

Scottish Lion appeal – the verdict

To the relief of many in the run-off market, the Scottish court of appeal has overturned the controversial opinion by Lord Glennie on the Scottish Lion scheme of arrangement. The judgment by the Inner House of the Scottish Court of Session rejects the assertion that for a solvent scheme to be approved there must be a ‘problem’ requiring a solution.

It confirms that solvent schemes should be treated in the same way as insolvent schemes at sanction, and that the loss of a policyholder’s contractual rights is not in itself a reason to prevent sanction.

The decision was not unexpected, given the surprise at Lord Glennie’s initial ruling. He had seemed to suggest that solvent schemes required 100 per cent creditor approval, and some schemes were consequently put on hold pending the appeal. Foremost among those welcoming the appeal court decision was Dan Schwarzmann, partner with PricewaterhouseCoopers and scheme advisor to Scottish Lion:



Dan Schwarzmann:
excellent news for solvent schemes

‘This is excellent news for solvent schemes of arrangement and given the clarity of the judgment, which touched on many past cases, I believe it to be far reaching,’ said Schwarzmann,

adding that the four day appeal hearing was the most extensive review of solvent schemes of arrangement to date.

‘Had the earlier decision been allowed to stand it would have created an impossible hurdle for any solvent schemes to overcome, and would effectively have lead to the minority prejudicing the majority. The decision of the Court of Session brings real clarity, and makes it clear that the sanctioning scheme judge should consider the actual merits of the scheme, rather than dismissing it out of hand simply because it was a solvent scheme.

‘It is certainly beyond dispute that solvent schemes, which impact policyholders’ contractual rights, are a wholly acceptable tool to close books of business in run-off,’ added Schwarzmann. ‘Having said that, from our years of work here we understand that they only work in certain circumstances and we will continue to liaise with all stakeholders, including policyholders, to allay any concerns they may have.’

Philip Hertz, partner with Clifford Chance, also welcomed the appeal judgment: ‘This decision means that the roadblocks thrown up by the objecting creditors have now been cleared and, assuming no further appeal of this decision, the full sanction hearing can now go ahead,’ he told *Run Off & Restructuring*.

‘When this came before the judge at first instance, Lord Glennie concluded in favour of the objecting policyholders by holding that “a solvent scheme is an instance where creditor democracy should not carry the order of the day”. On appeal the only issue was whether the petition for the scheme of arrangement could be dismissed on a preliminary point, “namely, that, this being a solvent scheme, the petitioner could not succeed in its application for sanction in the absence of an offer to establish that there was a problem requiring a solution”.

‘We were delighted to be brought into this appeal and with the ultimate decision for our client,’ said Hertz. ‘The case serves as a useful reminder that the existing statutory protections are sufficient to prevent schemes being abused, leaving the courts with the ultimate discretion as to whether it sanctions those schemes that are ultimately proved to be fair. It also goes some way to dispelling any uncertainty in the marketplace following the BAIC case, and confirms that solvent schemes are a legitimate means of achieving closure.’

Not everyone was delighted with the decision. Covington & Burling, who acted for some of the scheme objectors, viewed it rather differently: ‘The judgment

of the Inner House in the Scottish Lion appeal is a narrow one. The appellate court held only that the merits of, and objections to, the solvent scheme proposed by Scottish Lion must be determined on a

fully developed factual and legal record, and that the burden of establishing that the scheme warrants sanction remains squarely with the company.’

Covington’s statement continues: ‘The court also emphasised that in deciding whether to exercise its discretion to sanction the proposed scheme, the Outer House must consider a variety of factors, including the impact of the scheme in extinguishing the vested contract rights of creditors faced with contingent long tail liabilities, the integrity of the vote adjustments that were unilaterally made by the proponents of the scheme, and any pre-vote arrangements made with creditors who voted in favour of the scheme. These and other issues will be addressed on their merits.’

