IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 210 OF 2020 (ASCJ)

IN THE MATTER OF SECTION 24(2)(H) OF THE INSURANCE LAW, 2010

AND IN THE MATTER OF PREMIER ASSURANCE GROUP SPC LTD. (IN CONTROLLERSHIP) ("PAG" OR "THE COMPANY")

Appearances: Menelik Miller and Renee Caudeiron, (with them Audrey Roe and Jennifer Hydes) on behalf of the Cayman Islands Monetary Authority ('the Authority')

Rupert Bell, Christopher Keefe and Daisy Boulter of Walkers for the Joint Controllers (Jeffery Stower and Jason Robinson of KPMG) ("the Controllers")

REASONS

Appointment by the Authority of Controllers over the affairs of licensee under the Insurance Law 2010 – need for confirmation by the Court of powers vested in Controllers – whether their appointment effective as against the world at large without confirmation by the Court – jurisdiction of the Court to grant confirmatory and declaratory orders.

1. This is the hearing of a petition by the Controllers for confirmation by the Court that they are authorised to exercise powers vested in them by virtue of their appointment by the Authority and without further sanction of the Court. The need for this confirmation arises in the light of earlier decisions of this Court and of the Court of Appeal to be examined below, which, while confirming that controllers are entitled by virtue of their appointment by the Authority immediately to assume control of the subject entities, they will nonetheless, in keeping with the respective statutory

provisions under which they are appointed, require the sanction by the Court of their powers in order to ensure the effectiveness of those powers as against the world at large; most recently, ***In Re Caledonian Bank Ltd*** (below) . In the present case involving an entity regulated under the Insurance Law, 2010 (the "**Insurance Law"**), in the absence of a statutory basis for the grant of confirmation of the powers vested in the Controllers, their petition invokes the inherent jurisdiction of the Court.

2. The immediate purpose of obtaining the order of confirmation is to enable the Controllers to seek recognition in the United States of America under Chapter 15 of the United States Bankruptcy Code (the "**Chapter 15 Proceedings**") and to, thereafter, seek a temporary restraining order ("**TRO**") and other provisional and final relief in those proceedings. Such steps are intended to safeguard the assets of PAG (which are all or substantially all located in the United States) and, specifically, to prevent the directors of PAG from potentially dissipating its assets upon being notified of the Controllers' appointment. For these purposes, it is also of juridical significance that, on the basis of legal advice they have received, the United States Bankruptcy Court will likely accord recognition of the Controllers' appointment only if sanctioned in "foreign proceedings", an issue to be more fully explained below.

3. The Authority supports the relief sought in the Controllers' petition.

Background

4. The Controllers were duly appointed by the Authority on 14 September 2020 pursuant to section 24(2) of the Insurance Law to assume control of the affairs of PAG.

5. PAG was registered as an exempted segregated portfolio company under the provisions of the Companies Law (as amended) with registration number 270105 on 29 June 2012. It is a wholly owned subsidiary of Premier Assurance Group LLC, ("Premier") a Floridian corporation. The ultimate parent of PAG holding through Premier, is Beast Capital LLC, also incorporated in Florida.

6. PAG is the holder of an Unrestricted Class 'B' Insurer's Licence granted by the Authority on 4 July 2012, pursuant to section 4 of the then operative Insurance Law (2008 Revision).

7. The Company provides services to its two segregated portfolios, Premier Assurance Segregated Portfolio ("**PASP**") and Global Assurance Segregated Portfolio ("**GASP**"). The principal activity of PASP and GASP is to insure events associated with human life. They offer unit-linked life insurance and health insurance products which provide coverage on a global basis (in the case of PASP through Premier Trust registered in the BVI and in the case of GASP through PA Global Trust, which is also registered in this jurisdiction). The products are offered globally with the exception of the United States and the Cayman Islands and so are sold to markets in the Latin American, Caribbean, European and Asian regions. PAG operates a

licensed branch in Labuan, Malaysia, for which the consent of the Authority to open a foreign branch was sought and granted on 20 November 2014.

8. Notwithstanding its global reach, as mentioned above, all or substantially all of PAG's assets are located in the United States within PASP and GASP.

9. On 14 September 2020, pursuant to a notice issued under section 24(2)(h) of the Insurance Law, the Authority effected its appointment of the Controllers over PAG (the "**Appointment Notice**"). The Appointment Notice specifically requires the Controllers to: (i) assume control of the affairs of PAG with all the powers necessary to administer the affairs of PAG including the power to terminate the insurance business of PAG; (ii) assess whether any applications should be made to the Court to protect the interests of policy holders and creditors of PAG ; and (iii) to prepare and furnish two reports (interim and final reports) in accordance with section 24(4)(b) of the Insurance Law to the Authority, concerning the affairs of PAG and giving their recommendations thereon.

10. The Controllers have not contacted PAG or its service providers to inform them of their appointment at this time for the reasons which follow.

11. As explained in the First Affidavit of one of the Controllers Jeffery Stower ("Stower 1"), the Controllers understand from the Authority (as confirmed by the Head of Compliance at the Authority, Audrey Roe at paragraph 40 of her First Affidavit) ("Roe 1"), that the Authority believes there is a real risk of dissipation of PAG's assets if the directors of PAG are alerted to the appointment of the Controllers before steps have been taken to secure or otherwise freeze PAG's assets.

