2nd Defendant

[2024] JMCC Comm 26

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2023CD00036

BETWEEN	FINANCIAL SERVICES COMMISSION	CLAIMANT
AND	STOCKS AND SECURITIES LIMITED	1ST DEFENDANT
	CAYDION CAMPBELL	2ND DEFENDANT

Financial Services Commission Act – The Companies Act – Members' voluntary winding up of company – Whether appointment of Trustee lawful – Whether appointment of a temporary manager by the Claimant takes precedence.

Lisa White, Faith Hall, Nicola Richards, Rochele Duncan, Matthew Gabbadon and, Karessian Gray instructed by the Director of State Proceedings for the Claimant

Carlene Larmond KC and Giselle Campbell instructed by Patterson Mair Hamilton for the 1st Defendant

Caroline P. Hay KC, Kimberley McDowell, Tereece K. Campbell Wong instructed by Caroline P. Hay, Attorneys-at-Law for the 2nd Defendant

G. Ashmead Esq. (Judicial Clerk)

Heard: 6th, 26th, 27th, 28th, 29th February 2024, 1st, 4th,5th, 6th, 7th 13th, 25th, 26th, 27th, 28th, 29th March 2024, 29th April 2024, 10th and 31st May 2024.

In Open Court

Cor: Batts, J.

"...it is one thing to know and learn the declarative knowledge of an institution but quite another to learn the procedural knowledge or know-how to practice it successfully."

Orlando Patterson "The Confounding Island" (2019) page 87.

[1] The Claimant is a regulator created by statute with the responsibility to oversee aspects of the financial sector. The 1st Defendant is a regulated entity which provides services in the financial sector. The 2nd Defendant is a licensed Trustee whose appointment as Trustee, to oversee a members' voluntary winding up, is in question. The issue between these parties arose in circumstances which can be shortly stated.

[2] The 1st Defendant had for some time been under what was called *"enhanced supervision"* by the Claimant. In or about January 2023 it became public knowledge that massive fraud had occurred within the 1st Defendant. The Claimant issued certain *"directions"* to the 1st Defendant. The directors and shareholders of the 1st Defendant met thereafter and decided to commence a process of voluntary winding up. They appointed the 2nd Defendant as a Trustee with a view to *"reorganizing"*. Upon hearing this the Claimant appointed a Temporary Manager and approached this court, in these proceedings, to have the "*purported*" winding up set aside. They also wished to have the Temporary Manager declared to be lawfully in charge of the 1st Defendant. It is in this way the regulator became the claimant in a suit against the regulated entity and its Trustee. The Trustee filed a counter claim for, among other things, an order converting the members voluntary winding up to a creditors' winding up. In the meantime, and while this suit was pending, the regulator applied, in separate proceedings, for an order seeking leave to wind up the regulated entity. That suit, being SU 2023 CD 00097, was stayed by order of this court on the 1st November 2023 pending the outcome of these proceedings.

[3] The average Jamaican may wonder whether it really makes a difference who initiates the proceedings to wind up the 1st Defendant. That reasonable person may ask, if it is the desire of all parties concerned that the 1st Defendant be put into liquidation, why is this litigation necessary. That question does not arise for my determination. It is not part of the remit of this court to consider the reasonableness, whether in the Wednesbury sense or otherwise, of the regulator's conduct. There is no pleading, raising such a question, as may have arisen in proceedings for judicial review. The issues for this court are:

1. Whether as a matter of law the shareholder's attempt to wind up the 1st Defendant was lawful and,
2. Whether the appointment of a Temporary Manager by the Claimant takes precedence over the appointment of the 2nd Defendant as Trustee.

In essence the question is which of the two, Temporary Manager or Trustee, is lawfully in control of the 1st Defendant. It is a matter of some relief, and perhaps coincidence, that the law in this instance conforms with that which, on the face of it, appears to be reasonable.

[4] Notwithstanding all the witnesses called, the cross-examination of those witnesses and the voluminous documentation, I can resolve this matter without any detailed reference to all the evidence. I will do so by referring to the statutory matrix and a few authorities to which I was helpfully referred. In this regard let me immediately pay tribute to the industry displayed by all counsel as well as the professional way this long and troubled litigation has been conducted. I also thank Ms. Carlene Larmond KC who, pursuant to an order of the court made on the 2nd day of October 2023, represented the interest of the 1st Defendant.

[5] The Claimant is a creature of the Financial Services Commission Act 2001. The sections of that statute, most relevant to this matter, are as follows:

"2. In this Act, unless the context otherwise requires-

"Authorized officer" means a person authorized by the Commission for the purposes of this Act;
"Executive Director" means the Executive Director appointed under section 4;
"Commission" means the Financial Services Commission established under section 3;
"financial services" means services provided or offered in connection with-

(a) Insurance
(b) The acquisition or disposal of –
i. securities within the meaning of the Securities Act;
ii. units under a registered unit trust scheme within the meaning of the Unit Trusts Act;
(c) such other services as the Minister may by order declare to be financial services for the purposes of this Act;

"functions" includes duties and powers;

"licence" means a licence issued pursuant to any relevant Act;

'prescribed financial institution" means an institution or person offering or providing financial services to the public;

"relevant Act" means the Act which governs the financial service provided by a prescribed financial institution

.....

6. (1) For the purpose of protecting customers of financial services, the Commission shall –

(a) supervise and regulate prescribed financial institutions;

(b) promote the adoption of procedures designed to control and manage risk, for use by the management, boards of directors and trustees of such institutions;

(c) promote stability and public confidence in the operations of such institutions;

(d) promote public understanding of the operation of prescribed financial institutions;

(e) promote the modernization of financial services with a view to the adoption and maintenance of international standards of competence, efficiency and competitiveness.

(2) For the purpose of the discharge of its duty under subsection (1) the Commission shall –

(a) take such steps as are necessary to ensure that appropriate standards of conduct and performance are maintained in prescribed financial institutions in accordance with this Act, any rules or regulations made hereunder or any relevant Act;

(b) at such times as it may determine but at least once in each year -

(i) examine, in such manner as it thinks fit, the affairs or business of every prescribed financial institution carrying on business in Jamaica or elsewhere for the purpose of being satisfied that the provisions of this and any relevant Act are being complied with and that the institution is in a sound financial condition; and

(ii) within ninety days after the completion of the examination, report to the Minister the results of every such examination and any such report may contain such recommendations as the Commission considers necessary or desirable to correct any malpractices or deficiencies discovered in the examination;

(c) in accordance with the provisions of any relevant Act -

(i) consider applications for licences or registration and grant or refuse to grant any such licence or registration; or

(ii) suspend, cancel or revoke any such licence or registration;

(d) appoint authorized officers for the purposes of paragraph (b);

(e) subject to such provisions as may be prescribed, summon the auditor or actuary, or any former auditor or actuary of a prescribed financial institution for the purpose of making enquires into the operations and financial position of that institution;

(f) implement measures designed to reduce the possibility of a prescribed financial institution being used for any purpose connected with an offence involving fraud, theft or money laundering;

(g) implement measures designed to reduce the possibility of a prescribed financial institution being used for any purpose

connected with an offence involving fraud, theft or money laundering;

(h) perform such other duties as may be prescribed by or pursuant to this Act.

