# In The Supreme Court of Bermuda

## COMMERCIAL COURT

**2023: No. 261**

**IN THE MATTER OF WHITE ROCK INSURANCE (SAC) LIMITED (PROVISIONAL LIQUIDATORS APPOINTED) (FOR RESTRUCTURING PURPOSES ONLY)**

**AND IN THE MATTER OF SECTION 35 OF THE INSURANCE ACT 1978**

**AND IN THE MATTER OF SECTION 24 OF THE SEGREGATED ACCOUNTS COMPANIES ACT 2000**

**REASONS**

**Date of Hearing:** **3 July 2024**
**Date of Decision** **3 July 2024**
**Date of Reasons:** **20 August 2024**

**Appearances:** **Jeffrey Elkinson, Britt Smith, Conyers Dill & Pearman Limited, for the Petitioner, the Bermuda Monetary Authority**
**Kyle Masters, Oliver MacKay, Carey Olsen Bermuda Limited, for the Company, White Rock Insurance (SAC) Limited**
**Katie Tornari, Changez Khan, Marshall Diel & Myers Limited, for the Joint Provisional Liquidators, Michael Morrison and Charles Thresh of Teneo (Bermuda) Limited**
**Lilla Zuill, David Kessaram, Cox Hallett Wilkinson Limited, for the Liquidating Trustee, Lawrence Hirsh**

**REASONS of Mussenden J**

## Introduction

1. This matter came before me on the Summons, issued 25 June 2024 by the petitioner, the Bermuda Monetary Authority (the "**Authority**" or the "**Petitioner**"), for the Amended Petition (the "**Petition**") to be dismissed and for such further or other order as may seem fit.

2. White Rock Insurance (SAC) Limited (the "**Company**") supports the application to dismiss the Petition. The Joint Provisional Liquidators (the "**JPLs**") take a neutral position.

3. The Liquidating Trustee by letter applied to the Court to have the matter adjourned and for the Authority's application to be denied. Mr. Lawrence Hirsh was appointed by the U.S. Bankruptcy Court for the District of Delaware to serve as Liquidating Trustee for the Vesttoo Creditors Liquidating Trust (the "**Liquidating Trust**") and Wind-Down Officer for Vesttoo Ltd. and its 48 affiliated debtor entities as Wind-Down Debtors (the "**Vesttoo Debtors**"). The Vesttoo Debtors Chapter 11 bankruptcy plan (the "**Plan**") became effective on 11 April 2024 after this Court entered its order on 22 March 2024 authorising the JPL**s** for the Company to consent to terms of the Plan and various Plan-related settlements.

4. On 3 July 2024 I made the following orders:
    a. I did not grant the application of Mr. Lawrence Hirsh;
    b. I dismissed the Petition;
    c. I stated that I will provide written reasons for my decision; and
    d. I would address any other matters, including costs, at a later stage.

## Background

5. The Company is registered as a Class 3 insurer and a Class C long term business insurer under the Insurance Act 1978 (the "**Act**").

6. The Company is part of the Aon Group. The Company's insurance manager and principal representative is Aon Insurance Managers (Bermuda) Ltd. ("**Aon**").

7. The Company is also registered by the Registrar of Companies of Bermuda (the "**ROC**") as a segregated accounts company and has approximately 70 segregated accounts. The account owners for 23 of these accounts are entities related to the Vesttoo Group (the "**Vesttoo cells**"). The Vesttoo cells have written a large number of contracts typically collateralised by a mixture of cash and letters of credit issued by banks ("**LOCs**"). The Authority received information provided by AON, that cash collateral typically comprises premium paid by cedants and, further, that LOCs were intended to be provided by banks, secured against capital provided by investors.

8. An affiliate of the Vesttoo Group in Bermuda, Vesttoo Alpha P&C Ltd. ("**Vesttoo Alpha**"), is registered by the Authority as a collateralised insurer, and is also registered by the ROC as a segregated accounts company. Vesttoo Alpha issued two collateralized policies (the "**Vesttoo Alpha Policies**").

9. In July 2023, the Company informed the Authority that it had concerns about the LOCs collateralising some of the contracts issued by the Vesttoo cells. On 19 July 2023, the Authority appointed Teneo (Bermuda) Limited ("**Teneo**") under section 30 of the Act to investigate the Company and Vesttoo Alpha and any relevant Vesttoo cells.

