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Industry Information

Revisiting the “old chestnut”

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The inherent discretion to confirm the powers of controllers appointed under Section 24 of the Insurance Law

On 29 September 2020, Chief Justice Smellie QC handed down his judgment in *the Matter of Premier Assurance Group SPC Ltd (in Controllership) (FSD Cause No. 210 of 2020)* confirming the powers of the controllers appointed under section 24(2)(h) of the Insurance Law, 2010 (the “Insurance Law”) so as to enable them to exercise their powers as against the “world at large”. In doing so, the Chief Justice held that the Court has an inherent jurisdiction to supplement section 24 of the Insurance Law to “fill the practical gap” left by that provision.

Background

The Controllers were appointed by the Cayman Islands Monetary Authority (the “Authority”) on 14 September 2020 pursuant to section 24(2)(h) of the Insurance Law to assume control of the affairs of Premier Assurance Group SPC Ltd (“PAG”), an exempted segregated portfolio company.

All “powers necessary” to administer the affairs of the licensee

Section 24(2)(h) provides that a controller appointed by the Authority in the circumstances set out in section 24(1) of the Insurance Law shall have “all the powers necessary” to administer the affairs of the licensee.

On the face of section 24 of the Insurance Law, the necessary powers vested by the Authority to administer the affairs of the licensee are not expressly set out, nor are they required to be confirmed or sanctioned by the Court. However, as explained below, previous authorities in relation to controllerships arising under section 18(1)(v) of the Banks and Trust Companies Law (as revised) (the “BTCL”) have held that the person appointed may require confirmation from the court before their powers are “effective” as against the world at large.

Accordingly, the Controllers in this case sought an order confirming their powers under section 24(2)(h) of the Insurance Law to ensure that they were effective against third parties. There was no statutory jurisdiction for making the making of a confirmatory order of the kind sought in this case, nor any direct authority for the making of such an order.



Need to exercise powers as against the “world at large”

The Court had previously provided guidance in relation to controllerships commenced under section 18(1)(v) of the BTCL, which incorporates by reference section 18 of the Bankruptcy Law. In particular, the Courts have grappled with the apparent inconsistency between:

- (a) the statutory powers vested in the Authority under the BTCL for the appointment of controllers with all the powers of a receiver or manager under section 18 of the Bankruptcy Law; and
- (b) those powers of the Court under section 18 of the Bankruptcy Law itself, which expressly restricts the right to appoint a receiver or manager of an insolvent company to the Court and giving it alone the power to determine the scope of the powers of the appointee.

This provision of the BTCL replicates the predecessor provisions in section 13(1)(vii) of the Insurance Law (2008 Revision), now repealed. Chief Justice Smellie QC stated that it was instructive to revisit this “old chestnut” for the purposes of the analysis in this case.

In the most recent case of *In re Caledonian Bank Ltd* (Grand Court) [2015 (1) CILR 143], the Court held that:

- (a) In relation to action as against the licensee, immediate control of the licensee’s affairs vests in the person appointed to the exclusion of the licensee’s directors, shareholders and anyone else who may claim any aspect of control. In those circumstances, the person appointed is not required to seek the Court’s confirmation or direction before being able to exercise his powers.
- (b) However, in relation to action against the world at large, the person appointed may require confirmation from the Court before their powers are “effective”.

This was precisely the position the Controllers found themselves in following their appointment – i.e. the Controllers sought confirmation that their powers would also be effective as against “world at large” so that steps could be taken to preserve and safeguard PAG’s assets based in the United States.

Invoking the Court’s inherent jurisdiction

Notwithstanding an absence of a statutory basis for the grant of confirmation of the powers vested in the Controllers, the Court considered that it had an inherent jurisdiction to supplement section 24 of the Insurance Law and to “fill the practical gap” left by that provision. The Court accepted that, given section 24(2)(h) does not specify what constitutes “powers necessary” to enable controllers to administer the affairs of the licensee, it would be surprising if the Court lacked jurisdiction to give directions with respect to the scope of such powers. The Court further accepted that the proposed exercise of the Court’s inherent jurisdiction in this case would not cut across or otherwise undermine the statutory regime. The obvious intent of section 24 of the Insurance Law is to confer upon the Authority (and, following their appointment, controllers) extra-curial powers to act expeditiously in the public interest.

Finally, the Court also held that the Controllers were, in any event, entitled to declaratory relief to confirm their necessary powers.

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