(3) In the performance of his duties under this section an authorized officer shall be entitled at all reasonable times –

(a) to have access to all books, records and documents in the possession or control of any director, manager, officer or employee of any prescribed financial institution;

(b) to require any director, manager, officer, auditor, former auditor or employee of any prescribed financial institution to furnish such information or to produce such books, records or documents as are in his possession or control, that relate to the operations of the prescribed financial institution and may be reasonably required for the performance of those duties.

(4) Any person who –

(a) fails to comply with a requirement made pursuant to subsection (3)(b); or

(b) willfully attempts to mislead or makes any false statement with intent to mislead or attempts to mislead any person in the execution of his duties under this section; or

(c) without lawful justification or excuse, obstructs or hinders any person in the execution of such duties,

shall be guilty of an offence.

.....

8. (1) Where the Commission believes that any part of the conditions specified in paragraph 1, 2 or 3 of Part A of the Third Schedule exists in relation to a prescribed financial institution, the Commission may –

(a) require the institution to give an undertaking signed by the majority of its board members to take such corrective action as may be agreed between the institution and the Commission;

(b) give directions to the institution under this section;

(c) issue a cease and desist order in accordance with Part B of the Third Schedule; or

(d) exercise any other functions conferred on it by or pursuant to any relevant Act.

(2) Directions under this section shall be such as appear to the Commission to be desirable in the interest of the institution's customers, potential customers and creditors, whether for the purpose of safeguarding its assets or otherwise, and may, in particular –

(a) require the institutions to take certain steps or to refrain from adopting or pursuing a particular course of action or to restrict the scope of its business in a particular way;

(b) impose limitations on –

(i) the acceptance of new business;

(ii) the granting of credit;

(iii) the making of investments;

(iv) dealing in securities; or

(v) any other activity that may be carried out by a prescribed financial institution;

(c) prohibit the institution from –

(i) soliciting business generally or from persons who are not already investors or policy holders; or

(ii) entering into any other transaction or class of transactions.

(d) Require the removal of any director or manager.

(3) A prescribed financial institution which fails to comply with any requirement or contravenes any prohibition imposed by any direction or cease and desist order under this section shall be guilty of an offence.

(4) A contravention of any direction or prohibition imposed under this section shall not invalidate any transaction.

(5) Where the Commission believes that any of the conditions specified in paragraph 4, 5, 6, 7, 8 or 9 of Part A of the Third Schedule exists in relation to a prescribed financial institution, the Commission may –

(a) take such action as it considers appropriate under subsection (1) (a), (b), (c) or (d);

(b) assume the temporary management of the institution in accordance with Part C of that Schedule;

(c) suspend, cancel or revoke the licence or registration of that institution in accordance with the procedure specified in the relevant Act: or

(d) present to the court a petition for the winding up of the institution or an application regarding reconstruction thereof.

(6) The provisions of the Companies Act relating to the mode of winding up by the court and to arrangements for reconstruction shall, with such modifications and adaptations as may be necessary, apply to a petition or application made by virtue of subsection (5) (d).

.....

22. No liability is incurred by the Commission or any person specified in section 15 (1) as a result of anything done by him bona fide in the exercise of any power, or the performance of any function or duty, conferred or imposed by or under this Act.

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THIRD SCHEDULE

PART A

Conditions subject to remedial action under section 8 (1)

1. The prescribed financial institution has breached the provisions of its memorandum and articles of association.
2. The institution, a director or any employee or agent in the conduct of the institution's business –
    a. is engaging or about to engage in an unsafe or unsound practice in conducting the institution's business;
    b. is contravening or has contravened –
        i. any provisions of the relevant Act or regulations made thereunder; or
        ii. any condition of the licence or registration granted under the relevant Act in respect of that institution.
3. A director or manager has ceased to be a fit and proper person in accordance with the relevant Act and the institution has refused or neglected to take appropriate action.
4. A final judgment has been obtained against the institution and has remained unsatisfied for at least one month.

5. *The institution has given false or misleading information in its application for a licence or registration or false statements concerning its affairs.*
6. *The institution is contravening or has contravened any cease and desist order or any directions issued by the Commission pursuant to this Act.*
7. *The value of the institution's assets is substantially less than the amount of its liabilities.*
8. *The institution has notified the Commission that it proposes to surrender its licence or registration.*
9. *A receiver has been appointed in respect of the institution.*

PART B

Cease and Desist Orders

1. *Before issuing a cease and desist order, the Commission shall cause to be served on the institution concerned a notice –*
    a. *containing a statement of the facts constituting the alleged unsafe or unsound practice or the alleged contravention and, where appropriate, the name of the person against whom the allegation is made; and*
    b. *specifying a date (not being earlier than thirty nor later than sixty days after the date of service of the notice) and a place at which a hearing will be held to determine whether a cease and desist order should be made.*

2. *If at any time prior to the date of the hearing specified in the notice under paragraph l, the institution concerned consents to the making of a cease and desist order and the terms thereof, the hearing shall be waived and the order shall be made accordingly.*

3. *If at the hearing –*
    a. *The institution is not represented, it shall be deemed to have accepted the allegations stated in the notice and to have consented to the making of a cease and desist order and the Commission shall make a cease and desist order in respect of that institution:*
    b. *the allegations specified in the notice are established, the Commission shall make a cease and desist order in respect of the institution.*

and a copy of the order shall be served on the institution and, where, appropriate, on the person named in the notice pursuant to paragraph 1 (a).

4. *A cease and desist order shall –*
    a. *require the institution or the person so named, as the case may be, to cease and desist from the actions giving rise to the order;*
    b. *if made under –*
        i. *paragraph 2, take effect from such date as may be specified therein;*
        ii. *paragraph 3, take effect from the date of service of the order or such later date as may be specified therein.*

5. *Where in relation to any prescribed financial institution –*
    a. *a notice has been served pursuant to paragraph 1; and*
    b. *at any time prior to the holding of a hearing in accordance with that paragraph, the Commission is satisfied that the situation giving rise to the notice is likely to endanger the financial position of the institution or the interests of its customers,*

    the Commission may forthwith serve on the institution and any person named in such notice, a temporary cease and desist order which shall take effect as from the date of such service.

6. *Where a temporary cease and desist order is served under paragraph 5, the institution or person on whom it is served may, within ten days after the date of such service, apply to a Judge of the Supreme Court in accordance with rules of court to set aside, limit or suspend the operation or enforcement of such order.*

PART C

Temporary Management of a Prescribed Financial Institution

1. *(1) For the purposes of section 8 (5) (b), the Commission shall serve on the prescribed financial institution a notice announcing its intention of temporarily managing the institution from such date and time as may be specified in the notice.*
    (2) The Commission may appoint any person to manage the institution on its behalf.
    (3) A copy of the notice referred to in sub-paragraph (1) shall be sent to the Registrar of the Supreme Court and shall be posted in a

conspicuous position at each place of business of the institution and shall be published in a newspaper circulated in Jamaica.

(4) Upon the date and time specified in the notice referred to in sub-paragraph (1), there shall vest in the Commission, full and exclusive powers of management and control of the institution, including, without prejudice to the generality of the foregoing, power to-

(a) continue or discontinue its operations;

(b) stop or limit the payment of its obligations;

(c) employ any necessary officers or other employees;

(d) execute any instrument in the name of the institution;

(e) initiate, defend and conduct in the name of the institution, any action or proceedings to which it may be a party.