In contrast, Vivien Tyrell, partner with Reynolds Porter Chamberlain, describes the appeal court’s decision as ‘a thorough and helpful analysis of the issues before them,’ adding: ‘In a nutshell, the issue they had to decide was whether Lord Glennie in the court below was entitled to dismiss Scottish Lion’s petition seeking sanction at a hearing, prior to a formal sanction hearing, on a preliminary issue.

‘The preliminary issue had been whether an opposed solvent scheme could succeed in the absence of there being a problem which is to be solved by the implementation of the scheme. Lord Glennie had decided that such a scheme could not succeed and that therefore the petition should be dismissed.

‘The appeal Lords have now decided that Lord Glennie erred in dismissing the petition in that way and ruled that his



Vivien Tyrell:
common sense has prevailed

premise, that there had to be a problem needing to be solved in such cases, was wrong. The case will now go back to the lower court for the proper sanction hearing to take place,' adds Tyrell.

As to the implications for solvent schemes in general, 'the status quo prior to Lord Glennie's earlier ruling prevails. The Lords of the Scottish appeal court have dealt very clearly with the extreme concern which was engendered in the run-off market that any opposed solvent scheme would fail unless there was a problem being solved by the scheme. (In some cases there is not an obvious "problem" which forms the basis of a solvent scheme. Also, one could have foreseen limitless arguments over what constituted a "problem").

'Common sense has prevailed,' concludes Tyrell. 'Lord Glennie's decision was always wrong. Had the appeal court found otherwise it would have raised a few eyebrows over the quality of the courts in Scotland. It didn't and it hasn't.'

Mike Walker, head of KPMG's Restructuring Insurance Solutions practice, concurs: 'The real surprise was the first judgment, which flew in the face of the statute wording and many years of legal precedent. It is not surprising that it did not stand scrutiny at appeal.'

He notes that other schemes were sanctioned prior to that opinion being overturned. 'They will, I'm sure, continue to be sanctioned in future. The appeal judgment confirms our long-standing view that each scheme should be judged entirely on its individual merits, as has been the case in the past, and indeed will be the case when Scottish Lion returns for a full sanction hearing,' adds Walker. 'Our experience, from the many schemes

we have been involved with, is that there is still significant creditor appetite for this process.'

Kevin Gill, partner with Ernst & Young, comments: 'The decision provides much needed certainty around solvent schemes, clarifying that there need not be a problem to pre-exist for creditor democracy to carry the day, confirming the position that practitioners of schemes were working to before Glennie's decision. The merits of the Scottish Lion scheme proposal can now be considered in the full light of evidence.'

But Gill also strikes a warning note: 'Whilst the decision is helpful towards the continued application of schemes to bring finality to run-off, the Scottish Lion episode is the latest chapter of a continuing trend of scrutiny of solvent scheme proposals by creditors, making it increasingly important for proposers of schemes to ensure that they are properly prepared and offer a demonstrably fair deal to affected creditors.'

Mark Adams, partner with Deloitte, says: 'Clearly the decision is one which is favourable to those promoting the Scottish Lion scheme. Although the Scottish courts and scheme promoters have some work to do before the scheme is sanctioned, if it is to be, the appeal court judges have reopened the door.'

'Designing and implementing solvent schemes will continue to require considerable care and thoughtful balancing of the interests of the various stakeholders, including balancing the interests of policyholders/reinsureds with the interests of shareholders.'

For more on Scottish Lion see legal article, page 24; also see our website www.runoffandrestructuring.com for further analysis by Clifford Chance and PricewaterhouseCoopers

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Sharp rise in UK asbestos claims estimates

The actuarial profession's UK Asbestos Working Party has updated its estimated future cost of asbestos-related claims to the UK insurance industry. This follows its research which identified that the proportion of people suffering from mesothelioma who subsequently make a claim for compensation almost doubled between 2004 and 2008. Its findings include:

The total undiscounted cost of UK asbestos-related claims to the insurance market could be around £11 billion for the period 2009 to 2050. Of this figure, 90 per cent relates to mesothelioma and over £9 billion relates to the period 2009 to 2040 (2004

estimate for the same period: £4.7 billion).