12. As explained in further detail in Roe 1, the Authority has very real concerns that, once the Controllers' appointment is made known to PAG's directors, they may seek to dissipate its assets, resulting in the policy holders and creditors suffering losses, and the Controllers being hampered in taking control of the assets of PAG. In particular, as explained in Roe 1 (with respective references to her paragraphs):

> *"SEC's Investigation and Order*
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> *1. A previous investigation by the United States Securities and Exchange Commission ("**SEC**") uncovered that two of the directors (Mr Cornide and Mr Falcon) were effectively using PAG as a "piggy bank" and were lending themselves money from its assets, whilst serving as investment managers of PAG (paragraph 7). Mr Cornide and Mr Falcon (together, the "**Founders**") are PAG's founding directors and each hold a 50% beneficial interest in PAG through the ultimate parent of PAG, Beast Capital LLC:*
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> *i. On 25 September 2019, the SEC settled cease-and-desist proceedings against the Founders for using investor funds to obtain personal loans and for failing to disclose their personal interest in transactions in which they used additional investment funds (paragraph 14).*
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> *ii. The Authority was not informed of this SEC investigation or settlement by the Founders until 25 June 2019, when the Founders responded directly to the Authority's questions to PAG's former insurance manager seeking to establish if the directors or PAG were subject to any ongoing investigations (paragraph 14). At that time, the Founders misrepresented the nature of the investigation to the Authority in that they failed to disclose that they were personally subject to an SEC investigation (paragraph 15).*
>
> *iii. The SEC's order stated that:*

a. *The Founders (acting as investment advisors to PAG) advised PAG to invest up to 25% of its investment reserves in a note issued by Silverback Capital Partners, LLC ("**Silverback**") (an entity also owned and controlled by the Founders). Silverback would then make personal loans back to the Founders totalling over US$7 million from the funds borrowed from PAG (paragraph 16).*

b. *Given that the Founders owned PAG's holding company and Silverback, and also provided investment advice to PAG, there was a clear conflict of interest, breach of the Founders' fiduciary duty to their client and a failure in their duty to disclose all material conflicts when they recommended that PAG invest in the note with Silverback (paragraph 17).*

c. *The Founders violated Section 206(2) of the Investment Advisers Act of 1940 and without admitting or denying the SEC's findings, the Founders consented to the order and agreed to pay collective disgorgement and interest of over US$7 million and a civil penalty of US$100,000 each (paragraph 18).*

Cease-and-Desist Order

2. *Given that GASP had a protracted history of balance sheet insolvency, the Authority imposed a requirement on PAG to file quarterly management accounts (paragraph 19). Following this, the Authority directed PAG on 10 April 2019 to: (i) cease-and-desist from writing new business attributable to GASP; and (ii) inject sufficient new capital into GASP to establish and maintain the required level of solvency of GASP by 7 May 2019 (paragraph 20).*

   i. *Despite the directors stating that PAG would inject capital of US$1,000,000 into GASP by 12 May 2019, PAG did not ever inject such capital into GASP and the directors did not ever confirm to the Authority that they had done so (paragraph 21).*

ii. *The auditor of PAG (the "**Auditor**") informed the Authority following the 2019 audit that it was concerned that GASP had violated the Cease-and-Desist order by writing new business in 2020 (paragraph 22(1)).*

GASP

3. *Following the 2019 audit, the Auditor expressed a number of concerns to the Authority, including the following:*

   i. *PAG had established a 'rent-a-cell' arrangement in another jurisdiction [(believed by the Authority to be Barbados due to regulatory enquiries received from that jurisdiction)] from where it is now writing its health insurance book of business (paragraph 22(3)).*

      1. *It was PAG's intention to establish another segregated portfolio type structure in the same jurisdiction as the current rent-a-cell arrangement (paragraph 22(4)).*

   ii. *PAG eventually transferring GASP's entire book of business to the new segregated portfolio structure in the same jurisdiction (paragraph 22(5)).*

4. *The records of PAG's and its Auditor demonstrate that GASP's level of insolvency increased from a capital deficit of US$9,808,265 (from the financial statements for the period ending 31 December 2019) to US$15,025,789 (from PAG's management accounts as at 31 March 2019) (paragraph 23).*

5. *Despite the financial position of GASP, its financial statements for the period ending 31 December 2019 were prepared on the going concern basis of accounting. The "Basis of Adverse Opinion" in those accounts records that the accounts were prepared on this basis because the directors were "satisfied that GASP has the resources to continue in business for the foreseeable future". This is despite the Auditor concluding under that same section of the accounts that GASP was not a going concern (see paragraph 24).*

6. *On 31 August 2020, PAG proposed to terminate GASP in a new business plan submitted to the Authority (paragraph 25).*

7. *The Authority has received a number of complaints by GASP's policy holders over the delayed settlement of claims, which have included allegations of fraud and refusal to return calls or emails against PAG (paragraph 26).*

PASP

8. *On 3 August 2020, the Authority received PASP's audited financial accounts for the year ending 2019, which depicted PASP as solvent with shareholder equity of US$14,150,462 (paragraph 27). However, the Auditor's disclaimer in those financial statements records that they had not obtained sufficient appropriate audit evidence to provide the basis for an audit opinion on the financial statements (paragraph 27). In particular:*

   i. *COVID-19 was modelled into the formulation of loss reserves in the financial statements. The Auditor stated that COVID-19 was a non-adjusting post balance sheet event that did not exist on 31 December 2019. This led to total liabilities being understated by US$18,286,190. Such an adjustment would leave PASP with a capital deficit of US$4,135,728 on the date of the balance sheet (paragraph 28).*

   ii. *PASP had used an unapproved Discounted Cash Flow ("DCF") methodology to formulate its loss reserves. Had PASP used the Cash Value methodology, its loss reserves would have been substantially higher. The Auditor advised that the DCF understated PASP's loss reserves and total liabilities by US$16,700,000 (paragraph 29).*

   iii. *The Auditor stated that PASP were unable to obtain or provide sufficient assurances regarding the recoverability of various receivable assets on the balance sheet, including US$6,672,665 due from PASP's affiliates and US$3,350,244 from PASP's reinsurers) (paragraph 30).*