(5) Not later than sixty days after the Commission has assumed temporary management of a prescribed financial institution, it shall apply to the Court (furnishing full particulars of the institution's assets and liabilities) for an order confirming the vesting in the Commission of full and exclusive powers of management of the institution as described in sub-paragraph (4).

(6) All expenses of and incidental to the temporary management of an institution shall be paid by that institution in such manner as the Commission may determine.

2. *(1) An institution which is served with a notice under paragraph 1 may within ten days after the date of such service, appeal to the Court of Appeal which may make such order as it thinks fit.*

(2) The Court of Appeal may, on sufficient cause being shown, extend the period referred to in sub-paragraph (1).

(3) The Commission may, if it considers it to be in the best interests of the customers of an institution which is being temporarily managed by it, apply to the court for an order staying –

(a) the commencement or continuance of any proceedings by or against the institution, for such period as the court thinks fit; or

(b) any execution against the institution's property.

3. *Where the Commission has served a notice on an institution under paragraph 1, it shall, within sixty days from the date specified in such notice or such longer period as a Judge of the Supreme Court may allow-*

(a) restore the institution to its board of directors or owners, as the case may be;

(b) present a petition to the Court under the Companies Act for the winding-up of the institution; or

(c) propose a compromise or arrangement between the institution and its creditors under section 192 of the Companies Act or a reconstruction under section 194 of that Act."

[6] It is common ground that the 1st Defendant is a prescribed financial institution. It is apparent that the Financial Services Commission Act 2001 ('the FSC Act') gives no express power to the regulator to control the actions of shareholders of financial institutions. Neither does it give an express power to bar or otherwise prevent commencement of proceedings to wind up such an institution. The regulator may however issue directions, see section 8(1)(b) of the FSC Act quoted above. It is a moot point whether directions may be issued to bar the commencement of winding up proceedings. The regulator is also empowered to insert a Temporary Manager or to commence winding up proceedings. In this case the 1st Defendant was put under temporary management after its members had commenced the process of voluntary winding up.

[7] The directions issued by the Claimant, before the commencement of winding up, were as follows, see exhibit 1A, page 3:

"THE FINANCIAL SERVICES COMMISSION

Directions issued pursuant to section 8(1)(b) of the Financial Services Commission Act

To: Stocks and Securities Limited
33 ½ Hope Road
Kingston 10

Attention: Jeffrey Cobham, Chairman

WHEREAS section 8(1) of the Financial Services Commission Act (FSC Act) empowers the Financial Services Commission (FSC) to issue directions to a prescribed financial institution where the FSC believes that any of the conditions specified in paragraph 1,2 or 3 of

Part A of the Third Schedule to the FSC Act exists in relation to that institution; AND

WHEREAS the FSC has concerns regarding the true financial condition of Stocks and Securities Limited ("SSL") based inter alia, on (a) the issuance of an audit report with a material uncertainty relating to the entity as a going concern in respect of SSL's Audited Financial Statements for the year ended June 30, 2022, (b) the delay of over 3 months for the submission of the audited accounts to the FSC, and (c) SSL's history of accumulated losses; AND

WHEREAS the FSC has additional concerns regarding SSL's exposure to possible fraudulent activities based on SSL's letter to the FSC dated January 10, 2023, and the implications therefrom for the solvency of the entity, being a condition specified under paragraph 2 of Part A of the Third Schedule to the FSC Act; AND

WHEREAS the FSC believes that in the circumstances, there is need for the FSC to issue directions to SSL in the interest of SSL's customers, potential customers and creditors for the purpose of safeguarding its assets and otherwise to:

i. Ensure equitable treatment of all affected clients in the event of encashment requests;
ii. Prevent contagion effect on other financial institutions; and
iii. Minimize the risk exposure to the company's financial position.

NOW THEREFORE In exercise of the power conferred on the FSC under section 8(1)(b) of the FSC Act, the following directions are hereby issued to SSL:

SSL shall:

1. *Refrain from disposing of otherwise transferring or substituting any of its assets whether on or off-balance sheet or assets held in trust, without the prior written approval of the FSC;*
2. *Refrain from accepting monies from existing or prospective clients in respect of securities business conducted for or on behalf of such clients, except for monies received to reduce a client's lability to SSL;*

3. *Immediately cease making payments to clients and other persons (including associated persons as defined under the Securities Act) in respect of funds held by SSL or received subsequent to these Directions, without the prior written approval of the FSC. This Direction relates to all obligations of SSL. This must include payments for all operational activities such as salaries, rentals, statutory obligations, and operational overheads. Only one third party transaction which should not exceed US $15,000 will be allowed per customer. All other such payments to third parties should be routed through the client's banking facilities;*
4. *Provide to the FSC, a schedule of all payments made each day, twice daily, at 11:00 a.m. and 6:00 p.m. commencing January 13, 2023;*
5. *Refrain from disposing of or otherwise transferring or substituting assets associated with all repurchase agreements and/or other client obligations including those held in the Bank of Jamaica's (BOJ's) Central Securities Depository and overseas brokers, without the prior approval of the FSC;*
6. *Refrain from making any cash payments and/or transferring any funds from the uninvested cash position;*
7. *All request for payments must be accompanied by a declaration from the nominated officer that the requirements for all AML/CFT required due diligence checks have been verified and that the funds involved in the transaction does not constitute criminal property.*
8. *Honour all client obligations before making payments to any SSL associated persons as defined under the Securities Act;*
9. *On or before January 13, 2023, inform the FSC in writing of any pending or outstanding litigations against SSL;*
10. *Submit to the FSC-*
    a. *On January 13, 2023, a list of assets indicating unencumbered assets and obligations including amounts held on and off-balance sheet as at January 12, 2023. (The list must include where the assets are held, and must indicate whether or not these assets are in custody or in a trust arrangement);*
    b. *On January 13, 2023, a copy of all broker statements and bank statements, as at December 31, 2022;*
    c. *On January 13, 2023, a maturity profile report of all Asset and Liabilities positions, as at December 31, 2022;*
    d. *On a weekly basis commencing on January 16, 2023 (and on each succeeding Monday), a list of all clients of SSL and a detailed listing of all outstanding balances due to clients including clients whose funds are held off-balance sheet. This*

report must capture information/data as at the Friday preceding the date of the report ("the Preceding Friday");

e. *On a weekly basis commencing on January 16, 2023 (and on each succeeding Monday), a list of assets, both on and off-balance sheet reported separately. This must include the location of the assets, copies of the broker statements associated with those assets and reasons for any movement in balances. This report must capture information/data as at the Preceding Friday;*

f. *On a weekly basis commencing on January 16, 2023 (and on each succeeding Monday), a detailed listing of all outstanding balances due to other financial institutions. This report must capture information/data as at the Preceding Friday;*

g. *On a monthly basis commencing on January 16, 2023, all broker and bank statements as well as documentation indicating the reasons for any movement in balances. This report must capture information/data as at the Preceding Friday;*

h. *On a weekly basis commencing on January 16, 2023, an Inventory Asset Report indicating the assets which are unencumbered. This report should capture information/data as at the Preceding Friday;*

i. *On a weekly basis commencing on January 16, 2023, a weekly cash-flow report. This report must capture information/data as at the Preceding Friday;*

j. *On a weekly basis commencing on January 16, 2023 a maturity profile indicating SSL's asset and liabilities, including off balance sheet positions for that week. This report must capture information/data as at the Preceding Friday;*

k. *Daily Encashment Positions for the preceding day submitted by 10:00 a.m. on the following day starting January 13, 2023;*

l. *On a weekly basis commencing on January 16, 2023, a schedule of all and any payments due including but not limited to payments due to customers and creditors, salaries and operating expenses for the coming week;*

m. *On a weekly basis commencing on January 16, 2023 balance sheet positions, off balance sheet portfolio of inventory & C1 Form Report every Monday containing positions as at the Preceding Friday;*

n. *Commencing January 16, 2023, Bi-weekly MD&A Reports, which must include weekly stress test results;*

11. *Cooperate with FSC's staff and their lawfully appointed officers and provide such persons at all reasonable times with access to*

all books, records and documents related to SSL's securities business operations as well as access to any premises from which SSL operates.

