiary under its supervision following an order made by the Merrimack County Superior Court of the State of New Hampshire ("the Superior Court"). In March 2003 a Rehabilitator was appointed by the Superior Court. In around May 2003 the Rehabilitator concluded that Home Insurance was insolvent and that further attempts to rehabilitate the company would be futile. Accordingly, on 8th May 2003 she filed a petition with the Superior Court seeking a winding up. That order was granted on 11th June 2003. On the same day as the petition was filed in New Hampshire, the Rehabilitator presented a winding up petition to the English court and, again on the same day, this court appointed Margaret Elizabeth Mills and Gareth Howard Hughes to be provisional liquidators. That provisional liquidation is still in force and no winding up order has yet been made. The order appointing the provisional liquidators clearly contemplates that, following the appointment of a liquidator in New Hampshire, the provisional liquidators should exercise their powers as requested and approved by that liquidator, save where the English court otherwise directs and save where to do so would cause them to contravene English law. The provisional liquidation is clearly subsidiary or ancillary to the New Hampshire liquidation.
4. In New Hampshire, insurance creditors do not all have an equal right to prove. Reinsurance creditors are Class V creditors, which means that their claims are subordinated. The AFIA Claimants are Class V creditors and submitted proofs in the New Hampshire liquidation proceedings in or before June 2004, but they have not pursued their claims. The state of assets and liabilities in the liquidation of Home Insurance is such that as things stand, as Class V creditors the AFIA Claimants will not make any recovery. It was therefore feared that they would not make properly formulated claims under their policies because they would have no incentive to do so. It would be costly and time-consuming for them to make claims, and the only result would be recovery on the ACE Companies' reinsurance in which the AFIA Claimants

would not participate (because of their subordination). If they made no claims that would mean that no claim could be made against the ACE Companies in respect of the relevant reinsurance, and that asset would be lost to everyone.

5. In order to avoid that consequence there were negotiations between the insolvency practitioners and the AFIA Claimants in order to try to come to an arrangement to extract some benefit from the reinsurance treaties effected with the ACE Companies. The overall effect of the arrangement is that the AFIA Claimants will make claims which will, so far as valid and proper, give rise to claims against the ACE Companies. It was agreed that the recoveries from the ACE Companies, after deduction of certain expenses, would be split as to 50% to the AFIA Claimants (sharing *pari passu*) and as to 50% for the other ordinary creditors of Home Insurance. The overall arrangement was summarised in a letter from the provisional liquidators to the various AFIA Claimants dated 22nd January 2004. As well as containing the arrangement just summarised (set out at rather greater length and more formally) it was stipulated that the approval of the supervising New Hampshire court would be sought to a compromise to that effect, involving the implementation of a scheme of arrangement pursuant to S.425 between Home Insurance and the AFIA Claimants. For their part, the AFIA Claimants agreed that they would not seek to enter into any direct arrangement with the ACE Companies during what was described as the “Standstill Period” which was a number of potential dates depending on the fate of various steps necessary to implement the details of the arrangements. For working purposes, Home Insurance says that the claim against the ACE Companies is worth about US\$231m. I should say that that is only a working figure and the ACE Companies do not accept it. In particular, the ACE Companies claim to be entitled to set-offs and a number of other potential defences. I mention this at this stage in order to demonstrate that the claims potentially have a very significant albeit uncertain value.
6. Home Insurance duly sought to implement that arrangement and on 5th July 2004 Park J. granted permission for the company to convene a scheme meeting to implement the appropriate scheme of arrangement. The only class of creditors at whom the scheme is directed is the AFIA Claimants. The meeting of creditors was held on 8th September 2004. All creditors present and voting at the scheme unanimously approved it; the total in value of their claims exceeds US\$482m. That meeting having been held, the scheme now comes before me for sanction. The extended period of time between that meeting and the presentation of the petition for sanction (which was presented on 3rd November 2005) seems to have been filled by proceedings in New Hampshire. In order to explain their significance, I need to refer to some of the terms of the detailed scheme.

Scheme

7. I do not think it is necessary for me to set out any of the terms of the scheme verbatim. It will suffice if I summarise those that are significant for present purposes. The significant terms are as follows:
 - i) Clause 2.2 provides that the company, acting by the New Hampshire liquidator and the provisional liquidators, should procure that it uses all reasonable endeavours to collect in and realise the sums due from those companies who reinsured liabilities owing to the AFIA Claimants. Almost all of those companies are in fact the ACE Companies; I was told that there may be one or

two non-ACE Companies in that category, but that does not matter for present purposes. In essence, the liabilities to be recovered were those of the ACE Companies.