9. *The Auditor informed the Authority that the shareholders of PAG were selling PASP and had invited expressions of interest, which closed on 24 July 2020. The Authority had not been informed of the planned disposal of PASP (paragraph 31).*

> 10. *The Auditor advised the Authority that PAG had expressed to them a desire to re-domicile from the Cayman Islands and held a real fear that "they [PAG and their directors] will just walk away" leaving policy holders at risk."*

The Authority's concerns summarised

13. The financial statements of PAG, GASP and PASP received in 2020 and the Auditor's observations, evidence, statements and comments were all of grave concern to the Authority. Taken together, the Authority is represented to be of the opinion that there is sufficient evidence that the Founders and PAG are:

    i. manipulating financial statements by understating reserves and overstating assets;

    ii. operating an insolvent segregated portfolio (GASP) which is struggling to pay its claims;

    iii. in the process of relocating the book of business currently written by GASP to another jurisdiction;

    iv. in the process of selling PASP without informing the Authority;

    v. in breach of the Authority's cease and desist order; and

    vi. in breach of the Insurance Law.

14. A table summarising the financial position of PAG as of 31 March 2020 is presented at paragraph 38 of Roe 1.

15. Accordingly, in order to safeguard the interests of the creditors and policyholders in the short-term, as mentioned earlier, the Controllers stated intention is to, without

giving notice to the directors of PAG for the reasons set out above and with the support of the Authority, take the following steps:

a. First, to commence proceedings under Chapter 15 of the United States Bankruptcy Code (the "**Chapter 15 Proceedings**") or such other bankruptcy proceeding in the United States as the Controllers may consider necessary and appropriate for the recognition of their appointment as Joint Controllers of PAG.

b. Second, to seek a temporary restraining order ("**TRO**") and related provisional and final relief in the Chapter 15 Proceedings in respect of PAG's assets located in the United States.

16. As explained in paragraphs 16 and 17 of Stower 1, the Controllers are advised by their United States legal counsel that an administrative appointment by the Authority pursuant to the Insurance Law may not, by itself, be sufficient to amount to a "foreign proceeding" (as that term is defined in Chapter 15 of the United States Bankruptcy Code) for the purposes of seeking recognition under Chapter 15. Accordingly, for the purposes of seeking such recognition in the United States and safeguarding PAG's assets by means of a TRO, the Controllers seek an order from this Court confirming their powers under section 24(2)(h) of the Insurance Law in the terms which were propounded in a draft Order. I am informed that the Controllers are advised that if this Court were to confirm their powers under section 24(2)(h) of the Insurance Law in the terms set out in the draft Order (and as sought in their petition), there are reasonable prospects that their appointment as Joint

Controllers of the Company will be recognized under Chapter 15 of the United States Bankruptcy Code.

Legal Principles

17. The following analysis of the legal principles proceeds on the basis of my acceptance of the strong and clear basis, apparent from the evidence, for the intervention of the Authority by the appointment of the Controllers.

18. Pursuant to section 24 of the Insurance Law, the Authority[1] has the power to appoint a person to assume control of the affairs of a licensee[2]. Such a power can be exercised immediately by the Authority in the circumstances set out in section 24(1). In this case, the Authority exercised its powers to appoint the Controllers on the grounds of section 24(1)(a), (b), (d), (f) and (g) of the Insurance Law, which provide as follows:

> *"24. (1) The Authority may immediately do any of the things provided in subsection (2), where the Authority is of the opinion that:*
>
> *(a) a licensee is or appears likely to become unable to meet its obligations as they fall due;*
>
> *(b) a licensee is carrying on business in a manner detrimental to the public interest or to the interest of its creditors or policy holders;*
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> *(c) ...*
>
> *(d) a licensee has contravened this Law, Part XVIIA of the Companies Law (2018 Revision), Part 12 of the Limited Liability Companies Law (2018 Revision) or Part 8 of the*

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1 Defined as the "*Cayman Islands Monetary Authority*" in section 2 of the Insurance Law.

2 Defined in section 2 of the Insurance Law as the holder of a valid licence granted under section 4.

Limited Liability Partnership Law, 2017 or the Money Laundering Regulations (2009 Revision);

(e) ...

(f) *the direction and management of a licensee's business has not been conducted in a fit and proper manner;*

(g) *a person holding a position as a director, manager or officer of a licensee's business is not a fit and proper person to hold the respective position; or*

(h) ...".

19. In such circumstances, the Authority may take any of the steps set out in section 24(2) of the Insurance Law. Those steps include the appointment of a receiver or controller (as in this case) pursuant to sub-section (h), which provides as follows:

> "*(2) Where subsection (1) applies, the Authority may do any of the following –*
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> ...
>
> *(h) at the expense of the licensee, appoint a receiver or person to assume control of the licensee's affairs who shall have all the powers necessary to administer the affairs of the licensee including power to terminate the insurance business of the licensee*...".

20. Thus, a person appointed as controller (as here) in respect of a licensee pursuant to section 24(2)(h) shall *"have all powers necessary to administer the affairs of the licensee"*. I must however, return to examine the breadth and meaning of that provision.

21. A controller also has a number of obligations set out in section 24(4) of the Insurance Law, to supply the Authority with information in respect of the licensee

and to prepare and supply a report on the affairs of the licensee to the Authority within 3 months of his appointment (or within such other period as the Authority may specify).

22. On receipt of the findings contained in the report produced by a controller appointed pursuant to section 24(2)(h), the Authority has the power under section 24(5) of the Insurance Law to take various steps, including revoking or extending the period of a controller's appointment, allowing the licensee to reorganise its affairs in a manner approved by the Authority, revoking the license or applying to the Court for an order that the licensee be wound up by the Court.