All reports and requests for authorization shall be submitted in writing to the Senior Director, Securities Division or other officer of the FSC that she may designate in writing.

Please be advised that all Directions, including the fore going, shall remain in effect until the FSC gives written confirmation that it has varied or lifted the Directions.

The FSC reserves the right to issue further directions if the circumstances so require.

Please be advised that any breach of the Directions may result in the FSC taking the appropriate enforcement action against SSL."

[8] These directions were accompanied or followed by two letters both dated 12th January 2023, see exhibit 1A pages 8 and 9. There is nothing in the directions, or those letters, precluding the 1st Defendant taking steps to wind up itself. It was urged upon me that as the 1st Defendant's property vested in the Trustee, upon the commencement of winding up proceedings, a transfer of assets in breach of the said directions occurred. That argument is unconvincing because there is no transfer of assets to the Trustee in a bankruptcy proceeding. The Trustee by law has vested in him or her the power to sell, see section 239 of the Companies Act which provides that the Trustee shall *".. take into his custody, or under his control all the property and things in action to which the company is or appears to be entitled"*. He therefore stands in the shoe of the company being wound up and is able to handle its assets. A breach of the direction, against the transfer of assets, would only occur if the Trustee started to sell the assets of the estate. An issue would then arise as to whether his statutory power of sale overrides any direction from the Claimant. In this case the Trustee made no effort to sell anything and therefore that issue did not arise.

[9] It is appropriate at this juncture to examine the statutory basis for, as well as the process of, winding up commenced by the 1st Defendant on the 16th day of January

2023. At an extraordinary general meeting the shareholders resolved to commence a members' voluntary winding up, see exhibit 1A pages 16, 61 and 62. The power to do this stems from section 272 of the Companies Act which reads as follows:

"272. (1) A company may be wound up voluntarily -

(a) when the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.

(b) if the company resolves by special resolution that the company be wound up voluntarily.

(c) [Deleted pursuant to the Insolvency Act 2014]

(2) In this Act the expression "a resolution for voluntary winding up" means a resolution passed under any of the provisions of subsection (1)."

Sections 273 to 276 are also relevant:

"273. (1) When a company has passed a resolution for voluntary winding up, it shall, within fourteen days after the passing of the resolution, give notice of the resolution by advertisement in the Gazette and in writing to the Registrar.

(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine not exceeding one hundred thousand dollars, and for the purposes of this subsection the liquidator of the company shall be deemed to be an officer of the company.

274. A voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntary winding up.

275. In case of a voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof:

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

276. Any transfer of shares not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members of the company, made after the commencement of a voluntary winding up, shall be void."

[10] The 1st Defendant's shareholders were therefore exercising a right given to them by Act of Parliament expressly, see **"Corporate Business Principles" by Suzanne Ffolkes Goldson** pages 104 to 108 for a general discussion. A Court should be slow to in any way constrain such a right. The court should also be slow to confer on a regulator, or any agent of the state, the power to restrict what essentially amounts to a property right. That is the right of someone in business to either, cut his or her losses by going out of business or, to lawfully reorganize his or her affairs, as is in his or her best interest. It is evident that a decision was taken in light of the bad publicity surrounding the published fraud, the full extent of which was unknown, to wind up the 1st Defendant with a view to reorganizing and if possible saving an anticipated investment, see witness statement of Mr. Marc Francis Ramsay paragraphs 24, 26, 27, 28 and 29 and Mr. Peter Knibb's evidence in amplification:

"Q: Paragraph 5 of your witness statement, arrangement frustrated due to uncovering of fraud. What do you mean by frustrated at the last minute?

A: Spectrum had done their due diligence, committed to new venture, and paid 50% of the agreed amount. Already in discussions with the management team at SSL with a view to further their acquisition. SSL Management team now found themselves in a damage control mode in order to ensure transaction would be consummated."

[11] The Claimant is, on the admission of its own witness, of the opinion that permission was required before the commencement of proceedings to wind up, see witness statement of Ms Karene Blair at paragraph 19:

"At no material time did any representative of SSL consult with me or any member of FSC team about the change of course or mention the prospect of appointing a trustee for SSL or the reorganization of SSL. As Senior Director, Securities, if any other person became aware of this information, it would have been routed to me. That did not happen. In essence SSL had no consent or permission from FSC to make such appointment. SSL contravened the FSC's Directions."

However no statutory provision requires the regulator's consent before a company goes into liquidation neither did any condition issued by the Claimant to the 1st Defendant.

[12] Much ado was made about the Declaration of Solvency, exhibit 1A page 20, filed with the Notice of Winding Up. However, a review of the relevant statutory provisions makes it clear that, whether the company was solvent and whether a Declaration of Solvency was or was not filed, in no way impacts the validity of a decision to voluntarily wind up. The relevant provisions of the Companies Act are:

"277. (1) Where it is proposed to wind up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors, may, at a meeting of the directors make a statutory declaration to the effect that they have made a full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within such period not exceeding twelve months from the commencement of the winding up as may be specified in the declaration.

(2) A declaration made as aforesaid shall have no effect for the purposes of this Act unless –

(a) it is made within the five weeks immediately preceding the date of the passing of the resolution for winding up the company and is delivered to the Registrar for registration before that date; and

(b) it embodies a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration.

(3) Any director of a company making a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full within the period specified in the declaration, shall be liable to imprisonment with or without hard labour for a period not exceeding six months or to a fine not exceeding fifty thousand dollars or to both such imprisonment and fine; and if the company is wound up in pursuance of a resolution passed within the period of five weeks after the making of the declaration, but its debts are not paid or provided for in full within the period stated in the declaration, it

shall be presumed until the contrary is shown that the director did not have reasonable grounds for his opinion.

(4) A winding up in the case of which a declaration has been made and delivered in accordance with this section is in this Act referred to as "a members' voluntary winding up", and a winding up in the case of which a declaration has not been made and delivered as aforesaid is in this Act referred to as "a creditors' voluntary winding up".

278. The provisions contained in sections 280 to 286 (inclusive) shall apply in relation to a members' voluntary winding up.

279. (1) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them.

(2) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof.

.....

282. (1) If, in the case of a winding up commenced after the appointed day, the liquidator is at any time of opinion that the company will not be able to pay its debts in full within the period stated in the declaration under section 277, he shall forthwith apply to the Supervisor for an assignment in accordance with the Insolvency Act and thereafter proceed in accordance with the provisions of the Insolvency Act.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding six months or to both such fine and imprisonment."