- ii) After certain payments out in respect of expenses and the like, the company was to procure that 50% of the proceeds of that exercise was to be paid to the New Hampshire liquidator and 50% was to be paid to the scheme administrators to be held as scheme assets.
- iii) Clause 2.4 prevented any of the AFIA Claimants from taking proceedings to enforce their claims against Home Insurance.
- iv) Clause 2.7 preserved rights of set-off so far as they exist under New Hampshire law.
- v) Clause 2.14 is an important clause for present purposes. It provides that scheme creditors are to give the New Hampshire liquidator and the provisional liquidators all reasonable assistance required by Home Insurance in connection with the scheme and with the recovery of scheme assets. In substance this seems to give the various liquidators the important power to compel the AFIA Claimants to follow through and provide them with relevant material with a view to being able to make onward claims against the ACE Companies.
- vi) Clause 3 provides for payment *pari passu* to the AFIA Claimants as scheme creditors.
- vii) Clause 7 deals with the duration of the scheme. Clause 7.1(d) is the most important event. It provides that the scheme shall terminate if the New Hampshire liquidator determines in his sole discretion (following consultation with the scheme administrator and the creditors' committee) that the scheme should terminate in the event that the New Hampshire Supreme Court entered a decision which had the effect of disapproving the proposal. As will appear below, at the time there were proceedings pending in that Court which went to the validity of the overall arrangement.
- viii) Clause 8.3 contains certain provisions governing the date from which the scheme becomes effective. It provides that the scheme should only apply from the "Effective Date", which is described as being the date on which all of three specified conditions are fulfilled (and when the sanction order has been delivered for registration to the Registrar of Companies). The three conditions are:
 - a) The obtaining of an order of the New Hampshire court (defined as the "Superior Court") approving in principle the proposal to implement the scheme (as described in the letter that I have referred to above).
 - b) The obtaining of a "Global Liquidation Order" from this court, that order being an order approving the remission of Home Insurance's English assets to the New Hampshire liquidator for the administration and distribution as part of the New Hampshire liquidation. An

application has been made to me for such an order; I have not yet heard or determined it.

- c) Obtaining approval from the FSA.
8. The third of those conditions (FSA approval) has been obtained. The second has not, but a decision on it can be made by me once this judgment has been delivered; I propose to hear the application at that point in time. Its fate will therefore very shortly be known. It was not suggested at the hearing before me that any uncertainties in that respect would have any effect on whether I should sanction the scheme. The first condition may or may not have been fulfilled, depending on the correct view as to the effect of certain proceedings in New Hampshire and the status of an order made by the Superior Court. It is those proceedings that have hitherto apparently been holding up this scheme. I therefore need to turn to a short description of those proceedings.

The New Hampshire Proceedings

9. On 11th February 2004, before the application to Park J., the New Hampshire liquidator commenced proceedings in the Superior Court seeking that court's approval in principle to the proposed arrangement with the AFIA Claimants. There were two objectors to that approval. The first was a direct insurance claimant called Benjamin Moore and Co (who are said to have a Class II claim in the liquidation which is not subordinated in the same way as the Class V claims of the AFIA Claimants) and the second were the ACE Companies. I understand the main ground of opposition to have been that the proposed arrangements contravened the mandatory *pari passu* rule which is said to obtain in New Hampshire liquidations. On 24th April 2004 the Superior Court entered an order approving the scheme. On 7th May 2004 Benjamin Moore & Co appealed against that order, with the ACE Companies assuming active participation as an automatic party to that appeal. There were various applications to the Superior Court and to the Supreme Court for a stay of the first approval order. They were unsuccessful. The appeal was still pending at the date of the hearing before Park J. On 13th September 2004, the Supreme Court delivered its decision. It directed the Superior Court to address a number of specific issues, and directed it to conduct an evidentiary hearing. In essence, this order of the Supreme Court prevented the Superior Court's earlier order from being an approval within the relevant condition in clause 8.3 of the scheme. The scheme could therefore not be made effective. That had to wait, at the earliest, for the next determination of the Superior Court. That took some time, but on 22nd September 2005 the Superior Court issued an order confirming its previous position and holding, for the purposes of New Hampshire law, that the agreement was necessary, fair and reasonable. It therefore approved it.
10. The liquidators had not sought to obtain the sanction of the court to the arrangement pending the second determination of the New Hampshire Superior Court. Nor did the liquidators seek sanction immediately after the obtaining of the order. Before they did so, on 20th and 21st October 2005, both the ACE Companies and Benjamin Moore & Co filed appeals against the Superior Court's order of 22nd September. There has been some debate as to whether or not the commencement of those appeals means that there is a technical stay of the Superior Court's order so that the order cannot be treated as an order within condition 8.3 of the scheme. It is the ACE Companies'

contention that it does. Applications have been made in New Hampshire in order to clarify the position on a stay, and if necessary to obtain an order for a stay. I received some limited evidence from a partner in Lovells (who act for the ACE Companies) who was admitted to the New Hampshire bar, and he expresses the view that there is a stay and that that stay has an effect which means conceptually the relevant approval for the purposes of the conditionality of the scheme cannot be said to have been obtained. Neither Mr Hacker QC, who appeared for the ACE Companies, nor Mr Knowles QC, who appeared for the company, invited me positively to decide that point one way or the other. My decision in this case will have to reflect the fact that it remains an open question as to whether or not the stay has the effect contended for. It is not known when the latest appeals will actually be heard and determined by the New Hampshire Supreme Court, but nobody has suggested that it will happen imminently, and the sensible assumption is that it may well take several months. Mr Knowles accepted that if that Court's decision is against the validity of the overall arrangement, the scheme would probably have to be terminated, and if necessary clause 7.1(d) would be invoked.