23. In this case, the Controllers were appointed over PAG pursuant to section 24(2)(h) of the Insurance Law and, as mentioned above, are required by their appointment, pursuant to section 24(4)(b) to: (i) prepare and supply an interim report on the affairs of PAG making, where appropriate, recommendations in respect of PAG, by no later than12 October 2020; and (ii) prepare and supply a final report on the affairs of PAG making, where appropriate, recommendations in respect of PAG, by 14 December 2020.

24. As regards the Authority's power to apply to the Court for an order to wind up a licensee, as that power is conditioned on the Authority first receiving a report from the Controllers (as referenced above from section 24(5)(of the Insurance Law), such an application to wind up could not yet be made in this matter, the Controllers not yet having had time to investigate and file a report. Hence, the application for the

confirmation of the existing powers of the Controllers, rather than one for winding up under the supervision of the court.

25. The practical need for a confirmatory order despite the expressed powers given by their appointment to "*administer the affairs of the licensee*", arises because the Controllers must now act outside the jurisdiction and as indicated above based on their legal advice, an order made in proceedings before this court is required to obtain recognition under Chapter 15 of the U.S. Bankruptcy Code.

26. There is no statutory jurisdiction vested for the making of a confirmatory order of the kind sought here, nor is there any direct case precedent for the making of such an order. However, some guidance on the co-relationships between the powers vested in the Authority for the appointment of controllers (or receivers) and the jurisdiction of the Court for the sanction or effectuation of the exercise of such powers, can be found in the authorities in relation to section 18(1)(v) of the Banks and Trusts Companies Law (2020 Revision) (the "**BTCL**"); as those authorities are considered against the background also of the predecessor provisions in section 13(1)(vii) of the Insurance Law (2008 Revision) (now repealed); for the making of these appointments.[3]

[3] Section 13(1)(vii) provided that when of the opinion that a licensee had committed any of the infractions of the kind now covered by section 4(1) of the Insurance Law, the Authority may, in addition to taking any of the other steps: *"(vii) at the expense of the licensee, appoint a person to assume control of the licensee's affairs who shall, with necessary changes, have all the powers of a person appointed as a receiver or manager of a business appointed under section 18 of the Bankruptcy Law (1997 Revision)"*.There are two further legislative provisions in the Cayman Islands containing provisions empowering the Authority to appoint a person to assume control of a business but, like section 4 of the Insurance Law, without cross-reference to the Bankruptcy Law(1997 Revision), namely: s.30(3)(e) of the Mutual Funds Law (2020 Revision) and s.17(2A)(h) of the Securities Investment Business Law (2020 Revision).

27. Section 18(1)(v) of the BTCL largely replicates the former provision of section 13(1)(vii) of the Insurance Law (2008 Revision) and perpetuates a dichotomy with which the Courts have continued to grapple, aptly referred to by Mr Bell as "the old chestnut". This is so in the case of the BTCL even while, as shown from the current revisions of the other regulatory laws and from Section 4 of the Insurance Law itself, the dichotomy no longer arises from them. On the face of these provisions, the powers vested by the Authority to administer the affairs of licences under these laws are not expressly required to be confirmed or sanctioned by the Court. Nonetheless, for the purposes of the present analysis, it will be instructive to revisit the old chestnut.

28. Section 18(1)(v) of the BTCL provides that whenever the Authority is of the opinion that one of the circumstances in subsection (1)(a)-(h) exists, it may forthwith take a number of steps, including:

> "*(v) at the expense of the licensee, appoint a person to assume control of the licensee's affairs who shall, mutatis mutandi, have all the powers of a person appointed as a receiver or manager of a business appointed under section 18 of the Bankruptcy Law (1997 Revision)*" (emphasis added).

29. This incorporation of reference to section 18 of the Bankruptcy Law has been repeatedly queried by the Courts as giving rise to inconsistent legislative provisions and, in particular, an inconsistency between:

    a. the powers of the Authority under the former section 18 of the BTCL which, as does the current section 18(1)(v), provided the Authority with the power to appoint a controller of a bank which is in financial difficulties, with all the

powers of a receiver or manager under section 18 of the Bankruptcy Law; and

b. those of the Court under section 18 of the Bankruptcy Law itself which, in equally express terms, restricts the right to appoint a receiver and manager of an insolvent company to the Court and giving it alone the power to determine the scope of the powers of the appointee.

30. In ***Finsbury Bank and Trust Company v Attorney General*** [1996 CILR 349], the question arose as to whether the receiver appointed by the Governor-in-Council (who formerly exercised the powers now vested in the Authority) to assume control over the affairs of the bank in that case under section 14(1)(d)(v) of the Banks and Trust Companies Law 1989 (the "**BTCL 1989**")[4], could claim his fees and expenses incurred in having acted without the directions of the Court.

31. In that case, the Governor appointed a chartered accountant, Mr Bullmore, to assume control of Finsbury Bank and had undertaken to indemnify Mr Bullmore for his fees. The Governor subsequently revoked the bank's licence upon receipt of Mr Bullmore's statutory report and applied to the court for the compulsory winding up of the bank. The bank was subsequently placed into voluntary liquidation and the liquidators refused to reimburse the Government the fees owed to Mr Bullmore, on the grounds that Mr Bullmore, although having been duly appointed by the Governor, had failed to seek directions from the Court before performing his duties, and that the Governor had acted as a mere volunteer in paying his fees.

[4] Which is in all material terms as the equivalent provision in the BTCL.

