PMPA

1983 No. 7208P

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THE HIGH COURT

IN THE MATTER OF:

P.M.P.A. INSURANCE COMPANY LIMITED

AND

IN THE MATTER OF:

THE INSURANCE (NO. 2) ACT 1983

Judgment of Mr. Justice Lynch delivered the 24 day of October, 1985.

In this judgment "the Company" means the P.M.P.A. Insurance Company Limited and "the Society" means the Private Motorists Provident Society Limited.

On the 20th October, 1983, a Provisional Administrator was appointed to the Company pursuant to Section 2 (4) of the Insurance (No. 2) Act 1983. On the 25th of October, 1983 the Provisional Administrator was appointed receiver and manager of all the property and assets of the Society pursuant to Section 4 of the 1983 Act. On the 14th of November, 1983 the Provisional Administator was appointed to be administrator of the Company and was confirmed as receiver and manager of all the property and assets of the Society.

On the 5th of December, 1983 an Order was made for the appointment of a Provisional Liquidator of the Society and on the 19th of December, 1983 a further Order was made for the winding-up of the Society and the Provisional Liquidator was appointed to be its Official Liquidator. On the appointment of the Provisional Liquidator of the Society on the 5th of December, 1983 the administrator of the Company ceased to be receiver and manager of the Society.

When he ceased to be receiver and manager of the Society the administrator of the Company handed over to the liquidator of the Society all property and assets of the Society which had come to the administrator's hands, except some moneys on deposit at Citibank in St. Stephen's Green, Dublin 2. On the 19th of December 1983 the administrator wrote to the liquidator explaining that he was retaining those funds:-

"(1) to defray any expenses which the Court may determine, I am properly entitled to meet by deduction out of the funds of the Society and:

(2) on trust for the Society, in respect of any excess, or any amount which the Court may determine should not be used to defray such expenses."

The funds thus retained by the administrator are referred to in this judgment as "the retained fund".

The issue that now arises for determination by the Court is as to whether or not the administrator is entitled to pay out of the retained fund certain sums before handing over the retained fund or the balance thereof to the liquidator. Particulars of these sums totalling £186,756.69 which the administrator claims to be entitled to retain or pay out of the retained fund are set out in paragraph 11 of the administrator's affidavit sworn in May 1985 and in paragraphs 5, 6 and 11 of the administrator's supplemental affidavit sworn on the 7th of June, 1985. These particulars are as follows and I set them out giving the particulars in the supplemental affidavit first as it is in that order that I propose to deal with them:-

(1) In the period prior to the 5th October, 1983, that is to say the date of appointment of the administrator as receiver and manager:

Crossed lodgments £51,718.83.

Returned cheques £ 2,490.05.

(2) In the period from the 5th October to the 5th December, 1983 during the time when the administrator was receiver and manager:

Crossed lodgments £16,659.30.

(3) Total of small sums mistakenly paid after expiration of standing orders £1,855.76.

(4) Wages and salaries (of Company's employees secunded to Society's work) £60,698.

(5) Salares and expenses of Denis O'Brien £5,352.

(6) Overheads and other services £30,182.

(7) Legal fees £1,260.75.

(8) Administrator's own professional fees £16,540.

No issue arises as to the propriety or the accuracy of any of these sums. What is at issue is whether or not the administrator is entitled to pay or retain them from the retained fund. If he can do so then the effect of this is that the Society bears the cost of them: if, on the other hand, the administrator cannot do so

then the Company bears the cost of them.

I propose to deal with the first three items excluding, however, the item "returned cheques £2,490.05", first. These items comprise what are termed "crossed lodgments" by which is meant that moneys payable by Bank Giro into the Company's account were mistakenly credited by the banker to the Society's account. It seems to me that the same considerations apply to the numerous small overpayments which were made by various bankers mistakenly overlooking that standing orders had expired.

In regard to all of these items, it seems to me that the owners of the moneys never intended that the Society should have possession of those moneys, much less their ownership. I think that these moneys have come into the name or possession of the Society in a way different from what is usually understood by moneys paid under a mistake of fact. Where moneys are paid under a mistake of fact as is usually understood by that expression the payer really intends to pay the moneys to the payee. He would not pay the moneys if he were not under some misapprehension but nevertheless being under that misapprehension his intention is that the moneys shall go from him to the payee. When he discovers his mistake of fact he has, of course, a right to reclaim payment of the moneys from the payee but that right ranks as a simple contract debt.

This is not what happened in regard to the sums with which I am now dealing however. It was never intended by the owner or payer of these moneys that they should be paid to the Society. Cheques were collected by various branch offices and were forwarded to the credit of the Company and with the correct account number of the Company for lodgment to the Company's account. The bank made

these errors and put the moneys into the name of the Society instead of the Company. In these circumstances, it seems to me that there is no sense in which such moneys could be regarded as assets of the Society. The Society have no right to the possession of the moneys, much less to their title or ownership. The moneys stand in the account or name of the Society which holds them as trustee without any beneficial interest in them. The same applies to moneys paid by bankers overlooking the expiration of bankers orders and therefore paid without any authority or consent of the owners of such moneys. All such moneys whether those paid overlooking the expiration of bankers orders or those paid by way of what has been termed crossed lodgments are not assets of the Society and in these circumstances the administrator is entitled to retain these three sums, namely £51,718.83, £16,659.30 and £1,855.76 out of the retained fund before paying over the balance thereof to the liquidator.