10. On 27 July 2023, Aon, in compliance with its obligations under section 8A of the Act, notified the Authority that a number of the LOCs collateralising the contracts issued by the Vesttoo cells were "fraudulent". The Company started to investigate the matters and was cooperating fully with Teneo's investigation. On the same day, Teneo presented the Authority with its preliminary findings which included that 17 of the 23 Vesttoo cells were impacted; those impacted cells had issued policies collateralised with 35 LOCs with a total face value of over $2.28 billion. Those 35 LOCs were not properly issued by relevant banks and the 2 LOCs collateralising the Vesttoo Alpha Policies were not properly issued by the

bank in question. The matter began to evolve into what appeared to be an enormous fraud and the largest directly involving the Bermuda insurance market.

11. On 2 August 2023, an order was made upon petition of the Authority to wind-up Vesttoo Alpha appointing Michael Morrison and Charles Thresh of Teneo as JPLs. This was on the basis that the Vesttoo entities and the wider Vesttoo Group was investigated and the fraud was linked to several of its high level executives.

12. On 2 August 2023, the Authority filed the Petition in this matter, on the basis that it had to intervene immediately so that the fraud could be investigated under the supervision of the Court. The Authority believed that the appointment of JPLs was necessary and in the public interest for the following reasons:

    a. The Authority was concerned at the prospect of an uncoordinated rush by cedants to apply for receiverships over the impacted cells. In the absence of coordination by the appointed JPLs, the Authority was concerned that there would not be a systematic and co-ordinated approach to investigation and remedy, including actions to recover any money paid out to the investors by way of the premium paid by cedants.
    b. The Authority was concerned about the reputational risk to the Bermuda market.
    c. The matter was likely to be the largest fraud to have occurred in the Bermuda market.
    d. There must be an urgent and thorough investigation of how Bermuda insurers came to issue policies with invalid collateral. It had to be conducted, and seen to be conducted, by independent professionals under the supervision of the Bermuda Court.

13. The Authority's grounds on which to present a winding up petition against the Company under section 35(1)(b) of the Act were as follows:

    a. The Company was in breach of its licence as it had issued policies which were not fully collateralised.

b. The Company had been unable to confirm that as a result of the fraudulent LOCs the reinsurance transactions and the segregated accounts were not ever collateralised.
c. The segregated accounts which were deficient could not be collateralised in the immediate future in accordance with the terms of the Company's licence.

14. The Authority took the position that at the date of the Petition, there were a substantial number of cells which had not been impacted by the fraudulent events and that the appointment of the JPLs would assist in maintaining the integrity of those cells. Policyholders, as a class, would be assisted by the JPLs and the JPLs could investigate the frauds and where necessary, take advantage of the powers afforded to court appointed officers to take actions to recover assets. The Authority also took the view that the breaches could not be remedied and there was no realistic prospect of the Company securing alternative LOCs or funding for those cells. Thus, the Company was not in a position to maintain the insurance contracts issued by the Vesttoo cells. In the circumstances, the Authority took the view that it was just and equitable and expedient in the public interest for the Company to be wound up.

15. On the 18 August 2023 the Petition was amended in order to rely on the additional grounds to wind up the Company in the public interest if it was just and equitable to do so pursuant to the following sections:
a. Section 161(g) of the Companies Act 1981 (the "**Companies Act**"); and
b. Section 35(3) of the Act.

16. On 18 August 2023, Chief Justice Hargun, as he then was, ("**Hargun CJ**"), made an order appointing Michael Morrison and Charles Thresh of Teneo as the JPLs of the Company pursuant to section 170(2) of the Companies Act with delineated powers in accordance with the Schedule attached to the order. It was also ordered that the title of the proceedings be appended with the words "(Provisional Liquidators appointed) (for restructuring purposes only)". The board of the Company remained in place.

17. Over time various parties served notices of intention to appear on the Petition and there were hearings of the Petition, summonses and affidavits filed, confidential reports filed, and various orders made.

18. On 13 June 2024 the Liquidating Trustee filed a Notice of Intention to appear at the hearing of the adjourned Petition on 14 June 2024 and any subsequent hearings.

**The Law**

19. Section 35 of the Act provides as follows:

> ***Winding up on petition of Authority***
> *35 (1) The Authority may present a petition for the winding up, in accordance with the Companies Act 1981, of an insurer, being a company which may be wound up under that Act, on the ground—*
> *(a) that the insurer is unable to pay its debts within the meaning of sections 161 and 162 of the Companies Act 1981; or*
> *(b) that the insurer has failed to satisfy an obligation to which it is or was subject by virtue of this Act; or*
> *(c) that the insurer has failed to satisfy the obligation imposed upon it by section 15 as to the preparation of accounts or to produce or file statutory financial statements in accordance with section 17, and that the Authority is unable to ascertain its financial position.*
> *(2) In any proceedings on a petition to wind up an insurer presented by the Authority under subsection (1), evidence that the insurer was insolvent—*
> *(a) at the close of the period to which the statutory financial statements last prepared under section 15 relate; or*
> *(b) at any date specified in a direction under section 27(2),*
> *shall be evidence that the insurer continues to be unable to pay its debts, unless the contrary is proved.*
> *(3) If, in the case of an insurer, being a company which may be wound up under the Companies Act 1981, it appears to the Authority that it is expedient in the public interest that the insurer should be wound up, it may, unless the insurer is already being wound up by the Court, present a petition for it to be so wound up if the Court thinks it just and equitable for it to be so wound up.*
> *(4) Where a petition for the winding up of an insurer is presented by a person other than the Authority, a copy of the petition shall be served on the Authority, and it shall be entitled to be heard on the petition*