32. At first instance, the Grand Court held at [1994–95 CILR 531] that it was clear from the wording of section 14(1) of the BTCL 1989 that, although the Governor had appointed Mr Bullmore to assume control of the bank's affairs, Mr Bullmore derived his powers in exactly the same manner as a trustee- in- bankruptcy appointed as receiver under section 18 of the Bankruptcy Law. Consequently, Mr Bullmore's powers derived from the Court and he could not act in any manner without directions from the Court.[5] The Grand Court held that the Governor's directions were void and conferred no authority to act,[6] but that since the indemnity for fees was necessary for the effectiveness of appointments under section 14(1), and since Mr Bullmore would have been authorised by the Court had he applied at the proper time or retrospectively, the liquidation estate of Finsbury Bank was obliged to reimburse the Governor.[7]

33. The Court of Appeal dismissed the liquidators' appeal of this decision [reported at 1996 CILR 349]. Whilst acknowledging that it was difficult to reconcile the provisions of section 14 of the BTCL 1989 with those of section 18 of the Bankruptcy Law, the Court of Appeal held that it was obliged to construe the two provisions so as to avoid defeating the clear legislative intention behind section 14, which was to enable the Governor to act quickly to revoke a company's licence if necessary in the public interest.

[5] See page 534, line 39 to page 535, line 2.
[6] See page 535, lines 31 to 38.
[7] See page 536, lines 19 to 38; page 536, line 41 to page 537, line 9; page 537, lines 15 to 17; lines 20 to 34.

34. On that basis, the Court of Appeal held that the fact that an appointee under section 14(1) of the BTCL 1989 needed to apply to the Court for directions before carrying out his duties as receiver did not derogate from the authority conferred by his appointment to assume control of the company and report to the Governor. Whilst it was difficult to reconcile the provisions of section 14 of the BTCL 1989 with those of section 18 of the Bankruptcy Law due to the absence of any detailed description of a receiver's powers in section 18 and the unhelpful use of the phrase "mutatis mutandis" in section 14(1), the Court was obliged to construe the two provisions so as to avoid defeating the clear legislative intention:

> *"Applying the liberal approach of reconciliation to s.18 of the Bankruptcy Law, the receiver and manager appointed thereunder by the court is a creature of the court and his powers as such are conferred by the court* *__but this cannot be used to derogate from the express power of the Governor's appointee "to assume control of the licensee's affairs."__* *There is support for this approach in the following quoted statement from* ***Craies on Statute Law*** *(op. cit., at 98):*
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> > *". . . [I]f the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result" (**Nokes v. Doncaster Amalgamated Collieries Ltd.** (1) ([1940] A.C. at 1022, per Lord Simon)).*
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> *From careful analysis of s.18 of the Bankruptcy Law (Revised), it will be seen that after the sentences dealing with the powers of the Grand Court there is implied recognition that a trustee, after an absolute order of bankruptcy, has powers independent of those conferred on his appointment as receiver or manager. The same implication should be extended to an appointee under s.14(1)(d)(v) of the Banks and Trust Companies Law, 1989"* (emphasis added).

35. On that basis, the Court of Appeal held that Mr Bullmore was entitled to recover his fees for work done and expenses reasonably and necessarily incurred as were attendant and incidental to his assuming control of the affairs of the bank and rendering the report as required by the provisions of section 14 of the BTCL 1989. The case was remitted to the Grand Court for the assessment of quantum of such recoverable fees.

36. In ***Governor v Federated Intl. Bank Ltd*** (Grand Court), 5 November 1998, unreported) ,this Court, in an application by the Governor and the receivers acting pursuant to powers granted to them by section 14(1)(d)(v) of the BTCL 1989, referred to the operation of that provision (as distinct from the actual outcome in **Finsbury Bank**) as follows:

> "*The powers vested pursuant to that provision upon the person appointed as receiver or manager have been held not to be exercisable until they have been sanctioned by the Court by way of directions given for their execution. See Finsbury Bank and Trust Company v Attorney General 1996 CILR 349 in the Court of Appeal and the earlier judgment of this Court, reported at 1994-1995 CILR 531. The rationale is that as the powers are derived in the same manner as those of a trustee-in-bankruptcy under S. 18 of the Bankruptcy Law, the powers are derived from the Court and a receiver therefore may not act in any manner without first obtaining directions from the Court. It followed that the receiver had in that case erred in not first obtaining such directions and the directions from the Governor, upon which he had acted, were void and if no effect.*"

37. That case did not give rise to the kind of difficulties presented in ***Finsbury Bank*** because, the lessons from ***Finsbury Bank*** having been learnt, the Receivers of

Federated International Bank applied for the sanction of the Court before they took any steps in the receivership although having been duly appointed by the Governor.

38. More recently, in ***In re Caledonian Bank Ltd*** (Grand Ct.) [2015 (1) CILR 143], controllers were appointed by the Authority under section 18(1)(v) of the Banks and Trust Companies Law (2013 Revision) (the "**BTCL 2013**") (which is in all material terms the same as the equivalent provision in the BTCL and the BTCL 1989) over a bank to assume control of its affairs. Subsequently, and despite having notice of the appointment of the controllers, the bank's sole shareholder appointed joint voluntary liquidators. The joint voluntary liquidators of the bank sought an order from the Court patently intended to conflict with the powers of those controllers, that the voluntary liquidation continue under the supervision of the Court and that they be appointed as official liquidators of the bank. In that case, the joint voluntary liquidators submitted that the appointment of controllers did not confer on them powers to manage the bank's affairs until such powers were confirmed by the Court under section 18 of the Bankruptcy Law which had not yet happened.

39. The Court dismissed the application by the joint voluntary liquidators and held (following ***Finsbury Bank***, page 357, lines 39 to 44) that the appointment of controllers by the Authority under section 18 of the BTCL 2013 vests immediate control of the bank's affairs in them. In paragraph 15 of the judgment, it was held as follows (per Smellie CJ):

> *"15. In my view, at the very least, the legislative scheme must mean that the appointment of the controllers by CIMA, forthwith upon CIMA being of the opinion that at least one of the qualifying*

circumstances exits, vests immediate control of the licensee's affairs in the controllers. What, at the very least, this must mean is that the controllers, if not as against the world at large, are certainly, as against the licensee itself, in a position immediately to demand that it cedes operation of its business to them, including that those hitherto in control must hand over its books and records and relinquish control of such of the licensee's assets as may be within their immediate control" (emphasis added).