So far as the sum of £2,490.05 is concerned, it is contended that this is in a different position. These are cheques which were payable to the Society's account and were received by the Society's bankers (who are the same bankers as the Company's) for collection on behalf of the Society and were duly credited by the bankers to the Society's account. The cheques however were dishonoured and instead of debiting the account of the Society with the amount of them the banker debited the account of the Company. It is submitted on behalf of the Registrar of Friendly Societies and of the liquidator of the Society that the banker had no right to do this and that the Company can now require the bank to

rectify the error. It is further submitted that these moneys were never received by the Society as the cheques were dishonoured by the paying bank and there can therefore be no question of regarding the Society as trustees of these moneys: that what has happened is an error on the part of the bank by debiting the wrong account and the Company can now have it rectified by calling on their bankers to do so.

I do not agree. Without any intention whatever on the part of the Company to do so the Society's accounts have been benifited at the expense of the Company's accounts by the sum of £2,490.05. The Society is a trustee for the Company of this sum and not a mere debtor. This sum never was nor i[s] assets of the Society and therefore may be retained by the administrator of the Company from the retained fund.

I now come to deal with the sums set out at numbers 4, 5, and 8 above. As I have already said no issue arises as to the genuiness of these payments or as to their amount. In th[e] ordinary case there could hardly be any question about the liability of the Society to refund these sums on the basis th[at] they are moneys paid and expenses incurred for and on beha[lf of] the Society.

This is not an ordinary case however. This is a ca[se] where the administrator of the Company was appointed receiver and manager of the Society by virtue of Section 4 of the 198[3] Act. That Act is a completely novel one and the concept [of an] administrator of a company without a winding up is also nove[l] and the rights of the parties must be determined by refer[ence] to the provisions of the Act.

The administrator of the Company is not appointed recei[ver] and manager of the Society under the provisions of the 19[8]3

for the benefit of the Society. He is so appointed for the benefit of the Company and in order to facilitate and contribute to the safeguarding of the interests of the Company or of the creditors or policy-holders of the Company and to assist in the maintenance in the public interest of the proper and orderly regulation and conduct of non-life insurance business. See Section 4 of the 1983 Act. His work as receiver and manager of the Society is therefore part of his functions as administrator of the Company from which it follows that he must be paid out of the assets of the Company by virtue of Section 3 (4) of the 1983 Act. As already said if one were to disregard the provisions of the 1983 Act then one would have little difficulty in concluding that the administrator's work as receiver and manager of the Society is for and on behalf of the Society and should be paid by the Society, but one cannot disregard the provisions of the 1983 Act Under that Act only the administrator and nobody else could be appointed receiver and manager of the Society and his position as to remuneration must therefore be decided by reference to the terms of the Act. Was the work of the administrator of the Company as receiver and manager of the Society done for and on behalf of the Society or done for and on behalf of the Company? The statute clearly says that the administrator's such work was done for and on behalf of the Company and it follows therefore in my opinion that it must be paid for by the Company.

I have come to the conclusion, therefore, that none of the items mentioned at numbers 4 to 8 inclusive above is strictly speaking payable or retainable from the retained fund but I

think that for practical purposes it is proper to make an exception in respect of item number 5, namely, salaries and expenses of Denis O'Brien in a sum of £5,352 because Mr. O'Brien was an actual employee of the Society and therefore the payment of his wages (and in this regard it seems to me his normal expenses, including petrol expenses, should be in the same position) are a preferential payment in the affairs of the Society. As I am aware that the Society has been able to pay its ordinary creditors dividends totalling 21.5% of their debts, it is clear that the Society is in funds to discharge the preferential creditors. Denis O'Brien's claim would be a preferential claim and the Company having discharged it are entitled to claim in his name the refund on a preferential basis. From the practical point of view the easiest way of effecting such refund is by allowing the retention of this sum of £5,352 out of the retained fund.

The net effect of this judgment is that the items mentioned at numbers 4, 6, 7 and 8 above may not be paid or retained out of the retained fund but the other items mentioned at numbers 1, 2, 3 and 5 may be so retained.

In conclusion, a reference was made by Counsel for the liquidator of the Society to Section 222 of the Companies Act 1963. I do not think however that that section applies to inhibit the proceedings with which I have been asked to deal because those proceedings are directions to the administrator as to how he should close his accounts as administrator of the Company in regard to his functions as such in acting as receiver and manager of the Society.

KEVIN LYNCH

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AND

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THE INSURANCE (NO. 2) ACT 1983

AUTHORITIES REFERRED TO

The Insurance (No. 2) Act 1983

Companies Act 1963

Holt .v. Markham (1923) 1 K.B. 504

Brook's Wharf and Bull Wharf Limited .v. Goodman Brothers (1937) 1 K.B. 534

Fibrosa Spolka Akcyjna .v. Fairbairn Lawson Combe Barbour Limited (1943) A.C. 32.

Chase Manhatten Bank .v. Israel-British Bank (1981)Chancery Division 105

For the administrator of the P.M.P.A. Insurance Company Limited:

Mr. John D. Cooke S.C. and Mr. Peter Kelly B.L. instructed by Messrs. Arthur Cox and Co., Solicitors.

For the Registrar of Friendly Societies:

Mr. Michael C. Collins B.L. instructed by Messrs. Liam Lysaght and Co., Solicitors.

For the liquidator of the Private Motorists Provident Society Limited:

Mr. Ian Finlay B.L. instructed by Messrs. McCann, Fitzgerald, Sutton and Dudley, Solicitors