20. The Companies Act provides as follows:

> ***Circumstances in which company may be wound up by the Court***
> *161 In addition to any other provision in this or any other Act prescribing for the winding up of a company a company may be wound up by the Court if—*
>
> *...*
>
> *(g) the Court is of the opinion that it is just and equitable that the company should be wound up.*
>
> ***Applications for winding up***
> *163 (1) An application to the Court for the winding up of a company shall be by petition, presented either by the company or by any creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributories, or by all of those parties, together or separately:*
>
> *...*
>
> ***Powers of Court on hearing petition***
>
> *164 (1) On hearing a winding-up petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.*
> *(2) Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court, if it is of opinion,—*
>
> *(a) that the petitioners are entitled to relief either by winding up the company or by some other means; and*
>
> *(b) that in the absence of any other remedy it would be just and equitable that the company should be wound up,*
>
> *shall make a winding-up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.*
> *(3) Where the petition is presented on the ground of default in holding the statutory meeting the Court may—*
>
> *(a) instead of making a winding-up order, direct that a meeting shall be held; and*
>
> *(b) order the costs to be paid by any person who, in the opinion of the Court, is responsible for the default.*

21. Rule 159 of the Companies (Winding-Up) Rules (the "**Winding-Up Rules**") 1982 provides as follows:

> ***Application of existing procedure***
> *159 In all proceedings in or before the Court, or any Judge, Registrar or Officer thereof, or over which the Court has jurisdiction under the Act and Rules, where no other provision is made by the Act or Rules, the practice, procedure and regulations*

*shall, unless the Court otherwise in any special case directs, in the Court be in accordance with its rules and practice.*

22. The Rules of the Supreme Court 1985 ("**RSC**") Order 21 rule 3 provides as follows:

> ***21/3 Discontinuance of action, etc. with leave***
> *3 (1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.*
> *(2) An application for the grant of leave under this rule may be made by summons or motion or by notice under Order 25, rule 7.*

23. In *Re Xyllyx plc (No 1)* [1992] BCLC the Secretary of State for Trade and Industry petitioned on the just and equitable ground that it appeared to him to be in the public interest that the company should be wound up. Over a year later, the company having appeared, having filed considerable evidence and the events having moved on substantially, the Secretary of State decided that in light of the then present circumstances that he did not wish to proceed with the Petition, and he would consent to having it dismissed. There was then an issue of costs and then the application of two contributories to be substituted for the Secretary of State on the petition. The Court held that "*If the contributories were substituted as petitioners it would transform a public interest petition into a contributories' petition in which none of the existing evidence could be material. Accordingly, it was not in the interests of justice to allow the contributories to be added to the list so very much out of time*."

**<u>The Application and Hearings to Dismiss the Petition</u>**

24. On 25 June 2024 the Authority, as Petitioner, filed a Summons for an application that the Petition be dismissed along with the supporting Fourth Affidavit of Susan Davis-Crockwell. The application was to be heard on 28 June 2024.

25. The Liquidating Trustee opposed the application to dismiss the Petition. Counsel for the Liquidating Trustee filed a letter dated 27 June 2024 in support of this position by Lawrence Hirsh (the "**Hirsh Letter**"). At the hearing on the 28 June 2024, I heard from counsel for the Authority and for the Company in support of the application to dismiss the Petition and I heard from counsel for the JPLs. I adjourned the matter to 3 July 2024 in order to give counsel for Mr. Hirsh adequate time to prepare submissions and to verify the Hirsh Letter of Mr. Hirsh by affidavit.

Affidavit of the Authority

26. Ms. Davis-Crockwell stated that the scale of fraud perpetrated by the Vesttoo Group was considered by the Authority and the Bermuda and international insurance markets as enormous and estimated at over $4 billion having regard to the total value of invalid LOCs. Ms. Davis-Crockwell stated that since the appointment of the JPLs, extensive work had been carried out by them with reports filed in Court. She referred to affidavits of the JPLs and where Mr. Thresh had stated that the JPLs had instructed attorneys in respect of Chapter 11 cases which Vesttoo Limited and its Debtorshad filed in the US Bankruptcy Court in the District of Delaware. Mr. Thresh set out the difficulties encountered in those proceedings and that there was a plan proposed by an unsecured creditors committee, to which the JPLs had initially objected but later withdrew its objections and consented to a particular plan.

