Re **Andrew Weir** Insurance Company Limited

Chancery Division (Companies Court)

(Transcript:Barnett Lenton)

HEARING-DATES: 12 November 1992

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COUNSEL:

J Cone for the Petitioners

PANEL: Harman J

JUDGMENTBY-1: HARMAN J

JUDGMENT-1:

HARMAN J: I have before me an application by the Petitioners, Mr Anthony William Baldwin, John Norman Miles and Raymond Brian Ingielewicz, who are three directors of Andrew Weir Insurance Company Limited ("the Company"). The Petition was presented by those three gentlemen for the liquidation of that Company this morning and is returnable before the Registrar on the 20th January next year. The application before me is ex parte and seeks the appointment of provisional liquidators pending determination of the Petition.

The story is a sadly familiar one of insurance company difficulties which have been arising in recent years. The Company ceased underwriting last year and has accepted no premiums since, I think, November 1991. It appeared at that time that the reserves and assets of the company were sufficient to cover not only reported claims on Policies written by the Company (many of which claims affecting this, as other general insurance companies, arise from business written in the United States, are disputed and subject to difficult litigation over there) but also the form of claim which has to be allowed for in insurance company matters and is colloquially referred to as "IBNRs" (which is translated as "Claims incurred but not reported"). It is, I think, notorious that IBNRs are matters at which the directors can only make what I think is properly described as an informed guess.

Regrettably over the last year both incurred claims and IBNRs have increased and upon a detailed review the reserves now seem to the directors, who have taken extremely careful steps to consider in every proper way their duty to the creditors as well as to the members of the company, including taking advice from accountants, specialist insolvency practitioners, the auditors and actuaries, to be likely to prove inadequate. The result of all the advice received led the Directors on the 5th November this year to announce the suspension of payment of claims. That step was, I am satisfied, responsibly taken in the best interests of creditors both present and contingent.

The result of suspension of payment of claims, of course, will be to alarm potential claimants. That is particularly so, in my judicial experience in other insurance company cases, in the United States and that can easily lead to a serious risk of attempts by claimants in the United States to obtain and execute judgments against assets of the company. If successful such judgments and executions will result, quite likely, in some policyholders or other creditors being paid and other creditors or policyholders being unpaid, producing a far from equitable or proper distribution of the assets rateably between all the creditors and policyholders.

Further, of course, in any insurance business of this sort there is what is sometimes called a fairly long tail, and many of the potential claims may not come in or be known for some years. One has, therefore, to project claims and results. It would be wrong to pay out immediate claimants on policies, all of whom would be covered by the present assets, leaving uncertain the prospect of payment of future claims. The distribution of assets would not be pari passu among the creditors.

As I have said, the directors seem to me to have acted with impeccable care and to have taken an entirely responsible attitude. They come before me today upon this ordinary application for the appointment of provisional liquidators. Traditionally, provisional liquidators have usually been appointed in cases where it was thought by the petitioning creditor, frequently the Crown, that there was a real risk of the assets of the company being dissipated or for there to be some form of jeopardy to assets or risk of improper dealing with assets. Nothing of that sort whatever arises in this case.

However, the power in the Court to appoint liquidators provisionally, as the Act puts it under Section 135, is in entirely general terms:

(1) "The court may" (plainly creating a judicial discretion) "at any time after the presentation of a winding up petition appoint a liquidator provisionally."

There is no sort of suggestion in the Statute that it is only in cases where there is jeopardy to assets or impropriety of some sort that the court should make such an appointment.

The case here made by Mr Baldwin's affidavit in support of this application is two-fold. Firstly, there is the possibility -- indeed, I think probability -- of an application to the Bankruptcy Court in the United States (quite likely the state of New York) under Section 304 of the United States' Bankruptcy Code for an order which has a similar effect in that jurisdiction to Section 130(2) provided by the Insolvency Act 1986 in this country; that is to say, a prevention of executions, restraints and other remedies being enforced against individual assets of a company.

Further, that application in the United States or the New York Courts could only be made by persons duly appointed as relevant officers for the purpose and, to my mind, such persons could only be either liquidators, administrators, receivers or provisional liquidators. It is, of course, a fact that in an insurance company case there can be no application for an administration order. So that the Court is left only with the powers in the Insolvency Act to appoint provisional liquidators. The need, therefore, for office- holders is plainly raised by the need to apply under Section 304.

Further, the hope in this case is that there will be a scheme of arrangement under Section 425 of the Companies Act 1985. That will take a considerable time to prepare; several months at the least. It is hoped that the winding up petition may be properly adjourned for periods to enable that scheme of arrangement to be prepared. That will mean that the winding up petition will be pending for a substantially longer period than the ordinary winding up petition is likely to be pending. During that period the company has to have re-insurance protection for excess claims that may come in on policies still outstanding and extant. It would be desirable it should be open to make reinsurance recoveries and otherwise deal with its assets in a careful and proper manner. To try and do those things pursuant to a series of applications under Section 127 of the Insolvency Act would: (a) burden the Court in an intolerable way; (b) be extremely expensive to the creditors, who in the end are looking to these assets which will be diminished by such expenses; (c) be a serious burden on the time and efforts of the persons in charge of the company, which could better be devoted to actually managing the affairs of the company.

It seems to me quite wrong and certainly impracticable to expect a substantial insurance company business to be carried on for months pursuant to Section 127 applications. In order to avoid that, to put in office-holders such as provisional liquidators, absent (as here) any suggestion of impropriety, seems to me to be a proper judicial exercise of the powers of the Court. I believe that there is a tendency to appoint provisional liquidators nowadays in cases

where there are no suggestions of misfeasance or wrong-doing by the directors. I have myself made such appointments in other cases. I shall make it in this case. I regard it as a desirable development in the Court's jurisdiction which is in no way fettered by Parliament, being, as I say, intended to (and I hope effective for) the benefit of creditors generally, to whom the Court should surely be looking in a case where the company is likely, regrettably, to be insolvent.

For those reasons, it seems to me I should make the order which I have made. I have had the great advantage of hearing Mrs Storey for the Official Receiver, who has not opposed the making of this order in any way. I have well- known and highly reputable insolvency practitioners (Mr Bird and Mr Boys-Stones, both of Messrs. Price Waterhouse) proposed as the provisional liquidators. I am wholly satisfied of their suitability for the appointment, and I therefore will make the order which I have discussed in detail with Mr Cone in the form of a minute which he will lodge.

DISPOSITION:

Judgment accordingly

SOLICITORS:

Stephenson Harwood