Sanctioning the Scheme

11. Against that background, I need to consider whether it is right for me to sanction the scheme. I was taken to the appropriate authorities as to my function, and have well in mind the principles arising from those authorities. I have also considered the procedural requirements for the validity of a scheme. I am satisfied that the procedural requirements have been fulfilled. I am also satisfied that, subject to the points made by the ACE Companies at the hearing before me, it would be right for the court to sanction this scheme in accordance with the principles that I have just referred to. The real issues in this matter arise out of the submissions made on behalf of the ACE Companies. I shall therefore consider those in order to determine whether anything in them requires that I should not sanction the scheme at this stage. I say "at this stage" because Mr Hacker does not invite me simply to refuse sanction. His case is that the matter should be adjourned until the outcome of the pending appeal in the New Hampshire Supreme Court is known. Until that is known, he says it would be inappropriate to sanction the scheme because, if the Supreme Court allows the appeal and does not give the necessary approval, the scheme cannot go ahead, and would have to be brought to an end (under the provisions of clause 7). It is said by him to be neither necessary nor appropriate to sanction the scheme now in the face of that uncertainty, and he relies on certain prejudice were I to do so. He therefore says the petition should be adjourned.
12. Mr Hacker's case in this respect turns on two heads of supposed prejudice or disadvantage, but before dealing with them I should make a point about the loudness with which his client's voice should be heard. No point has been taken as to his client's locus standi to appear before me, but Mr Knowles has invited me to bear in mind what Mr Knowles says is the ACE Companies' real interest and real motivation in seeking to prevent the scheme (and indeed the overall arrangements) taking effect. If the overall arrangements are not implemented, then it seems highly likely that the ACE Companies will be very significant beneficiaries. If the AFIA Claimants do not make claims, then claims cannot be made against the ACE Companies. In that event, the ACE Companies would be able to keep such sums as they would otherwise be obliged to disgorge under the relevant reinsurance treaties. Their real motivation is

likely to be to prevent those claims being made, and the points that they make against the implementation of the scheme (and the arrangements) should be heard with that firmly in mind.

13. I bear firmly in mind what Mr Knowles has said. Bearing in mind the nature of the objections that are made (which appear below) it would be naïve to put on one side the obvious benefits to the ACE Companies of suggesting barriers to the scheme and I will not fall victim to such naïvete. It seems to me to be obvious that the ACE Companies will have such a motivation. That does not mean that any other points advanced by them are necessarily bad, but so far as they make any points which involve an assessment of what the real practical impact of what I am being asked to sanction is, then I bear firmly in mind the fact that the points are being made on behalf of someone who cannot justifiably assert their own principal interest. In saying this, I do not ignore two things. The first is that in the New Hampshire courts, the arrangements were opposed by Benjamin Moore and Co, who are Class II creditors. Mr Hacker told me that that concern supported the ACE Companies' case in this court, but it was not represented before me. It is, however, the only Class II creditor that has indicated opposition to the arrangements (as far as I am aware). It is not at all surprising that the other Class II creditors have supported it – they are all likely to benefit. The second matter is the status of the ACE Companies as creditors. They claim to be creditors of Home Insurance. Throughout the proceedings in the New Hampshire courts, the ACE Companies have asserted that they are Class V (i.e. subordinated) creditors. Purely in that capacity, they would have little discernable interest in opposing the scheme. Without the scheme they get nothing; with the scheme they still get nothing. However, in Mr Lee's witness statement (referred to above) signed on 2nd November 2005, they assert for the first time that as well as being Class V creditors they are also Class II creditors. Mr Knowles says that this is the first time that they have asserted that they are Class II creditors, save that they have hitherto asserted a small (US\$7,000) claim, and he invites me to treat that assertion with a certain degree of scepticism. I think that I should do no more than note that they have claimed to be Class II creditors and it has not been demonstrated that they are not. I am therefore prepared to assume for these purposes that they are Class II creditors. As such, they are capable of benefiting from the scheme, because they will be able to partake in a fund swelled by 50% of the recoveries on the reinsurance treaties; though of course they will have provided those monies themselves, which demonstrates where their real interests are likely to lie. Nevertheless, as Class II creditors, they would have an interest in making sure that there was no wasted expenditure, which is a point that Mr Hacker makes. They can, at least logically, make that case.
14. With all that in mind, I turn therefore to consider the grounds on which the ACE Companies say that I should not sanction the scheme and should do no more than adjourn the petition at this stage. Their grounds of objection can be grouped under two headings. The first heading concerns the current state of uncertainty as to the lawfulness of the overall arrangement under New Hampshire law and the relationship between any decision of this court and the deliberations of the New Hampshire court. The second relates to the potential waste of money which would arise if I were to sanction the scheme and if it were in due course to transpire that the New Hampshire courts withhold their approval. I shall take the points in that order.