27. Ms. Davis-Crockwell stated that, having discussed with the JPLs the benefits of them remaining in place, it was the Authority's view that for the purpose of the Petition, the JPLs had done all that could be expected of them to that point in time and that there was no further utility in the context of the Petition for them to continue in place. This view was based on the Authority's position from the onset of the discovery of the fraud to encourage the Company to resolve the complaints of the cedants. The Authority had been kept informed of such progress and had recently been informed by the JPLs that significant progress had been made with reaching resolution with a substantial number of cedants (the "**Settling Parties**"), to the Authority's satisfaction. Absent from the Settling Parties was the company Clear Blue which had chosen to initiate litigation which it commenced on 30

November 2023 against the Company and various companies within the Aon Group in respect of losses it says it suffered as a consequence of the fraud.

28. Ms. Davis-Crockwell submitted that on 1 December 2023 Hargun CJ ordered that there be a Preliminary Issue, inter alia, in respect of whether there was a breach of the Company's registration and its obligations under the Act as regards policies which were not fully collateralised. He granted leave for any party to apply to set aside the order, and Clear Blue applied to do so but later indicated that it no longer wished to proceed to set it aside. Thereafter, the Authority reviewed the circumstances and determined that it did not believe that there was any benefit to wind-up the Company for the following reasons:

    a. Nearly all the cedants had signed off on (or were in the course of doing so) agreements of resolution with the Company;
    b. One cedant had issued proceedings seeking its recourse in the US Courts;
    c. In light of discussions with the JPLs and the Company, and their respective attorneys; and
    d. In light of the original purpose of the Petition.

29. Ms. Davis-Crockwell stated that the original purpose of the Petition had been achieved and the action taken by the Authority was proven to be the correct action in all the very serious circumstances which were presented in July/August 2023 when very little was known as to how the fraud occurred, who had perpetrated it and what the consequences would be on the Bermuda insurance market. She stated that the Authority was satisfied that it had the appropriate powers under the Act which would enable it to perform its regulatory role and which would guide the Company accordingly. Thus, the Authority no longer believed that it was appropriate to wind-up the Company and it requested the Court to grant the application to dismiss the Petition.

Affidavit of the Liquidating Trustee

30. Mr. Hirsh stated that in his view the Petition was properly filed as the Authority rightly had very serious regulatory concerns about likely the largest fraud to have occurred in the Bermuda market. He referred to the Authority's affidavit evidence where the intention was

that the Company's and Aon's senior management should be held to account about how the Company, Vesttoo Alpha and their agents failed to realise that over $2 billion of LOCs collateralizing its contracts were void. However, he submitted that the Authority reversed its position, praised the Company for its action, applied for JPLs to be appointed rather than have the board replaced with independent fiduciaries and along with the Company issued a joint statement about their intention on pursuing maximum recovery for the reinsureds impacted by the alleged fraud. He referred to the Authority's evidence that it was their view that the Aon Group with its considerable resources and reputation could assist cedants and take appropriate action.

31. In respect of the application to dismiss the Petition, Mr. Hirsh was sceptical about the Authority's position that the Company had entered or was entering into settlement agreements with more than 80% of the cedants. He noted that no cedant had withdrawn or amended its proof of claim in the Vesttoo bankruptcy cases to reflect that it had been satisfied in full or material part by any settlement with Aon or the Company. He noted that there were very significant losses to be addressed but as the Company and Aon had not made available the details of any settlements with cedants that it was important to preserve all available assets, including litigation claims against insiders at the Company to ensure that cedants could be made whole.

32. Mr. Hirsh stated that he had been advised that where a petition was dismissed it would bar the Authority from re-opening proceedings on the same grounds on which the Petition was brought in future, effectively sweeping away the concerns about the conduct of the Company and Aon. He stated that many of the most valuable claims were against the Company's board, auditors, affiliates and other insiders, but that a dismissal of the Petition would severely lessen the chances of claims against the Company's insiders being pursued. Thus, he had proposed to the Company to agree to independent oversight of the company and preservation of insider claims but it was not accepted.

33. Mr. Hirsh stated that he had overlapping interests and parties that he had represented. He referred to the proof of claim filed by the JPLs in the Vesttoo case and the appendix

reference to the amount of $3 billion, in relation to the segregated accounts that are creditors in the Vesttoo bankruptcy case for which he as trustee acts and was bound to protect. In his view, the application to dismiss was value–destructive for cedants already greatly harmed by the Vesttoo Fraud.

