

**Judgment 50/2005**

**Messenger Insurance PCC Limited (in administration) v. Cable & Wireless PLC et al – Royal Court (Civil action file 832) – 12 May, 2005 and 16 August, 2005**

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**Protected Cell Companies Ordinance, 1997 – protected cell company had been placed in administration – application for discharge of freezing order – substantive proceedings in the High Court in England.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 12<sup>th</sup> day of May, 2005 before Geoffrey Robert Rowland, Esquire, Deputy Bailiff;

Between

MESSENGER INSURANCE PCC LIMITED

“The Company”

and

CABLE AND WIRELESS PLC

PENDER INSURANCE LIMITED

ZURICH INSURANCE COMPANY, SWITZERLAND

“The Creditors”

QBE INTERNATIONAL INSURANCE LIMITED

PENDER TELECOMMUNICATION MEMBERS FACILITY ASSOCIATION

PENDER MUTUAL INSURANCE COMPANY

In the matter of an application dated 11<sup>th</sup> May, 2005 by MESSENGER INSURANCE PCC LIMITED (“The Company”) under Section 21 of The Protected Cell Companies Ordinance, 1997 (as amended) for an Administration Order to be made in relation to the Company;

And in the matter of a cross-application under Section 21 of the said Ordinance by Cable and Wireless PLC, Pender Insurance Limited, Zurich Insurance Company Switzerland, QBE International Insurance Limited, Pender Telecommunications Facility Members Association and Pender Mutual Insurance Company, (together “The Creditors”);

THE COURT, having heard Advocates M.G. Ferbrache, J.P. Greenfield and J.M. Wessels, Counsel for the Company, the Creditors and the Guernsey Financial Services Commission respectively,

AND HAVING considered the proposed agreed variations and amendments to the Act of Court dated 11<sup>th</sup> May 2005 in this matter and THE COURT having ordered that a revised composite order be drawn up to replace the aforesaid Act of Court dated 11<sup>th</sup> May 2005 MADE AN ORDER THAT:

1. An Administration Order be made against Messenger Insurance PCC Limited (“the Company”) pursuant to the provisions of section 20 of the Protected Cell Companies Ordinance 1997 (as amended) (“the Ordinance”) and that for the period for which this Order is in force, or until further order in the meantime, the affairs, the business and the property of the Company shall be managed by the Joint Administrators hereinafter appointed for the purposes of achieving a more advantageous realisation of the Company’s assets than would be effected on a winding up.
2. (A) Peter Andrew Franks, Partner of Messrs Ernst & Young (“E&Y”) based in Guernsey, Chartered Accountant and head of E&Y’s Insurance Industry Practice across the Channel Islands; and (B) Gareth Howard Hughes of E&Y based in London, Chartered Accountant, Licensed Insolvency Practitioner and head of E&Y’s London based Financial Services Corporate Restructuring Team be appointed Joint Administrators of the Company.
3. Any act required or authorised under any enactment to be done by the Joint Administrators of the Company may be done by any one of the above named Joint Administrators acting alone.
4. The Joint Administrators shall prepare and lodge with the Court by no later than 4 pm on Friday 10<sup>th</sup> June 2005 a preliminary report on the affairs of the Company, the actions that they have taken and their future recommendations.
5. The expenses of the Joint Administrators shall be taken out of a Fund comprising £260,000 which shall be maintained by them in a separate account (“the Fund”). The said sum shall comprise of a payment of £65,000 severally from each of the following 4 creditors of the Company (“the Creditors”):-

