

9.5.05

cont.

1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS
3
4

CAUSE NO: 169 OF 2005

7 IN THE MATTER OF THE COMPANIES LAW (2004 REVISION)
8 - AND -
9 IN THE MATTER OF DYOLL INSURANCE COMPANY LIMITED

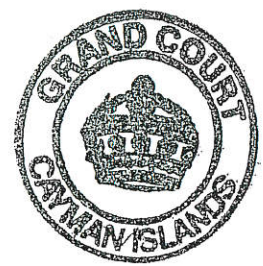
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12 BEFORE: The Honourable Madam Justice Levers
13

14
15 APPEARANCES:
16 Mr. E. George, Q.C. and Ms. L. Hatfield of Solomon Harris for the Applicant
17 Mr. S. Hall-Jones and Mr. S. Diamond of Diamond Law & Assoc. for the Creditors
18 Mr. K. Farrow of Quin & Hampson for CIMA
19 Mr. R. Gardner of Walkers for the JPL's
20

21 HEARD: May 2, 2005
22

JUDGMENT

23
24 Levers J.
25



26 Dyoll Insurance Company Limited was incorporated under the Companies Act of
27 Jamaica on October 8, 1964 for the purpose of carrying out the business, in Jamaica, of
28 the provision of insurance products to that populace. In July 1972, the company was
29 registered in the Cayman Islands as a foreign company pursuant to the Cayman Islands
30 Companies Law. The company holds a Class "A" licence under the Insurance Law of
31 the Cayman Islands and has been a fixture in this jurisdiction for over 30 years
32 conducting insurance business and issuing insurance policies of a varied nature but
33 particularly covering loss and damage to property caused by certain natural disasters.

1

2 In September, 2004, a natural disaster of monumental and tragic proportions befell the
3 Cayman Islands during the passage over and near these Islands of Hurricane Ivan. In
4 the wake of this disaster, devastated property owners turned to their insurer, Dyoll
5 Insurance Company Limited, to protect them from the severe losses incurred as Dyoll
6 had promised to do when it issued them policies in exchange for the payment of regular
7 premium income to Dyoll. Unfortunately, the company was not in a financial position to
8 honour its obligations to the citizens of the Cayman Islands and, in common parlance,
9 appears to have gone "belly-up". A Petition for the winding up of the company was
10 presented to the Grand Court of the Cayman Islands and, on April 11, 2005, this Court
11 made an Order, *inter alia*, appointing Kenneth Kryss and Christopher Stride of RSM
12 Cayman Islands as Joint Provisional Liquidators of the company.

13

14 Subsequently, this Application has been brought seeking a further Order setting aside
15 the Order of April 11 and the ground of this current application rests on the Court's
16 jurisdiction to make the previous Order of April 11. The straightforward submission has
17 been made that, Dyoll not being a "company" within the meaning ascribed to such
18 entities by the Cayman Islands Companies Law (2004 Revision), the Grand Court of the
19 Cayman Islands would have no jurisdiction to make any Order authorized by that Law to
20 be made against or in the matter of the affairs of such a company.

21

22 Before going into the merits or otherwise of the submission made, I must confess to
23 being somewhat bemused at the irony of this Court being asked to make any Order,

1 even one setting aside an Order previously made, in a matter in which it is submitted
2 that the Court has no jurisdiction. It would appear to me that the only Order that could
3 be contemplated in such a circumstance would be one striking out the Petition on the
4 basis that it is brought in a Court without jurisdiction. Otherwise, this Court will be left
5 with the incongruity of a pending Petition in which a ruling has been made (or, at this
6 stage, is being sought) based on a lack of jurisdiction in the court to deal with that
7 Petition at all.

8

9 Be that as it may, I will now examine the submission that this Court has no jurisdiction to
10 appoint provisional liquidators for a foreign company which has established a place of
11 business in the Cayman Islands and which has carried on business here for more than
12 30 years. The submission is based on the definition of "company" in Section 2 of the
13 Companies Law as follows:

14

15 *"company" except where the context excludes exempted*
16 *companies, means a company formed and registered under*
17 *this Law or an existing company.*
18

19 It is submitted that Dyoll Insurance Company, having been incorporated under the
20 Companies Act of Jamaica in 1964 and subsequently only "registered" in the Cayman
21 Islands as a Foreign Company pursuant to the provisions of Part IX of the Cayman
22 Islands Companies Law, cannot be said to have been "formed" under that Law. But this
23 submission is flawed and exposes a misunderstanding of the process of the forming of
24 corporate associations into companies.

25

1 Firstly, it must be noted that the Companies Law clearly envisages a distinction between
2 the words "formed" and "incorporated" as Part IX expressly refers to companies
3 "incorporated outside the islands" in defining foreign companies but the word
4 "incorporated" is not used in Section 2 in the definition of "company" to which the Law
5 applies. I take the view that the formation of a company is at least conceptually a
6 process that takes place before the company is incorporated or even registered.
7 However, for the purposes of the application before me, it is unnecessary for me to
8 decide definitively exactly how that critical flow of the processes of corporate birth can
9 be diagramed. What is unassailable is that the "incorporation" of a company is different
10 from the "formation" of it.