34. Mr. Hirsh expressed the view that if the Petition was brought as a public policy petition then it was difficult to understand the considerable lack of transparency at every level and the unwillingness of the Authority to communicate and coordinate with him under the auspices of the U.S. Bankruptcy Court. Such conduct appeared to be contrary to the public interest and did not take into account the regulatory breaches that led to the Petition in the first place. In essence, the dismissal of the Petition would serve to provide Aon and the Company an escape route while potentially cutting off avenues for recourse to the cedants injured by the fraud unless the Court imposed mandatory conditions on the withdrawal of the Petition to preserve valuable litigation claims in the hands of independent fiduciaries for the benefit of the cedants who have suffered serious loss and damage. Thus, he asked the Court to consider how a withdrawal of the Petition would affect other parties to the proceedings including the beneficiaries of the Liquidating Trust whose interests he was bound to protect.

Submissions of the Authority

35. Mr. Elkinson relied on the affidavit of Ms. Davis-Crockwell to support the arguments that the Petition be dismissed. The essence was that the Petition was brought in the public interest, a winding-up of the Company was not inevitable, it was a light-touch appointment with the board still in place and the Court had the power to dismiss the Petition pursuant to section 164 of the Companies Act. He submitted that the Authority was satisfied that the Company had resolved its issues and took the position that the Petition should not be pursued. This was based on the fact that of the 22 Vesttoo cells listed at Annex 1 to the Order dated 1 August 2023, nearly 82% of them are resolved or in the process of resolution (68 % are fully resolved and 14% are pending final execution of a settlement agreement).

36. Mr. Elkinson submitted that the Hirsh Letter set out that Mr. Hirsh had a commercial interest in the proceedings and that he wanted the JPLs to stay in place to support that interest. He noted that the Preliminary Issue and the position of Clear Blue, which had been an actor in the litigation, had caused some delay for 3 – 4 months when Clear Blue decided not to proceed with the Preliminary Issue. However, during that time period, the Company and Aon were able to proceed with more settlements.

37. Mr. Elkinson stressed that the position of the Authority acting in the public interest should outweigh the position of the Liquidating Trustee who opposed the dismissal of the Petition for strictly commercial interests. He submitted that the Authority reserved all its regulatory powers over the Company and that the Petition could always be issued again. Further, the Liquidating Trustee and the cedants could seek their remedies elsewhere with litigation against the Company and Aon. Mr. Elkinson questioned why the Authority's Petition in Bermuda which deals with regulatory matters should be used in another jurisdiction as an advantage for the commercial interests of various parties. He submitted that the Liquidating Trustee as well as anyone else could issue their own petition if they wished to do so. In light of those reasons, Mr. Elkinson submitted that the Petition should be dismissed in accordance with the wishes of the Authority. Also, he relied on the case of *Re Xyllyx plc (No 1)* to show that a petitioner could apply to have a petition dismissed.

Submissions of the Company

38. Mr. Masters submitted that the Company supported the application to dismiss the Petition which was brought on public interest grounds and that it was appropriate to so dismiss it for the reasons set out by the Authority.

39. Mr. Masters submitted that Mr. Hirsh had been appointed as the Liquidating Trustee in March 2024 in Delaware and that in May 2024 he had signed a non-disclosure agreement in respect of confidential documents, however, Mr. Hirsh had not progressed his actions. Mr. Masters submitted that the Hirsh letter did not identify any basis to wind-up the Company. Further, Mr. Hirsh's clients' real interests were in the Vesttoo Cells not the

Company. Mr. Masters stated that before the Petition action commenced, the Company had started actions against Vesttoo in the US and thus there was no reason to believe that the Company would not progress actions in the US after the JPLs were discharged. Mr. Masters submitted that it was important to query who Mr. Hirsh was acting for as the vast majority of the cedants had settled or were about to settle. There was a small balance of cedants who had not been satisfied, excluding Clear Blue, but those cedants have not made an appearance in the proceedings.

40. Mr. Masters submitted that the JPLs seemed to be operating at a cost of approximately $200,000 per week and thus any adjournments would cause significant costs to be incurred by the Company.

Submissions of the JPLs

41. Ms. Tornari submitted that the JPLs are officers of the Court and were appointed to assist the Court and as such they held a neutral position in relation to the application to dismiss the Petition. However, the JPLs welcomed a very short adjournment in order to work with the Liquidating Trustee, the Company and the Authority on various issues.