[13] The Declaration of Solvency is optional not compulsory hence the use of the word '*may*' in section 277(1). In a members' voluntary winding up there is greater control over the process. It is for that reason, and possibly a desire to calm any panic at the time of dissolution, that directors may decide to file a Declaration of Solvency. None of those reasons were advanced before me. The Defendants' witnesses only said they were advised to file one. The Declaration of Solvency was drafted with the assistance of the 2nd Defendant. A nullified Declaration of Solvency does not end the winding up, see **In the Matter of The New Millenium Experience Company Limited [2003] EWHC 1823** at paragraphs 92 and 101. If it is knowingly false, there are criminal consequences. If it turns out that the company is in fact insolvent the winding up by law becomes a creditors' winding up and is then governed by the relevant provisions of the Insolvency Act. The Insolvency Act, in sections 9 to 56, essentially hands control of the insolvency process to the creditors who can among other things replace the Trustee, postpone winding up or attempt rehabilitation of the entity. The sections of the Companies Act, quoted in paragraph 12 above, reference a "liquidator" however the schedule to the Insolvency Act 2014 deleted the word "liquidator," wherever it appeared in the Companies Act, and replaced it with the word "Trustee".

[14] I am therefore of the view that the question, whether the declaration of solvency was truthful or inaccurate, is irrelevant because the declaration was unnecessary for the winding up process. The declaration only determines whether the winding up continues as a members' voluntary winding up or converts to a creditors' winding up. The company in either event remains an entity in the process of being wound-up. The facts, and particularly events after the end of January 2023, make it clear that the 1st Defendant was either, at all material times or, subsequent to the 16th January 2023 an insolvent entity. It is common ground that the company is now insolvent. It follows that the Trustee, pursuant to section 282, would have had to convert the process to a creditors' winding up. The Third Schedule to the Financial Services Act gives power to the regulator to intervene after a Receiver is appointed. Although the role of Receiver and Trustee may at times overlap there

is a critical distinction between the two. The company remains alive in a receivership and thus, whether appointed by debenture or otherwise, the Receiver may continue to trade and collect debts in the company's name. The appointment of a Temporary Manager is, in those circumstances, understandable. It is, however, inappropriate where a process to wind up a company has commenced and even more so after a Trustee is appointed to handle the process. This is because once the winding up begins the company must cease trading, see section 275 of the Companies Act.

[15] It is apparent from the statutory scheme that winding up proceedings pose no threat to the creditors of the 1st Defendant or to the public. No such prejudice was deposed to in the evidence and, when I asked counsel for the Claimant, none was identified. It would be strange if there was any danger to the public, because the Financial Services Commission Act provides for the institution of winding up proceedings as the ultimate weapon in the regulator's arsenal, see section 8(5)(d) of the Act. I recognize that Ms Karene Blair, at paragraph 30 of her witness statement, stated:

> *"At this juncture, since the FSC was first advised in January 2023 of the fraudulent activities and the finding by the Temporary Manager that SSL is insolvent, it is prudent in this highly publicized matter for SSL to remain under regulatory management by the FSC. The Temporary Management takes precedence. In the face of fraudulent activities and insolvency, SSL should not be permitted to take steps to reorganize and/or wind up the company without thorough and complete investigations being done in relation to the fraudulent activities. The proposed SSL reorganisation is otherwise untenable as SSL is insolvent. However, such reorganization as proposed would not benefit from FSC's oversight.*
>
> *Any proposed reorganization will have serious repercussions for SSL's clients, as it is a high possibility that the clients will not be*

able to recover their funds and/or assets if the company is dissolved under trusteeship."

However investigations and forensic audits can take place under the auspices of a Trustee whose duty includes the protection of creditors. The 2nd Defendant is aware of his statutory duty as Trustee and was well qualified so to perform them, see paragraphs 5 to 23 and, 69 to 72 of his witness statement. There was no real danger to the public interest posed by the lawful liquidation of the 1st Defendant.

[16] The process of voluntary winding up commenced on the 16th January 2023 before the Claimant appointed the Temporary Manager on the 17th January 2023, see exhibit 1A pages 30 and 56. Winding up commences when the vote to wind up is taken, see section 274 of the Companies Act quoted at paragraph 8 above. There was therefore no entity capable of being managed by the Temporary Manager at the time of his appointment. A Temporary Manager is secondary to a Trustee who has statutory duties to fulfill, see per Brooks J as he then was in **Financial Services Commission v Dyoll Insurance Company Limited (2005) HCV 1267 unreported judgment dated 3 June 2005** at page 8, *"The answer to that submission is that upon the appointment of the provisional liquidator taking effect the temporary manager would no longer have any authority other than that expressly given by the provisional liquidator, who would then be accountable to the court.*". The Trustee's duties are accurately stated in paragraph 71 of the 2nd Defendant's witness statement. The Australian case of **Henry Joseph Kazar v Ross Andrew Duus et al AG 3005 of 1998 undated judgment delivered 30th October 1998** was brought to my attention. In that case two administrators were appointed each by a separate institution and under different statutes. The case is however of little assistance with the issue before me as in that case, unlike in this, one statute was expressly stated to be "*subject to*" the other.

[17] The above analysis means that this claim cannot succeed. The 1st Defendant was being lawfully wound up by its shareholders exercising a power which the Claimant

had no legal authority to curtail. The Claimant's directions did not explicitly or at all bar a members' voluntary winding up even if, which I do not accept, a power to do so could be implied in the statute. The Declaration of Solvency was unnecessary for winding up to occur. Therefore, whether the declaration was knowingly or inadvertently false, is irrelevant to the question whether a members' voluntary winding up had lawfully commenced. This does not mean that the regulator had no recourse. It may, for example, have applied to the court to have the winding up converted to a creditors' winding up under the supervision of the court. It could have placed before the court any information relevant to that process. However, the course adopted, of appointing a Temporary Manager, was ill advised because it is ineffective to stop winding up proceedings which have already commenced.

[18] In the event some other court takes a contrary view of the law I will briefly address some of the factual issues before me. Chief among them is whether the Declaration of Solvency was fraudulently made and/or was knowingly false and/or was in fact false at the time of the declaration. For the reasons stated below I am satisfied that at the date the declaration was filed the company was already in an insolvent position. The 2nd Defendant stated, and I accept, that see paragraph 86 of his witness statement:

> "*The reversal in solvency between December 31, 2022 and January 31, 2023 was not a result of a deterioration in the performance of the 1st Defendant but stemmed from the collapse of the transaction with Spectrum. To the best of my knowledge this would have occurred after January 24, 2023. This outcome clearly could not have factored in the director's consideration, especially considering that there were no directors by that time. This resulted in the refund of deposits and the reclassification of equity to a liability.*"

[19] It is now known that the amount defrauded, by the 1st Defendant's employee, is approximately JM$940 million and that the 1st Defendant's total assets were, as at 30th January 2023, JM$24 million below total liabilities, see generally the expert report of Mr Brian Hackett, exhibit 2 and, his response to questions posed exhibit 2(C). Mr Hackett at page 6 of his report references the 1st Defendant's inability to settle its liabilities in full as at 16th January 2023 as the relevant determinant of solvency. I accept the evidence of Mr Kenneth Tomlinson at paragraphs 13 to 18 of his witness statement. He at paragraph 14 referred to the fact that SSL *"had stopped paying its obligations in the ordinary course of business as they generally became due"* as the determinant for insolvency. Neither of these reflect the test of solvency in section 277 (1) of the Companies Act. The Insolvency Act in section 2(1) defines "Insolvent person" as follows:

> *"(a). means a person who resides, carries on business or has property in Jamaica whose liabilities to creditors provable as claims under this Act amount to not less than $300,000 or such other amount as the Minister made by order published in the Gazette prescribed as the threshold and –*
>
> *i. Who for any reason is unable to meet his obligations as they generally become due;*
>
> *ii. Who has ceased paying his current obligations in the ordinary course of business as they generally become due; or*
>
> *iii. The aggregate of whose property is not at a fair valuation, sufficient or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations due and accruing due;*
>
> *(b). does not include a bankrupt"*

For completeness "bankrupt" means a person who has made an assignment under part (vi) or against whom a receiving order has been made under part (v) of the Insolvency Act.