40. Importantly, what was being distinguishing was the position of controllers as against the "*world at large*" and it was held at [16] that such powers may not be *effective* unless confirmed by the Court:

> "*16. While, as against others, the controllers may find (for instance for the purpose of recovering assets which may be at large) that their appointment is not effective without the aid of the court (vesting them with the assimilated powers to be bestowed pursuant to s.18 of the Bankruptcy Law (1997 Revision)), it surely cannot be right that as against the licensee on notice of their appointment, the controllers can simply be ignored. The licensee, and those hitherto in control of it, are bound to comply with the appointment of the controllers and this must mean immediately relinquishing control of the licensee's affairs. The position therefore is that the controllers have effectively assumed control of the licensee's affairs to the exclusion of the JVLs, the directors and the shareholder, and anyone else who may claim any aspect of control.*" (emphasis added).

The powers of the controllers here

41. Relying especially on that dictum from ***Caledonian***, and by parity of reasoning, the Controllers submitted and I accepted that they have the necessary powers pursuant to their appointment under section 24(2)(h) of the Insurance Law to administer the affairs of PAG to the exclusion of its directors and shareholders. However, for reasons already mentioned and to be examined further below, the Controllers seek the Court's confirmation of their powers in the terms of the Draft Order to ensure

that their powers of appointment are *effective as against the world at large* for the purpose of preserving and safeguarding PAG's assets by among other things, commencing the aforementioned proceedings in the United States.

Powers exercisable by the Joint Controllers without the Court's confirmation

42. The earlier authorities of ***Finsbury Park*** and ***Federated International*** appear to suggest that any powers vested in the person appointed by the Authority under section 18(1)(v) of the BTCL 1989 or BTCL 2013 were not exercisable until they had been sanctioned by the Court. That position arose as a result of the Court's attempts to reconcile the apparent inconsistency between section 18 of the Bankruptcy Law and section 18(1)(v) of the BTCL 2013 (and its predecessor). The inconsistency between these legislative provisions was reflected upon in ***Caledonian***. In paragraph 9, I recommended that this provision be "*modernized to reflect the true meaning of the dual but separate roles of CIMA and the court in making these appointments*". In recognition of the dual roles of the Authority and the Court, some clarification was offered in relation to the circumstances in which controllers require confirmation of their powers from the Court and, in doing so, distinguishing between the powers of the controllers as against the licensee and those as against the world at large.

43. In ***Caledonian***, it was recognised (as per the passages cited above) that the powers conferred on the person appointed pursuant to 18(1)(v) of the BTCL 2013 vest immediate control of the licensee's affairs in the person to the exclusion of the

licensee's directors, shareholders and anyone else who may claim any aspect of control. In so deciding, the Court of Appeal's findings in ***Finsbury Bank*** were followed (at page 357, lines 39 to 44) that the provisions of section 18 of the Bankruptcy Law cannot be used to derogate from the express power of the Authority's appointee to assume control of the licensee's affairs. It was held that (at the very least) this must mean that controllers as against the licensee are in a position to immediately demand that it cedes operation of the business to them (such as handing over the licensee's books and records and relinquishing control of its assets as may be within the licensee's immediate control). As against the licensee, controllers are not required to seek the Court's confirmation or direction before they are able to exercise such powers.

44. It is submitted here on behalf of the Controllers that those principles can be applied by analogy to section 24(2)(h) of the Insurance Law so as to give effect to the objectives of the legislative scheme of the Insurance Law and the Authority's role as regulator. As was recognised at paragraph 14 of ***Caledonian***, there are numerous volatile and urgent circumstances which could arise, including the urgent need to preserve assets and protect the records of the licensee. The removal of the reference to section 18 of the Bankruptcy Law in the current revision of the Insurance Law and the insertion of language confirming that a controller may exercise "*all powers necessary*" to administer the affairs of the licensee upon appointment, makes the argument an *a fortiori* one. In my view it supports (rather than detracts) from that

analysis by alleviating the concerns arising from the inconsistency of these legislative provisions.

Inherent jurisdiction of the Court to confirm the powers of the Joint Controllers

45. However, discussed above, as against the world at large, in ***Caledonian***, it was found that controllers may require confirmation from the Court before their powers are "*effective*". That is precisely the position the Controllers find themselves in here, following their appointment. Whilst the Controllers have been duly appointed by the Authority to assume control of PAG's affairs, those powers (on analysis of ***Caledonian***) are not effective to enable the Controllers to carry out their functions as against assets based in the United States without obtaining the Court's confirmation.

46. As explained above and as I accept, the Controllers understand that there is a real risk that PAG's assets could be dissipated if its directors are notified of their appointment before appropriate restraints are put in place to safeguard those assets. In that respect, the Controllers' propose to first commence proceedings under Chapter 15 to seek recognition of their appointment before applying for a TRO and related provisional and final relief against PAG's assets. As explained in paragraph 15 of Stower 1, the Controllers understand that this is currently the most feasible option available to them to secure or otherwise freeze assets located in the United States in the short-term.

47. It is therefore of crucial importance that under section 24(2)(h) of the Insurance Law their powers are confirmed by the Court in the terms set out in the Draft Order, so

that their appointment as Joint Controllers of the Company will be recognised under Chapter 15 of the United States Bankruptcy Code (see paragraph 17 of Stower 1).