Submissions of the Liquidating Trustee

Section 164 of the Companies Act and the Winding-Up Rules

42. Ms. Zuill submitted that the Authority's application to dismiss the Petition was fundamentally flawed as an order dismissing legal proceedings can only be made by the judgment of the Court at trial or on the application of an opposing party, that is, the Company or an appearing creditor. Thus, the Court should dismiss the Authority's application to dismiss the Petition. Ms. Zuill submitted that the proper course for the Authority to take was to withdraw the Petition. She relied on *Applications to Wind Up Companies* by Derek French [at para 3.6.1] where it stated "*The Court cannot dismiss a petition as an alternative to giving leave to withdraw, since dismissal would be a final judgment without hearing the petition and could create an issue estoppel.*"

43. Ms. Zuill submitted that there are no specific provisions of the Winding-Up Rules which deal with the withdrawal of winding-up petitions but that rule 159 directs that where there is a gap in the Winding-Up Rules, then the RSC apply. On that basis, RSC Order 21 rule 3 fills the gap which requires the leave of the Court to discontinue proceedings begun otherwise than by writ. In such an application the Court has an unfettered discretion as to whether to allow the Authority to withdraw its Petition and if so on what terms. She referred to Rule 27 of the Winding-Up Rules which deals with substituting another person as petitioner in place of the original petitioner. There a substitution will be permitted where the original petitioner "*consents … to allow [the petition] to be dismissed*", the basis being that some other entity other than the original petitioner makes the application to dismiss.

Issue Estoppel

44. Ms. Zuill submitted that it cannot be the intention of the Authority, by seeking dismissal of the Petition, to deny itself the right to assert in any future legal proceedings against the Company that the regulatory failures did occur. She argued that the Company would be entitled to say that the dismissal of the Petition prevents the Authority from alleging at any time in the future that the pleaded failures in the Company occurred. Thus, the proper recourse was for the Authority to apply to withdraw or discontinue the proceedings, which would be dealt with in accordance with the rules. She relied on *Fox v Star Newspaper Company* [1898] 1 QB 636 (CA) and *Fox v Newspaper Co Ltd* [1900] AC 19 (HL). That case involved a trial for libel where the plaintiff through counsel elected to offer no evidence and claimed to be nonsuited, but the Lord Chief Justice held that he was not so entitled. Smith LJ in the Court of Appeal found that pursuant to updated rules, there was no longer a judgment of nonsuit, but the rules of discontinuance applied, which set out that after a certain stage, the plaintiff cannot without the leave of the court discontinue the action. Chitty LJ put it as "… *after the proceedings have reached a certain stage the plaintiff who his adversary into court, shall not be able to escape by a side door and avoid the contest. … it is for the judge to say whether the action should be discontinued or not and upon what terms*." The House of Lords found that where when a matter comes into

court, and when the plaintiff offers no support to his action, there must be a verdict for the defendant.

45. Ms. Zuill submitted that the withdrawal of the Petition has a knock-on effect on the rights of the creditors of the Vesttoo cells and Vesttoo Debtors (as shareholders in the Company and account owners of the Vesttoo cells) to obtain compensation for wrongdoing committed by third parties.

Public Interest Petition

46. Ms. Zuill submitted that the Authority's position that its Petition sought a winding up solely order on public interest rounds was incorrect. She referred to the grounds of the Petition and to the affidavits of Ms. Wilson and Ms. Davis-Crockwell of the Authority. She also referred to the title of the Petition which cites section 35 of the Act as the principal piece of legislation on which the Petition is based. She submitted that the three grounds in section 35(1) had nothing to do with the public interest. She submitted that section 35(3) is a separate and distinct ground for the winding up of an insurance company, that is, in the expediency in the public interest. Ms. Zuill referred to the grounds of the Authority's Petition as stated at paragraph 18 (a) – (c) and submitted that no findings had been made with respect to those grounds and that the withdrawal of the Petition would mean that no findings would ever be made.

47. Ms. Zuill submitted that it was a matter of public interest as to how the Authority and the Courts dealt with the allegations in the Petition in respect of Bermuda's standing and reputation as an international insurance and reinsurance centre. She argued that to allow the Authority to dismiss or withdraw the Petition without regard to those cedants who had not received commensurate compensation from the Company or without the Court requiring a workable mechanism to be put in place to ensure that all persons damaged or injured by the fraud are restored to their previous positions would reflect badly on Bermuda's reputation and standing in the insurance market, raising damaging questions about Bermuda's regulatory regime and the role of the Court.

48. Ms. Zuill referred to the various affidavits of the Authority where its intentions were set out including that: (i) efforts would be made to recover assets and allow the Company and the Authority to find and implement solutions under the supervision of the Court; (ii) the belief at the time of filing the Petition was that the Company could not realistically survive and therefore inevitable it would be wound up; (iii) it pledged to take action to address the alleged fraud as it affected the Vesttoo cells at the Company; and (iv) it would focus on maximum recovery for the reinsureds impacted by the fraud.