The proportion of mesothelioma sufferers that have claimed for compensation has increased from around one third in 2004 to nearly two thirds more recently. This change, not predicted in 2004, explains most of the increase in total costs.

The working party has taken into account the Health and Safety Executive's statisticians' revised projections of the number of future deaths from mesothelioma in Great Britain, released in 2009, in conjunction with other projection models.

More details of the report can be found in the special supplement Asbestos Claims published with this issue.

Compre opens Swedish company

Compre Group

has opened its new service company Compre Services (Sweden) AB which has offices in Malmö and Stockholm. Staff previously employed by Compre's Swedish subsidiary, WI Insurance Co (ex Wasa International), are now employed by the new service company. Anneli Ölander has been appointed general manager and board member of the new company.



Anneli Ölander

R&Q buys JMD

R&Q has bought JMD Specialist Insurance Services Group. Randall & Quilter Investment Holdings acquired the entire issued share capital of JMD from the existing JMD management team and BP Marsh & Partners, for a total of just over £2 million.

R&Q's CEO Ken Randall describes the acquisition as 'a significant expansion of our service offering to active underwriting entities in the London market, especially Lloyd's.

'JMD provides a valuable service to the market by accelerating the collection of premium and allowing participants to measure their own and their partners' premium collection and claims payment efficiency.'

ARC raises concerns about Solvency II

Solvency II proposals would mean onerous capital requirements and higher expenses for the run-off sector, according to the Association of Run-off Companies. The key concerns raised by the ARC's working party on Solvency II are:

- Run-off companies' specific needs have not been considered in the Solvency II proposals thus far.
- Existing proposals would create an unreasonable capital burden on the run-off sector.

- Solvency II reporting and data quality requirements could result in unaffordable additional expenses for run-off companies.
- Small run-off carriers will be disproportionately impacted by the current Solvency II proposals.

The working party has now responded to the third round of the Solvency II consultation papers issued by the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS).

events

3 March

AIRROC Commutation Day

Dewey & LeBoeuf, New York
Contact: www.airroc.org

4-5 March

3rd Annual Emerging Trends in Asbestos Litigation

Ritz-Carlton, Marina del Rey, CA, USA
Contact: www.litigationconferences.com

8-10 March

Cologne Rendez-vous

Marriott Cologne, Germany
Contact: www.rqjh.co.uk

14-16 March

World Insurance Forum

Tucker's Point Hotel, Bermuda
Contact: www.worldinsuranceforum.com

24 March

ARC Academy: Tomorrow's Claims, 2010 and Beyond

BLG LLP, London
Contact: www.arclegacy.eu

24-27 March

17th Annual Insurance Insolvency & Reinsurance Roundtable

Scottsdale, Arizona, USA
Contact: www.litigationconferences.com

21-23 April

IAIR Insolvency Workshop

Miami Beach, Florida
Contact: www.iair.org

27-28 April

Reinsurance Claims

Kingsway Hall Hotel, London
Contact: www.c5-online.com/reinsclaims.htm

27-28 April

Reinsurance Agreements

The Carlton on Madison Avenue, New York
Contact: www.americanconference.com

29-30 April

Run-Off and Commutations

The Carlton on Madison Avenue, New York
Contact: www.americanconference.com

18-19 May

Litigating and Managing Asbestos Claims

Philadelphia, USA
Contact: www.americanconference.com

7-8 June

Reinsurance Contract Wordings and Disputes

Charing Cross Hotel, London
Contact: www.falconbury.com

7-10 June

Norwich Rendez-vous

St Andrews Hall, Norwich
Contact: www.rqjh.co.uk/rendezvous

11-16 September

Rendez-vous de Septembre

Monte Carlo, Monaco
Contact: www.rvs-monte-carlo.com