- (a) Zurich Insurance Company, Switzerland
  - (b) QBE International Insurance Ltd
  - (c) Cable and Wireless PLC and Pender Insurance Ltd (its subsidiary)
  - (d) Pender Telecommunications Facility Members Association and its associate company Pender Mutual Insurance Company.
6. The Joint Administrators if or once the sum in paragraph 5 above is exhausted shall thereafter return to the Court for directions as to the further funding of the Administration of the Company. For the avoidance of doubt, the Creditors (and others if the Court should so direct) shall have the right to make representations as to the amount of further funds (if any) to be taken from each Cell.
  7. The Creditors' said contributions to the Fund shall be recoverable from the assets of the Company as an expense of the Administration.
  8. The costs of the Joint Administrators and their lawyers (English and Guernsey) (which, for the avoidance of doubt, includes the Creditors' lawyers) in the preparation and presentation of this application shall not be an expense of the Administration and shall not be payable by the Company.
  9. Pursuant to section 22(6) of the Ordinance Cable and Wireless PLC and Pender Insurance Limited have unconditional leave to proceed with the proceedings against the Company both before the English High Court (Claim No. 2004 Folio 250) and the Royal Court of Guernsey.
  10. The Company shall not pursue (a) its application before the Court dated 16<sup>th</sup> February 2005 to vary the freezing injunction and (b) its related application before the English High Court dated 6<sup>th</sup> April 2005 without leave of the Court. Any application by the Company for such leave shall be on not less than 7 days' notice to the Guernsey Financial Services Commission ("the Commission") and the Creditors.
  11. All claims for costs and expenses in the preparation and presentation of the Company's application for an administration order shall be adjourned.
  12. Any notice or other document to be sent to the creditors of the Company must also be sent to the Commission.

13. A person appointed for the purpose by the Commission is entitled to attend any meeting of the creditors of the Company and make representations as to any matter for decision at such a meeting.
  
14. Save as set out in paragraph 10 above, general liberty to apply to this Court on not less than 48 hours' notice (excluding weekends) to all other interested parties (to include, as the context requires, the Company, the Joint Administrators, the Commission and the Creditors), save in circumstances where the Joint Administrators consider it necessary and appropriate to apply ex parte.

M. A. TOSTEVIN  
Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

16<sup>th</sup> day of August, 2005 before Geoffrey Robert Rowland Esquire, Bailiff; sitting alone

In the matter of:

MESSENGER INSURANCE PCC LIMITED  
(IN ADMINISTRATION)

(Appellant)

v.

1. CABLE & WIRELESS PLC  
2. PENDER INSURANCE LIMITED  
3. ZURICH INSURANCE COMPANY, SWITZERLAND  
4. QBE INTERNATIONAL INSURANCE LIMITED  
5. PENDER TELECOMMUNICATIONS FACILITY  
MEMBERS' ASSOCIATION  
6. PENDER MUTUAL INSURANCE COMPANY LIMITED

(Respondents)

Whereas on 6<sup>th</sup> and 7<sup>th</sup> July, 2005, the Bailiff considered an application for the discharge of the freezing order dated 29<sup>th</sup> March, 2004 and heard thereon Advocate M. G. Ferbrache, Counsel for the Applicant, Advocate A. D. Laws, Counsel for Cable & Wireless PLC and Pender Insurance Limited, Advocate J. P. Greenfield, Counsel for Zurich Insurance Company Limited, Advocate K. Le Cras Counsel for QBE International Insurance Limited, and Advocate S. H. Davies, Counsel for PTFMA and PMIC Limited, and whereas it was ORDERED that: -

- (1) The Order of the Royal Court dated 29 March 2004 (“the Freezing Order”) be discharged.
- (2) The Administrators be given leave to apply within 14 days of the date of this Order, on behalf of the Applicant, to the High Court in London for the discharge of the Freezing Order made by that Court on 29 March 2004 (as varied), insofar as that Order affects the assets of the Applicant.
- (3) The remuneration of the Administrators and the expenses properly incurred by them shall be payable from the assets of the Applicant as follows and in the following shares or proportions:

- (i) The Administrators' remuneration and legal and other proper expenses and disbursements relating to the C&W/Pender litigation, before the High Court in London, including the costs of further investigation of the financial position on the Cell GP12 contracts of reinsurance with AXA/QBE, shall be funded wholly from the assets of Cell GP12;
- (ii) The Administrators' remuneration and legal and other proper expenses and disbursements relating to the Zurich arbitration, including the costs of further investigation or the financial position on the Cell Pender contracts or reinsurance with Zurich, shall be funded wholly from the assets of Cell Pender;
- (iii) The Administrators' remuneration and legal and other proper expenses and disbursements relating to the claim commenced by the PTFMA in the Royal Court of Guernsey shall be funded wholly from the assets of Cell Pender;
- (iv) On an interim basis only, and subject to any adjustment, if necessary, at a final determination of the Administration Order or final ascertainment by the Court or Administrators of the liabilities attributable to each and any of the cells, and with such order deemed to be in compliance with the provisions of section 10 of the Protected Cell Companies Ordinance, 1997 (as amended), with such compliance to be confirmed upon final determination of the Administration Order, the Administrators' remuneration and legal and other proper expenses and disbursements attributable to Cell M2 shall be funded (to the extent that the assets of Cell M2 are insufficient) wholly from the assets of Cell GP12;
- (v) On an interim basis only, and subject to any adjustment, if necessary, at a final determination of the Administration Order or final ascertainment by the Court or Administrators of the liabilities

attributable to each and any of the cells, and with such order deemed to be in compliance with the provision of section 10 of the Protected Cell Companies Ordinance, 1997 (as amended), with such compliance to be confirmed upon final determination of the Administration Order, the Administrators' remuneration and legal and other proper expenses and disbursements attributable to the Core, or not specifically attributable to individual cells, shall be funded by the Core, and then re-charged by the Core as general costs of the Administration to Cells GP12 and Pender, 50% to each;

- (4) All alleged security and proprietary claims over the assets of the Core or of any Cell of the Applicant (and, in particular, over the assets of Cell GP12 and/or Cell Pender) shall be subordinated to the remuneration of the Administrators and any expenses properly incurred by them in the conduct of the Administration including, but not limited to, the legal and other proper expenses and disbursements relating to the C&W/Pender proceedings, the Zurich proceedings and the PTFMA proceedings. For the avoidance of doubt nothing in this Order shall otherwise affect the relative priorities of any liabilities of the Applicant or its Cells;
- (5) Paragraph 5(5) of the Applicant's application dated 23 June 2005 be adjourned to the hearing of the funding application referred to at undertaking 3 above;
- (6) Future applications in respect of the funding of the costs of the Administration be made to the Royal Court by the Administrators in writing on a quarterly basis (or more frequently if required), with a summary accounting of the funds spent by the Administrators and the appropriate allocation to Cell GP12 and Cell Pender, with such applications and summary accounting information to be provided to the Respondents and the Commission at the same time save where there is good reason not to provide such disclosure to the Respondents;

(7) Liberty to apply.

The Bailiff this day handed down his written reasons for the above order in the terms attached hereto.

S. M. D. ROSS  
Her Majesty's Deputy Greffier

Approved Text

**IN THE ROYAL COURT OF GUERNSEY**

**ORDINARY DIVISION**

Between

Applicant

**MESSENGER INSURANCE PCC LIMITED**

**(IN ADMINISTRATION)**

**V**

Respondents

**CABLE & WIRELESS PLC**

**PENDER INSURANCE LIMITED**

**ZURICH INSURANCE COMPANY, SWITZERLAND**

**QBE INTERNATIONAL INSURANCE LIMITED**

**PENDER TELECOMMUNICATIONS FACILITY MEMBERS'  
ASSOCIATION**

**PENDER MUTUAL INSURANCE COMPANY LIMITED**

Judgment of the Bailiff Geoffrey Robert Rowland

Advocate M G Ferbrache            the Applicant  
Advocate A D Laws                Cable & Wireless PLC and Pender Insurance Limited  
Advocate J P Greenfield Zurich Insurance Company Limited  
Advocate K Le Cras                QBE International Insurance Limited  
Advocate S H Davies    PTFMA and PMIC Limited