[20] I find on a balance of probabilities that on the 16th January 2023 the 1st Defendant would have been unable to pay its debts in full within 12 months of that date, within the meaning of Section 277 of the Companies Act. It is not the stipulated test in the Insolvency Act. I do find however that on the 16th January 2023 the liabilities of the 1st Defendant exceeded its assets when the fraudulent activity is taken into account and the Spectrum transaction is reversed. I also accept Mr Tomlinson's evidence in this regard. These findings result in a determination of insolvency in accordance with (ii) and (iii) of the definition in the Insolvency Act set out above. Although considering a differently worded statute, the United Kingdom Supreme Court's decision in **BNY Corporate Trustee Services Ltd and others v Eurosail-UK 2007 – 3BL plc and others [2013] UKSC 28, [2013] 3 All ER 271,** demonstrates the appropriateness of a pragmatic approach to the question of insolvency. To compound matters, and fortify my finding that the 1st Defendant was insolvent, it is now known that the potential investor, Spectrum Capital Partners Limited (hereinafter referred to as Spectrum), is no longer interested in purchasing a majority or any interest in the 1st Defendant.

[21] The fact, as I have found, that the 1st Defendant was insolvent at the time the statutory declaration was filed, is not the end of the matter. The issue for present purposes is the state of mind of the directors when they signed the declaration of solvency. Did they sign it knowing that the 1st Defendant was insolvent? It seems to me, having seen and heard the 1st Defendant's witnesses, Messrs. Marc Ramsay and Peter Knibb, that the directors honestly and reasonably concluded that the 1st Defendant was solvent as at the 16th January 2023. The evidence is that the directors had before them the 1st Defendant's audited accounts of 30th June 2022 and the management accounts of November 2022, see exhibit 1A pages 21, 22 and exhibit 2(t)-tab T. These documents placed the 1st Defendant in

a favourable financial position. The directors also had before them a signed agreement with the interested investor, Spectrum, which had already paid USD 1.1 million dollars into the account of the 1st Defendant, and a further USD $900,000 held by the 1st Defendant's attorneys-at-law in escrow. The unchallenged evidence of Marc Ramsay, which I accept, is that Spectrum continued to show an interest until early February 2023. Mr. Tomlinson, when cross-examined, confirmed Spectrum continued to express an interest even after his appointment as Temporary Manager. In this regard it is worth noting that Mr. Hackett, prior to preparing his report, had not seen the written agreement with Spectrum and was unaware of its status when doing his report. The decision by Mr. Tomlinson to reverse the credit entries connected to that transaction heavily influenced Mr. Hackett's' finding of insolvency. Mr. Tomlinson says the decision to reverse the transaction was taken because Spectrum lost interest an eventuality the directors hoped to avoid by interposing the Trustee. The 2nd Defendant in paragraph 82 of his witness statement outlines the effect of the reversal of the Spectrum transactions on the 1st Defendant's solvency. Mr. Hackett's opinion of the 1st Defendant's insolvency is also influenced by the amount defrauded by the 1st Defendant's employee. However, the directors were unaware of the amount defrauded when the Declaration of Solvency was signed because, although they knew a fraud had occurred, they did not know its true extent. As Mr. Knibb stated the directors considered the fact that the 1st Defendant had insurance for fraud and, that the fraudster had approached one of the people defrauded for a loan to bail her out of liability. This caused them to believe that the amount defrauded could not have been very high.

[22] Given the information in their possession I find the directors' opinion to be reasonable even though, as we now know, it turned out to be erroneous. It is noteworthy that the regulator, which possessed similar information, did not, on the 10th January 2023 when advised of the fraud, see exhibit 1(a) page 1, either appoint a Temporary Manager or commence winding up proceedings. The Claimant chose instead to issue very restrictive directions, dated the 12th January

2023, to the 1st Defendant. This suggests that the Claimant did not regard the 1st Defendant as insolvent as at that date. Mr Marc Ramsay, at paragraph 20 of his witness statement, points out that on the 21st December 2022 Spectrum issued a notice of satisfactory due diligence certifying that they had "*independently examined the business, operations, assets, liabilities, and financial condition of SSL*". This is not surprising and perhaps explains their considerable investment. I accept Mr. Ramsay's evidence that he was of the opinion, when he advised the 1st Defendant's board, that the 1st Defendant was on a *"growth trajectory towards reducing its debt further, introducing new lines of business and collecting debts due to it"*, see paragraph 29 of his witness statement. The Temporary manager admitted, during cross examination, that had the Spectrum transactions not been reversed the Claimant's financials would have been better as at 30th January 2023:

> *"Q: But for your instruction on the 1st March to reverse the accounting entry the values that were reflected in the December accounts would have reflected in January?*
> *A: It was reversed and would not be reflected yes*
> *Q: So asset over liability December 2022 balance had not reversed therefore would have exceeded liabilities in January 2023*
> *A: Yes*

[23] I find, on a balance of probabilities, that the directors acted honestly and with good intentions when they signed the Declaration of Solvency in January 2023. Their duty was not to take extraordinary steps or to wait for all possible information to come to hand. They were entitled, as men of business, to approach the assessment of solvency realistically. As stated in **LRH Services Ltd (In Liquidation) v Raymond Arthur Trew et al [2018] EWHC 600 (Ch),** paragraphs 22, 23 and 24, per David Cooke J at paragraph 27: *"...they were not obliged to make a worst case assessment but a realistic commercial one having regard to all the circumstances known to them."* This I find is precisely what the 1st Defendant's

directors did.

[24] Another factual issue relates to whether the declaration of solvency was lawfully filed and served. You will recall that as a matter of law the winding up commenced at the vote of shareholders, see section 274 of the Companies Act. The evidence is that the relevant notices were filed at the office of the Registrar of Companies and gazetted, see exhibit 1A pages 24 and 139. The fact that the Registrar of Companies raised requisitions, see exhibit 1A pages 45 to 47, does not detract from the fact of the filing of the notice and declaration. There is nothing to suggest that the requisitions from the Registrar resulted in a voiding of either the filing or the vote by members to wind up. It would be odd indeed if a Trustee's actions after such a vote could be automatically null and void because the Registrar of Companies found some technical error in the documentation filed. Support for this view of the law is to be found in **In the Matter of Domestic & General Insulation Limited [2018] EWHC 265 (Ch)**, **In re Centrebind Ltd (1966) unreported judgment of Plowman J 15 November 1966** and **Strategic Advantage SPL v Lawrence Butler et al [2020] EWHC 003171 (Ch) (decided on 4 September 2020).** In this case the errors found by the Registrar were, see exhibit 1A pages 45 to 47:

1. The declaration needed to be adjusted by correcting the duplication of the street number (33½) in the directors' address.
2. The declaration referenced the appended statement of the Company's Assets and Liabilities as at the 31st of January 2019 which did not meet the requirements of Section 277 (2) (b) of the Act as a statement as at the latest practicable date was required.
3. The date of the statement referenced in the body of the Declaration of Solvency (31st January 2019) is inconsistent with the date of the appended Statement (30th June 2022).
4. The words "In Liquidation" should follow the name of the company in the winding up documents.