48. I accept that the Court has an inherent jurisdiction to confirm the powers of controllers vested under section 24(2)(h) of the Insurance Law, notwithstanding the repeal of the former provision in the earlier revision which expressly called for this Court's sanction of the powers, like that which still remains in section 18 of the BTCL. In ***Bennion on Statutory Interpretation*** **(7th edition)** (2017) (First Supplement, 2019), the commentators state at paragraph 25.4 that:

> "*The court's inherent jurisdiction may in appropriate circumstances be used to supplement a statutory scheme so as to fill a gap or avoid injustice. So, for example, it is well established that the High Court may exercise its inherent wardship jurisdiction to fill an unintended statutory lacuna.*
>
> *...The general approach of the courts is summarised in the following passage by Baker J in* ***Health Service Executive of Ireland v Z***[8]:
>
> > *"[16] It is well established that the High Court may in appropriate circumstances use its inherent jurisdiction to supplement a statutory scheme. As Lord Hailsham of St Marylebone LC observed in* ***Richards v Richards*** *[1984] AC 174, 199—200:*
> >
> > > *'where, as here, Parliament has spelt out in considerable detail what must be done in a particular class of case, it is not open to litigants to bypass the special Act, nor to the courts to disregard its provisions by resorting to the earlier procedure, and thus choose to apply a different jurisprudence from that which the Act prescribes.'*

[8] [2016] 3 WLR 791.

On the other hand, as Lord Donaldson of Lymington MR observed in the Court of Appeal in ***In re F (Mental Patient: Sterilisation)*** *[1990] 2 AC 1, 13, in a passage approved by the House of Lords on appeal:*

> *"the common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill gaps is one of the most important duties of the judges. It is not a legislative function or process that is an alternative solution the initiation of which is the sole prerogative of Parliament. It is an essentially judicial process and, as such, it has to be undertaken in accordance with principle"* (emphasis added).

49. The inherent jurisdiction cannot, however, be deployed so as to undermine the will of the legislature as expressed in the statute (***Re L (Vulnerable Adults with Capacity" Court's Jurisdiction) (No. 2)*** [2013] Fam 1 at [62] and should not be exercised in a manner which cuts across the statutory scheme (***Re B (A Child) (Reunite International Child Abduction Centre and Others Intervening)*** [2016] AC 606 , per Lord Sumption at [85]).

50. I recognise first of all, that in the present circumstances the Controllers will not simply by dint of their appointment be able effectively to fulfil their statutory mandate without the intervention of the Court. This is therefore an appropriate case in which the Court can and should exercise its inherent jurisdiction to supplement section 24(2)(h) of the Insurance Law and in order to fill the practical gap left by that provision. The obvious intent of section 24 of the Insurance Law is to confer upon the Authority (and, following their appointment, controllers) extra-curial power in the circumstances described to act expeditiously in the public interest (as

with the Court of Appeal's findings in relation to the intent of the BTCL 1989 in ***Finsbury Bank*** at page 357). As outlined in paragraph 41 of Roe 1, the Authority as the regulator of financial services in or from within the Cayman Islands has an overarching regulatory function and as such is required under the Monetary Authority Law to carry out its stated regulatory functions (including, but not limited to, enhancing market confidence, consumer protection and the reputation of the Islands as a financial centre and endeavouring to reduce the possibility of financial services business being used for the purpose of money laundering).

51. All the powers sought to be exercised by the Controllers must fall within the "*powers necessary*" to administer PAG's affairs pursuant to section 24(2)(h) of the Insurance Law. However, section 24(2)(h) (like its predecessor and the current section 18(1) of the BTCL) does not specify the "*powers necessary*" to administer the affairs of the licensee. Whilst the Authority has the power under section 26 of the Insurance Law to apply *ex parte* to the Court for an order that the assets, books or papers of the licensee be preserved, not moved, destroyed or otherwise disposed, such an order would not, in itself, be effective so as to safeguard assets situated in the United States. Nor, as already noted, are things yet at the stage where an order for winding up could be sought from the Court. Therefore, it is accepted, as submitted on behalf of the Controllers, that the proposed exercise of the Court's inherent jurisdiction in this case would not cut across or otherwise undermine the statutory regime.

52. Given that section 24(2)(h) does not specify what constitutes a necessary power for the purposes of that provision, it would be surprising if the Court lacks jurisdiction to determine or give directions with respect to the scope of such powers. Further, it cannot be right (or the intention of the Legislature) that the Court's ability to give effect to the powers of controllers appointed under section 24(2)(h) as against the world at large, be excluded as a result of the removal of the reference to section 18 of the Bankruptcy Law in the current revision of the Insurance Law.

53. Accordingly, I granted the order pursuant to the Court's inherent jurisdiction to confirm that the Controllers possess the powers set out in the Draft Order in "*aid*" of the Controllership and in order to give effect to their appointment by the Authority as against others so as to secure the assets of PAG and prevent the risk of dissipation. I accepted that the powers sought to be confirmed by the Controllers in the Draft Order are plainly "*powers necessary*" within the meaning of section 24(2)(h).

Declaratory relief confirming the powers of the Joint Controllers

54. Further or alternatively, the Controllers submitted that they are entitled to a declaration that they possess the powers set out in paragraph 1 of the Draft Order in accordance with the principles in ***A Company v A Funder*** (Grand Court), Segal J, unreported, 23 November 2017 .

55. While I do not doubt the validity and efficacy of the confirmatory orders made, I deal with this issue *ex abundanti cautela* and in deference to the industry taken for the presentation of the arguments.

56. In ***A Company v A Funder***, the plaintiff sought a declaration from this Court to the effect that a funding agreement entered into between the plaintiff and the defendant was not unlawful and that the entering into and the commencement of proceedings with funding made pursuant to that agreement would not be held unlawful by reasons of maintenance or champerty. The plaintiff intended to commence proceedings in this Court for the recognition and enforcement of a New York arbitration award (and apply for an *ex parte* freezing injunction in aid of enforcement). The plaintiff was concerned that by pursuing those proceedings, it risked committing the crime (and tort) of champerty or maintenance.