**Hearing dates: 6<sup>th</sup> and 7<sup>th</sup> July 2005**  
**Judgment handed down: 16<sup>th</sup> August 2005**

**Cases, Legislation and Texts referred to:**

**Cases**

Deputy Commissioner of Taxation v Advanced Communications

Technologies (Australia) Pty Limited [2003] V.S.C. 67

Sundt Wrigley & Co Ltd v Wrigley. (1993) Unreported Judgement of the Court of Appeal in England 23 June 1993

Armco Inc and other v Donahue and Others, Judgement of the Jersey Court of Appeal 24<sup>th</sup> September 1998

Key Trust (2003) J.L.R. 437

Ostrich Farming Corporation Limited v Ketchell, Unreported Judgement of the Court of Appeal in England 10<sup>th</sup> December 1997

## **Legislation**

The Protected Cell Companies Ordinance, 1997 as amended by The Protected Cell Companies (Amendment) Ordinance, 1998

## **Texts**

Gee, Commercial Injunctions, 5<sup>th</sup> Edition para. 3.007, 20.057 – 20.060 and 20.068

## **Introduction**

1. On 7<sup>th</sup> July 2005 the Court made orders following an application made by Advocate M G Ferbrache who represented Messenger Insurance PLC Limited (In Administration) (“the Applicant”). Advocate A D Laws who represented Cable & Wireless PLC and Pender Insurance Limited (“Cable & Wireless/Pender”) requested that I should state reasons for the conclusions that I had reached on those issues which his clients had disputed. When I gave my decision I indicated that in general terms I had preferred the arguments advanced by Advocate Ferbrache who represented the Applicant and by Advocate Wessels who represented the Guernsey Financial Services Commission (“the Commission”). I therefore set out the background to the application and the key issues which were the subject of argument. I do so under a number of headings but in so doing I am mindful that there is a considerable overlap in that certain facts and submissions set out under one heading are of relevance under other headings. It was important to look at the overall total picture before making any of the orders.

### Orders made by the Court on 10th May 2005

2. The following undertakings were given and orders were made:

*“and upon Gareth Hughes and Peter Franks being the Joint Administrators of the Applicant (“the Administrators”), giving the following undertakings by its counsel, namely:*

- (1) *Should the Administrators intend to make any significant payment or distribution (being a payment or distribution exceeding £50,000 on any one occasion) of core or cellular assets of the Applicant, other than in payment of administration expenses, they will give no less than 14 days’ notice in writing to all creditors;*
  - (2) *Every three months the Administrators will provide to the Court, the Commission and the Respondents accounts detailing any payments that have been made from the core or cellular assets of the Applicant whether for the payment of administration expenses or otherwise, save where there is good reason not to provide such disclosure to the Respondents;*
  - (3) *To prepare and lodge with the Court and provide to the Respondents and the Commission an updated report on the affairs of the Applicant, the actions the Administrators have taken and their future recommendations on or before 31 August 2005 together with any future funding proposal they intend that the Court should consider save where there is good reason not to provide such disclosure to the Respondents;*
3. *It was ordered that:*
    - (1) *The Order of the Royal Court dated 29 March 2004 (“the Freezing Order”) be discharged.*