49. Ms. Zuill referred to the JPLs' second confidential report dated 20 March 2024 where the JPLs reported the belief of the cedants of the Vesttoo cells and the Vesttoo cells themselves that potential claims existed against Aon, its affiliated entities (including employees) and/or other third parties, which would be a potential source of additional recovery for cedants. However, Ms. Zuill referred to the Authority's position, set out in a letter dated 26 June 2024, to the Liquidating Trustee that pursuing causes of action against third parties for the benefit of creditors holding valid claims "was not the objective". She argued that this was a complete *volte-face* on the part of the Authority and contradicted its own position as stated to the media and to the Court in affidavit evidence.

50. Ms. Zuill submitted that despite the Authority's counsel's apparent dismissal of the Liquidating Trustee and the Authority's seeming belief that it need not cooperate with the officers appointed by the US Bankruptcy Court, the Bermuda Court had issued a practice Direction entitled "*Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters*" dated 9 March 2017 where it stated *"The overarching objective of these guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction ("Parallel Proceedings") by enhancing coordination and cooperation a mouse courts under whose supervision such proceedings are being conducted"*. Ms. Zuill submitted that if the Liquidating Trustee commences proceedings in the US on behalf of the beneficiaries of the Liquidating Trust in respect of Vesttoo Debtors and cedants of the Vesttoo cells against the Company, then the two Courts would be obliged to cooperate with each other to ensure that mattes are dealt with efficiently and

effectively. On that basis, the Court should cooperate with the US Court especially having regard to the Authority's and the Company's publicly stated intention to work together to obtain maximum recovery for those harmed by the fraud.

51. Ms. Zuill submitted that valuable causes of action existed on behalf of the segregated accounts against the Company insiders and affiliates, but in the event the Court dismissed the Petition without providing for the preservation of such causes of action with an independent fiduciary, the Company will have obtained significant advantages in its effort to avoid liability on the claims. Thus, allowing the Company, with indisputable conflicts of interests, to exercise unilateral control of the valuable causes of action would effectively extinguish them or at the very least leave the "fox guarding the henhouse" on how claims are pursued and/or resolved, a position that was inconsistent with the public interest.

**Analysis**

52. I granted the application to dismiss the Petition for several reasons.

53. First, I was satisfied that, pursuant to section 164(1) of the Companies Act, I had the jurisdiction on hearing the Petition, amongst other powers, to dismiss it. I was not satisfied on the arguments of the Liquidating Trustee that I did not have the power to dismiss the Petition as Section 164(1) was clear that I did have the power to dismiss it. The Liquidating Trustee may have thought that there was a better or different order that could be made, but their view does not undermine the fact that the Companies Act provides the Court with the authority to dismiss a Petition. Also, I rely on the case of *Re Xyllyx plc (No 1)* where the Secretary of State brought an application to dismiss his own petition. I also agree with Mr. Masters that the *Fox* case was not an insolvency case and is of very limited assistance in this matter of a petition.

54. Second, I was satisfied that the Petition was brought on the grounds that the Company should be wound up if it was just and equitable to do so in the public interest relying on section 35(1)(b) and section 35(3) of the Act and section 161(g) of the Companies Act. The

Petition set out the reasons why it was brought in the public interest and it set out the grounds for doing so. To that point, the Petition was filed in the early stages of a set of circumstances which revealed a massive fraud for which investigations were being commenced. Thus, the Petition was filed under the umbrella that the fraud should be investigated under the supervision of the Court. In my view, the Authority is the regulator of the Bermuda insurance market with a wide range of responsibilities, powers and obligations. One of their most important duties is to have regard for the reputation and integrity of the Bermuda insurance market as they regulate the companies that operate within the market.

55. Thus, I reject the arguments of the Liquidating Trustee who has argued that the section 35(1) grounds advanced by the Authority for the Petition are not related to the public interest. In my view, the grounds at paragraphs 18(a) – (c) cannot just be read in isolation from the remainder of the Petition which set out the reasons why it was brought in the public interest. Taken as a whole, I am satisfied that the Petition was brought in the public interest.