11
12 What does the Law mean by "formed and registered under this Law"? To my mind, a
13 company is formed in a particular jurisdiction as soon as the requirements for the
14 carrying on of business in that jurisdiction are complied with. The company is then
15 "incorporated" or "registered" in that jurisdiction as soon as the documentation is
16 processed by the relevant Companies Registry and officially recorded in accordance
17 with the law of that jurisdiction. In that light a company doing business in several
18 jurisdictions can be "formed" in each one as it decides to engage that jurisdiction's
19 citizens in commercial activity to its benefit and takes the positive step of complying with
20 that jurisdiction's requirements to conduct such beneficial commercial activity there.

21
22 Applying this finding of law to the facts in this case, Dyoll was formed in Jamaica as
23 soon as the Memorandum and Articles of Association and other documents of

1 incorporation were safely delivered to that Nation's Companies Registry. Then, it was
2 "incorporated" or "registered" in Jamaica on October 8, 1964, when the documentation
3 was completely processed by that Office and duly recorded in accordance with the
4 Jamaican Companies Act. Subsequently, Dyoll was also "formed" in the Cayman
5 Islands when the requirements of Part IX of our Companies Law were complied with
6 and the necessary documentation delivered to the Registrar of Companies for
7 registration. This is to be done within one month of either establishing a place of
8 business or actually commencing business in the Islands (*see sections 203-204 of the*
9 *Companies Law*). As soon as the documentation has been delivered to the Registrar,
10 the foreign company has been "formed" under the Cayman Islands Companies Law and
11 is permitted to transact certain types of business that a company not yet formed under
12 that Law cannot conduct. For example, it may hold land in the islands (*see section 205*
13 *of the Companies Law*).

14
15 The company having been "formed", the Registrar, when such formation by way of
16 compliance is established, is to issue a certificate of registration (*section 206*) thereby
17 providing conclusive evidence that compliance has been achieved [*see sub-section (2)*
18 *of section 206*] and, upon the issue of that Certificate, the foreign company becomes
19 "registered" under the Law. The Law clearly sets out the distinction between the
20 formation of the company (by way of compliance with the registration requirements) and
21 the new rights acquired thereby (e.g. the right to hold land) and the process whereby
22 compliance is evidenced (registration). Upon the issuance of the certificate of
23 registration, the foreign company is duly "formed and registered" under the Companies

1 Law and I so hold.

2

3 It follows that Dyoll Insurance Company Limited is formed and registered both under the
4 Jamaican Companies Act and the Cayman Islands Companies Law and the Grand
5 Court of the Cayman Islands has jurisdiction to make any Order authorized by the
6 Companies Law including the Order made on April 11, 2005. I am fortified in this finding
7 by two matters. Firstly, even in the new Jamaican Companies Act (passed in January
8 2005 but it is unclear as to whether or not it has come into effect), which includes a
9 definition of "company" identical to the one under review, section 3 "**Mode of forming**
10 **incorporated company**", sub-section (1), provides as follows:

11

12 *"One or more persons may form a company by signing and*
13 *sending articles of incorporation to the Registrar and*
14 *otherwise complying with the requirements of this Act in*
15 *respect of registration."*
16

17 Secondly, there is the matter of public policy. If a company wants the commercial
18 benefits of conducting business with citizens of these Islands, it must be prepared to
19 subject itself and its commercial operations worldwide to the Laws and Courts of these
20 Islands. There was no compartmentalization by Dyoll, in its commercial pursuits, of its
21 Jamaican portfolio from its Caymanian portfolio nor were any cost centres set up and
22 delineated so as to ensure that premium income from Cayman remained in Cayman
23 and premium income in Jamaica remained in Jamaica. The operations were carried out
24 as one company and, now that difficulties have arisen, it must be prepared to deal, as
25 one company, with the courts in both jurisdictions in which it previously flourished.

1

2 Any other approach by the Grand Court of Cayman would be an inferential support of
3 piracy and encouragement for corporations to come here, engage in commercial pillage
4 and plunder and then safely withdraw to their home bases without any prospect of
5 having to answer to the citizens of the Cayman Islands for any financial devastation
6 resulting from the company's business practices here. That could never be in
7 accordance with public policy and no decision of this court will ever be used as the thin
8 edge of the wedge which opens the door to that sort of result. I make no comment on
9 the commercial activities of Dyoll itself but only about the effect on the directing mind set
10 of foreign companies generally if the Court were to accede to the submissions being
11 made in this case.

12

13 This Court finds that it has and had jurisdiction to make the Order of April 11, 2005 and,
14 accordingly, the application to set aside is refused.

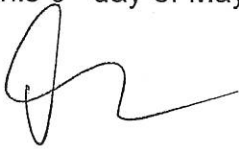
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16 Costs of the Joint Provisional Liquidators and the Applicant/Petitioner, to be paid by the
17 Financial Services Commission, to be agreed or taxed.

18

19 Dated this 9th day of May, 2005

20



21

22 Judge of the Grand Court