5. The Declaration of Solvency must be corrected before registration of the Notice of Appointment of Trustee.
6. The statutory declaration should be corrected: as to a date in item 4 and the statement that "*personal information was leaked.*"
7. A change to company secretary required a notice of appointment.
8. A notice in form 5 was needed to accompany the statutory declaration.

[25] These errors I find are not such as to move a court of law to declare a winding up void ab initio. They do not affect the validity of the meeting, or the vote taken at that meeting. Furthermore, the evidence is that the 2nd Defendant commenced acting as a Trustee, see letters dated 18th and 20th January 2023, exhibit 1A pages 142 and 148. The Claimant during the trial applied to amend the claim and to lead evidence that the directors who signed the declaration had previously resigned as directors. I refused the application because parties may waive, suspend or postpone the effective date of resignations. It is undisputed that the gentlemen did sign the declaration. Therefore, even if letters of resignation had been tendered, it is apparent that they elected, by and with the consent of shareholders, to continue to act as such. The Companies Act provides for validity of directors' actions when not appointed, see section 176 of the Companies Act. The intended new basis of challenge had no real prospect of success as, when asked, Claimant's counsel had no evidence other than the letters of resignation to support the assertion. In the circumstances I find as a fact that the Declaration of Solvency was valid.

[26] Another partly factual issue is whether the directions issued by the Claimant on the 12th January 2023 barred the 1st Defendant going into voluntary winding up. The directions are quoted at paragraph 7 above. A related issue is whether the 1st Defendant notified the Claimant of its intention to go into liquidation. It seems to me that there is nothing in the directions which communicate a bar to shareholders voting for voluntary winding up. Conversely the letter from the 1st Defendant of the

13th January 2023 alerted the Claimant to that possibility. The letter is as follows, see both exhibits 1A page 11 and 1 B (to view a complete readable copy):

"Dear Ms. Blair:

Re: SSL Action Plan: To address impact of Former Employee Suspected Fraud reported January 10, 2023

This serves to provide the Financial Services Commission (FSC) with a high-level action plan to be implemented by Stocks and Securities Limited (SSL) to address the impact resulting from currently allegations of fraud committed by a former employee who served in the role of Client Relationship Manager. The exposure is unknown still, but SSL is currently undertaking investigations with the support of our attorneys, Guardsman Elite, the police, and fraud squad. SSL is also in the process of appointing a receiver. The employee was interviewed by our attorneys on January 6 and 7, 2023 in the presence of her attorney and has admitted to wrongdoing. Other interviews were executed during the week of January 9, 2023, with known associates.

Nature of the suspected fraudulent activity by former employee

Further investigations suggests that the former employee not only amended and generated fraudulent client documents including encashment requests and statements to circumvent the internal protocols but may have benefitted financially from these activities.

Steps taken and next steps

Advisories and Meetings: Week of January 9th to January 13th, 2023.

1. *The matter was reported to the Board of Directors and communication to clients has commenced. In addition, disclosures have been made to FSC, BCMG Insurance Brokers, Jamaica*

Stock Exchange (JSE), external auditors BDO Chartered accountants, police, and fraud authorities

2. *SSL met with the FSC to review the Directions issued by the FSC under section 8(1) (b) of the FSC Act on January 12,2023 as part of the enhanced supervision by the FSC.*
3. *The SSL team also met with investigators from the Fraud Squad on January 11 and 12 where the following were provided:*
    1. *Client statements for 3 affected clients;*
    2. *Contact details for 2 of the affected clients who indicated a willingness to provide witness statements;*
    3. *SSL internal form used to facilitate written client instructions; and*
    4. *Detailed interview by SSL personnel which was used to provide a statement on the sequence of events*

Next Steps/Action Plan

Business Plan

1. ***Immediate appointment of a receiver effective January 16, 2023.***
2. ***SSL is proposing licensed trustee and receiver Caydion Campbell to oversee the investigation and carry out an independent business review, with a view to determine the true state of affairs of SSL assets, liabilities and possible contingent claims or obligations arising from the apparent fraud perpetrated by the former employee.***
3. *In addition, the licensed receiver will engage the service of one of the BIG 4 accounting firms to undertake the forensic investigation and asset tracing. We anticipate this will be executed by week ending January 20, 2023.*

4. *SSL, with the lead of the appointed receiver, will seek to establish a joint communication policy with the FSC to collaborate the narrative to the public.*
5. *The receiver will oversee, along with the assigned reporting officer for SSL, the execution of the Directions issued by the FSC under section 8 (1)(b) of the FSC Act, as part of the enhanced supervision by the FSC.*
6. *SSL will ensure that there will not be any breach of the Directions issued by the FSC and will make every attempt to honor the timelines stated in such Directions.*

Operational Action Plan: Bridging Operational Gaps

1. *1. Client transactions will be subjected to independent verification. Upon receipt of an order/request, the client facing staff will forward the order to a staff who is not associated with the transaction to verify. Verification will entail clients being called and asked to provide very specific details in relation to their order form.*
2. *Client orders/request will be accepted only from the email address on file. If there is a need to change the email address on file, then the client will be required to visit the office with appropriate identification to have this done.*
3. *Effective immediately, SSL will cease all internal transfers.*
4. *There will be an evaluation of clients assigned to sales and service staff every 2 years to assess risk and takes steps to rotate as necessary.*
5. *Access automated digital evaluation of email verification process.*

The Company estimates that within seven (7) to ten (10) days there will be a reasonable estimate of the exposure, however this is unknown at this time. SSL has confirmed that its insurance policy includes coverage for employee dishonesty and forgery with coverage

up to US$1 million. Efforts are also being made to have the former employee to commit to restitution.

We trust the above provide some confidence that SSL takes the ongoing situation seriously and plans to take these steps to reduce impact to the business and restore confidence with clients.

The company will continue to provide timely updates to the Financial Services Commission throughout the course of these investigations."

[emphasis added]

[27] The highlighted portions of the letter ought to have alerted the Claimant to the possibility of winding up proceedings. I agree with the 2nd Defendant's statement in cross examination:

> *"Q: Only paragraph 7 of your scope of services was communicated to FSC by SSL in letter of 13 January 2020?*
> *A: Partially, the context of all items read together, one would recognize that the scope of services in my engagement letter was in alignment with action plan and this was agreed by Ms Blair of the FSC."*

[28] The 1st Defendant, not being a creditor, or a debenture holder, it is unclear on what basis a receiver could have been appointed by the 1st Defendant. If the 1st Defendant chose to contract a receiver privately to oversee its affairs it may have exposed the company's creditors to great risk. A winding up process under law, as we have seen, minimizes such a risk, see paragraph 15 above. The complaint in this regard by the regulator is therefore difficult to understand. Let me reiterate that there was no legal obligation on the 1st Defendant to first advise the regulator of its intent to go into voluntary liquidation. It should be noted that, although the Claimant has a statutory power to intervene if a receiver is appointed to a regulated entity, see the FSC Act - Third Schedule Part A section 9, there is no equivalent provision

in relation to liquidators and trustees. Although their functions overlap a Receiver is primarily concerned with a going concern and the recovery of debt. The Trustee in a winding up is focused on closing down the company and seeing that assets are realized, and debts paid, before a final distribution. The Trustee may also play a role in making proposals to creditors for compromise and arrangements. The Trustee has a statutory duty to determine the company's solvency and to protect its creditors. The 2nd Defendant was well aware of his duty and made it clear to the Claimant see letter dated 23rd January 2023 exhibit 7(b) page 19. The decision to appoint a Trustee to undertake a winding up was in the circumstances preferable to the appointment of a Receiver.