57. Justice Segal acknowledged (at [3]) the artificiality of the application given that the defendant had not taken part in the proceedings, was not adverse to the plaintiff and did not contest the relief sought by the plaintiff. Furthermore, the defendant to the action which the plaintiff intended to commence to enforce the arbitration award and New York judgment, would not be bound by any such declaration. Despite the Court expressing concerns that this was effectively an *ex parte* application by the plaintiff for a declaration on an issue that was not in dispute between the parties, Segal J concluded that, provided certain amendments were made to the funding agreement, he would make a declaration that the funding agreement was not

unenforceable in the Cayman Islands as a matter of public policy by reason of champerty or maintenance. He held at [52]:

> "*52. I have already explained that the form and nature of the Plaintiffs' application in this case gave rise to some concerns and has caused me to make my analysis subject to certain important caveats. I did consider whether it was appropriate to grant any relief to the Plaintiff in circumstances where it might be said that the Plaintiff was in effect seeking an advisory opinion from the Court on a point of general commercial importance to the Defendant and the commercial funding industry. However, I was satisfied that I should allow the application to proceed and grant the relief sought since the evidence demonstrated that the Plaintiff had genuine claims which it intended to prosecute, that the Plaintiff intended to proceed immediately with litigation in this jurisdiction and that since maintenance and champerty remain criminal offences in this jurisdiction the Plaintiff had a legitimate interest to protect and there was a real issue to be decided (in connection with the prospective proceedings against the Award Debtors).*"

58. In this case, the Controllers intend to proceed immediately to commence Chapter 15 Proceedings in order to safeguard PAG's assets in the United States. Whilst pursuing these proceedings does not give rise to any potential criminal offence or tortious liability, for the reasons explained above, I accepted that there is a legitimate need to protect the interests of policy holders and creditors of PAG by enabling the Controllers to take steps to secure the assets of PAG given the risks of dissipation of the assets outlined above.

59. There is no doubt that the jurisdiction exists to grant declaratory relief for these purposes. It is recognised expressly by Grand Court Rules Order 15 rule 16:

> *"No action or other proceeding should be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed".*

60. The limitations on this wide jurisdiction are well recognised. In ***Malone v Metropolitian Police Commissioner*** [1979]1Ch3.44.[9] Vice Chancellor Megarr addressing the equivalent rules in the former Rules of the Supreme Court, concisely encapsulated the principles in these terms (at p353) (following his earlier decision in ***Uppal v Home Office*** (unreported) October 20, 1978), which in turn had relied on ***Gunriet v Union of Past Officer Workers*** [1978] A.C. 435):[10]

> *"In my judgment, the power to make declarations is confined to making declarations on matters that are justiciable in the courts. This is emphasised by the contrast in drafting in the rule [(0.15.r16)]. The second limb is cast in the form of conferring a positive power of making declarations of right. The first limb on the other hand is expressed in terms not of confirming any positive power but only of removing one possible objection to proceedings, namely, that a merely declaratory judgment is sought. Every other objection remains open, and so if the proceedings are brought in respect of moral, social or political matters in which no legal or equitable rights arise, the objection to the court deciding such matters remains."*

And further at p38-6-14"

> *"The remedy of a declaration is of course, discretionary. A declaration will normally not be granted on abstract questions or hypothetical facts. It is no use asking the court to make a general declaration stating what the law is on such-and-such a topic. A declaration will usually be made only on the specific facts of a specific case, and after proper evidence and argument has been put before the court. The court cannot make an interlocutory declaration (see **Hill v C.A. Parsons & Co. Ltd.** [1972] Ch. 305, 324); and apart from the rare possibility of the court making a final declaration in interlocutory proceedings (see **General Electric Company of New York Ltd. V Commissioners of Customs and Excises** [1962] Ch 784, 789), no declarations will be made on motion. It is a solemn matter for a court to make a declaration of rights, especially in a case which*

[9] Followed and applied by this Court in In Re Ojjeh Trust 1992-93 CILR 248

[10] Followed and applied by this Court in ***Woods v Thompson*** 2016(2) CILR 1

> *is of concern to many people; and the court should do so only after the full process of law has been employed to ascertain the complete facts and the contentions".*

Here it was in my view plain, that a declaration in the terms sought, as to the legal rights of the Controllers to assume control of the affairs of PAG (and its segregated portfolios), comes well within the ambit of the jurisdiction and discretion of the Court, as explained in the case law examined above.

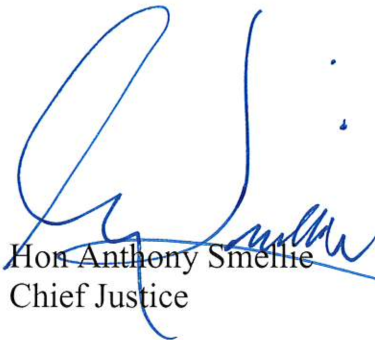
61. Accordingly, I accepted that I should make an order granting the Controllers declaratory relief in the terms also of the Draft Order to confirm their necessary powers under section 24(2)(h) of the Insurance Law.

CONFIDENTIALITY

62. In circumstances where the Authority has not yet publicised the appointment of the Controllers and they have not yet taken any public steps to secure the assets of PAG (due to the risk of dissipation of those assets by the directors of the PAG, as explained above), the Controllers requested, quite reasonably in my view, that the Petition, and the evidence filed in support, be sealed and not placed on the Court file until further order of the Court. I also granted an order in those terms.

CONCLUSION

63. For the reasons set out above, I granted the orders in the terms prayed in the Controllers' Petition and, subject to certain amendments, as set out in the Draft Order.



Hon Anthony Smellie
Chief Justice

29 September 2020