56. Third, since the Petition was filed there have been a number of developments. I have given significant weight to the evidence of Ms. Davis-Crockwell that, having had various discussions and a full consideration of the circumstances, seeking the winding-up of the Company or continuing with the Petition was no longer in the public interest. I accept her evidence that the Company has executed or is in the process of finalising the execution of settlement agreements with nearly 82% of the cedants affected by the fraud to the satisfaction of the Authority. In her view, the original purpose of the Petition had been achieved and the Authority had adequate powers under the Act to continue to regulate the Company. As stated above, in accepting the role of the Authority to have at its forefront, the reputation and integrity of Bermuda's insurance market, I am satisfied to accept its view about how the matter should be resolved. In doing so, in this case, I am satisfied that I should not go behind the reasoning of the Authority and what it believes to be the best way forward. Further, in such a case as this where an investigation was required to reveal

the true extent of the fraud, the Authority should have a wide scope to adjust their position accordingly, based on the circumstances as they developed.

57. Fourth, I do not accept the Liquidating Trustee's argument that there may be issue estoppel and that it could not have been the intention of the Authority to deny itself rights to assert in future proceedings against the Company that the regulatory failures did occur. In my view, the Authority has over the life of the Petition availed itself of legal advice and considered its position as an experienced and established regulator of the Bermuda insurance market. It has also had extensive discussions with the Company and the JPLs. In my view, it is not for the Court to go behind the decision-making of the Authority and its consequences but rather to consider the application on the merits. Further, I am reluctant to accept the views of the Liquidating Trustee on this point who have not had the benefit of all the facts, discussions and consultations that the Authority has had with all the relevant parties.

58. Fifth, I have considered the arguments of the Liquidating Trustee that the affidavit evidence of the Authority showed that its intentions were to recover assets and focus on maximum recovery, that the belief was that the Company could not realistically survive and therefore it was inevitable it would be wound up. I have also considered the evidence of Mr. Hirsh who stated that that this Court should treat the Authority's position about the level of settlement agreements with scepticism, that certain litigation claims were valuable assets of the Company which should be preserved in some way, that he had overlapping interests arising out of his appointments by the U.S. Bankruptcy Court and that this Court should consider how a dismissal or withdrawal of the Petition would affect other parties to the proceedings including beneficiaries of the Liquidating Trust which he was bound to protect. Ms. Zuill summed up the current position of the Authority as a *volte-face*. However, I am not inclined to these views as primarily, and as stated above, the Authority brought the Petition on the grounds of public interest, and now that the circumstances have changed to the satisfaction of the Authority, it is no longer in the public interest to pursue or maintain the Petition.

59. I accept the argument of the Authority that a winding up of the Company was not inevitable due to the commitment of the Authority to work with the Company and other parties including Aon to address the issues. According to the evidence of the Authority, this has been done to its satisfaction. I also reject Mr. Hirsh's argument that I should treat the 82% settlement figure with scepticism because to my mind, he makes that argument in a conceded ignorance of the facts of the settlements and thus I find his concern to be pure speculation. Thus, I am satisfied that the vast majority of cedants have executed settlement agreements but that there are still some which have not yet settled albeit, as Mr. Masters argued, they have not made an appearance in these proceedings. Again, the level of settlements has been achieved to the Authority's satisfaction.

60. Sixth, I have considered the role of Mr. Hirsh as Liquidating Trustee and Wind-Down Officer for the Vesttoo Debtors and his arguments about preserving the valuable litigation claims. These are the parties to which Mr. Hirsh declares he must protect and seeks the Court's assistance to do so. In my view, as a starting point, I agree with Mr. Elkinson when he argues that the commercial interests of parties in proceedings in a foreign Court should not outweigh the disposition of the public interest Petition of the Authority in Bermuda. I also accept that the Liquidating Trustee and the cedants can seek remedies by other means, similar to Clear Blue, other than by way of the continuance of the Petition. On that basis, I view the Authority's application to dismiss the Petition to weigh more in the balance than the continuance of the Petition, for some unknown - and most likely costly - period of time, for the benefit of the commercial interests of third parties.

61. Seventh, I have considered the submissions of Mr. Masters that the JPLs were operating at a cost of approximately $200,000 per week, such costs being incurred by the Company. In my view, on the basis that the Authority seeks the dismissal of the Petition for the reasons stated, it would not be fair to the Company to have to continue incurring any costs, to the extent of $200,000 per week, or even minimally for reduced obligations, for supporting the commercial interests of the Liquidating Trustee if the Petition was not dismissed.

**Conclusion**

62. In light of the reasons as set out above, I was satisfied that I should grant the application by the Authority to dismiss the Petition. Also, I was satisfied that I should dismiss the Liquidating Trustee's application to adjourn or to dismiss the Authority's Summons.

63. The Parties are to file a Form 31TC within 7 days of the date of issue of these Reasons to be heard on the subject of costs.

Dated 20 August 2024


**HON. MR. JUSTICE LARRY MUSSENDEN**
**CHIEF JUSTICE OF THE SUPREME COURT**