[29] It has also been argued that the directors or shareholders of the 1st Defendant had a duty to await further information before proceeding to wind up and/or to swear a declaration of solvency. I do not agree. It seems to me that persons in business are always entitled to take any lawful step in their self-interest or in the interest of their business. In this case the 1st Defendant had for some years been in a precarious position and was under "*enhanced supervision",* see the evidence of Ms Karene Blair and exhibits 5, and 5(a) to 5(l). The regulator up to the 10th January 2023, the date it was informed of the fraud, saw no need to wind up the 1st Defendant, as per Ms Blair in cross-examination:

> *"Q: Falling below benchmark that you recall, despite that SSL continued to function as a prescribed financial institution?*
> *Objection: Witness did not say at least once*
> *Judge: Will allow*
> *Q: [repeated]*
> *A: Entity was under enhanced supervision*
> *Q: Answer my question*
> *A: The FSC did not issue any intention to cancel the licence*
> *.....*

Q: Resulting from that no action took by FSC to stop SSL functioning as a prescribed business

A: Based on representations received the FSC continued enhanced supervisory process and did not issue intention to cancel.

.....

Q: Up to 10th January 2023 when SSL wrote to FSC about a shock position re capital adequacy had not caused FSC to intervene beyond enhanced governance measures

A: Based on financial statements that were before us, the representations from the entity, we based on representation at that time capital adequacy

J: Ask question again

A: There were no changes to the enhanced supervision because we had not received the audited financial statements until 10th January 2023."

[30] In January 2023 the 1st Defendant's directors had a reasonable expectation of a significant capital injection by an investor which had signed a contract and made a substantial first payment. In January this hope of revitalization was threatened by publicity emanating from an employee's fraud. It was not unreasonable for the shareholders and directors of the 1st Defendant to conclude that the best hope of assuaging public fears and shoring up the new investor's confidence was to reorganize by way of a member's voluntary winding up. Such a process could secure the company's assets, protect its creditors and, hopefully, forestall any desire by the new investor to cancel the investment. We will of course never know whether this tactic might have succeeded because the Claimant put a spoke in the wheel of those plans by appointing a Temporary Manager. It also obtained an injunction from this court to stop the 1st Defendant's member's voluntary winding up. As a result of the interlocutory injunction, granted on the 25th January 2023, the Temporary Manager now controls 1st Defendant. I find as a fact that the 1st

Defendant's conduct, in deciding to commence a voluntary winding up, was reasonable in the circumstances, as time was of the essence and media interest high.

[31] Therefore, these being my legal and factual findings, the remaining question is what orders or declarations are appropriate. It is conceded that, by virtue of the interim order, the Temporary Manager has been in control of the 1st Defendant since the 25th of January 2023. There is no suggestion that he has acted otherwise than honestly in that role. I do not think therefore that any useful purpose will be served by an order seeking to undo all he has done up to now. Nor would it be practical, even were it possible, to reinstate the 2nd Defendant as Trustee retroactively to January 2023. It is agreed on all sides that the 1st Defendant is now insolvent and an order for a court supervised creditors' winding up is appropriate. This I will order. However, given my conclusion on the law and the merits of the case it is only fair that the Trustee chosen by the members be allowed to conduct the winding up process. There is no suggestion that the 2nd Defendant is unsuitable or incapable, nor on the evidence before me, could it be so contended. I am told by the parties that there is in place an undertaking as to damages which was given by the Claimant in return for the grant of the interlocutory injunction. I will therefore grant liberty to the 1st and 2nd Defendants to pursue recovery of loss pursuant to that undertaking. Section 22 of the FSC Act, see paragraph 5 above, was not brought to my attention and there has been no argument thereon before me. The effect, if any, of that section on the Defendants' ability to recover damages on the Claimant's undertaking may be an issue for subsequent consideration. I express no opinion in that regard.

[32] The claim is therefore dismissed and there will be judgment for the Defendants on the counterclaim. My declarations and orders are as follows:

1. It is declared that the appointment of Mr. Caydion Campbell of Phoenix Restructuring Advisory and Insolvency Services Enterprise (PRAISE), Suite

#3, 47E Old Hope Road, Kingston 5 in the parish of St. Andrew as Trustee of the 1st Defendant for the purposes of winding up and reorganization is and was at all material times valid.

2. The interlocutory injunction granted on the 25th January 2023 be and is hereby discharged and the temporary management put in place by the Claimant on or about the 17th January 2023 shall cease with immediate effect and is hereby also discharged.

3. The 1st and 2nd Defendants are at liberty to pursue recovery of damages pursuant to the Claimant's undertaking as to damages.

4. The winding up of the 1st Defendant lawfully commenced on the 16th January 2023 shall recommence but shall be subject to the supervision of the court with liberty to creditors, contributories and all relevant and interested parties to apply to the court and be subject to such further or other conditions as the court may order.

5. The said Mr. Caydion Campbell shall continue to act as Trustee in the winding up unless or until the creditors determine otherwise pursuant to the provisions of the Insolvency Act or further order of the court.

6. The Temporary Manager and the Claimant shall provide the Trustee with all reports and other pertinent information in their possession as well as all relevant information he may request in furtherance of his duties.

7. The Trustee shall in accordance with Section 282 of the Companies Act (as amended by the Insolvency Act) apply to the Supervisor of Insolvency for an assignment in accordance with the Insolvency Act and shall thereafter proceed in accordance with the provisions of that Act.

8. The Trustee is further ordered and directed to invite, by post, electronic mail, newspaper publication and/or any address known to the 1st Defendant, all known potential and contingent claimants and/or creditors of the 1st Defendant to submit their proof of claims for adjudication and proving by the Trustee and/or for their admission or voting at a meeting of creditors and/or ranking for distribution and/or payment or for the reorganization of the business or otherwise whatsoever in accordance with the Insolvency Act or any further order of the court.

9. There is a stay of all pending or other proceedings against the 1st Defendant and no suit, action, or other proceedings including criminal proceedings shall be proceeded with or commenced against the 1st Defendant unless the permission of this Court is obtained.

10. The Trustee shall submit a report to the Court within 90 days of this Order and the Court will convene on the 26th September 2024 at 10:00 am for 2 hours in open court to consider any applications.

11. Suit SU2023CD00097 shall be listed on the 26th September 2024 at 10:00 am for 2 hours in open court before the same court for further orders.

12. Costs of this Claim will go to the 1st and 2nd Defendants against the Claimant to be taxed if not agreed.

David Batts
Puisne Judge