- (2) *The Administrators be given leave to apply within 14 days of the date of this Order, on behalf of the Applicant, to the High Court in London for the discharge of the Freezing Order made by that Court on 29 March 2004 (as varied), insofar as that Order affects the assets of the Applicant.*
- (3) *The remuneration of the Administrators and the expenses properly incurred by them shall be payable from the assets of the Applicant as follows and in the following shares or proportions:*
  - (i) *The Administrators' remuneration and legal and other proper expenses and disbursements relating to the C&W/Pender litigation, before the High Court in London, including the costs of further investigation of the financial position on the Cell GP12 contracts of reinsurance with AXA/QBE, shall be funded wholly from the assets of Cell GP12;*
  - (ii) *The Administrators' remuneration and legal and other proper expenses and disbursements relating to the Zurich arbitration, including the costs of further investigation or the financial position on the Cell Pender contracts or reinsurance with Zurich, shall be funded wholly from the assets of Cell Pender;*
  - (iii) *The Administrators' remuneration and legal and other proper expenses and disbursements relating to the claim commenced by the PTFMA in the Royal Court of Guernsey shall be funded wholly from the assets of Cell Pender;*
  - (iv) *On an interim basis only, and subject to any adjustment, if necessary, at a final determination of the Administration Order or final ascertainment by the Court or Administrators of the liabilities attributable to each and any of the cells, and with such order deemed to be in compliance with the provisions of section 10 of the Protected Cell Companies Ordinance, 1997 (as amended), with such compliance to be confirmed upon final determination of the Administration Order, the Administrators' remuneration and legal and other proper expenses and disbursements attributable to Cell M2 shall be funded (to the extent that the assets of Cell M2 are insufficient) wholly from the assets of Cell GP12;*
  - (v) *On an interim basis only, and subject to any adjustment, if necessary, at a final determination of the Administration Order or final ascertainment by the Court or Administrators of the liabilities attributable to each and any of the cells, and with such order deemed to be in compliance with the provision of section 10 of the Protected Cell Companies Ordinance, 1997 (as amended), with such compliance to be confirmed upon final determination of the Administration Order, the Administrators' remuneration and legal and other proper expenses and disbursements attributable to the Core, or not specifically attributable to individual cells, shall be funded by the Core, and then re-charged by the Core as general costs of the Administration to Cells GP12 and Pender, 50% to each;*
4. *All alleged security and proprietary claims over the assets of the Core or of any Cell of the Applicant (and, in particular, over the assets of Cell GP12 and/or Cell Pender) shall be subordinated to the remuneration of the Administrators and any expenses properly incurred by them in the conduct of the Administration including, but not limited to, the legal and other proper expenses and disbursements relating to the C&W/Pender proceedings, the Zurich proceedings and the PTFMA proceedings. For the avoidance of*

*doubt nothing in this Order shall otherwise affect the relative priorities of any liabilities of the Applicant or its Cells;*

5. *Paragraph 5(5) of the Applicant's application dated 23 June 2005 be adjourned to the hearing of the funding application referred to at undertaking 3 above;*

6. *Future applications in respect of the funding of the costs of the Administration be made to the Royal Court by the Administrators in writing on a quarterly basis (or more frequently if required), with a summary accounting of the funds spent by the Administrators and the appropriate allocation to Cell GP12 and Cell Pender, with such applications and summary accounting information to be provided to the Respondents and the Commission at the same time save where there is good reason not to provide such disclosure to the Respondents;*

7. *Liberty to apply."*

4. These are my reasons.

### **Background to the Application**

5. It is appropriate to review the background to the applications.

6. It is not necessary to review in great detail the problems confronting the Applicant which gave rise to the Guernsey Freezing Order or the application for an Administration Order to be made. Suffice it to record that Cable & Wireless/Pender contend that five employees of Cable & Wireless, in breach of their fiduciary and other duties, devised and carried out a dishonest scheme to pass insurance premiums received by Pender to a vehicle which they secretly owned namely the Applicant. It is contended that by the mechanism of concealed trust arrangements the employees were the beneficial owners of the majority of shares in Inscm Group Limited, the ultimate parent of the Applicant. It is further contended that the trustees of those arrangements were another individual person who owned most of the rest of the shares and another person who is a solicitor. It is claimed that the amount of premium paid to or for the benefit of the Applicant was approximately £85.4 million. Cable & Wireless/Pender's claim is against the entirety of the Applicant and they are advancing a proprietary claim to the monies held by the Applicant (without limitation). It is not a claim limited to any particular Cell or part of the Applicant which is a protected cell company, incorporated under Guernsey law.

7. The legislation which governs protected cell companies is The Protected Cell Companies Ordinance, 1997 as amended ("the Ordinance") This litigation is the first litigation in this jurisdiction when that legislation will be considered. It is also to be noted that the Ordinance provides for the appointment of an administrator. The power to appoint an administrator was innovative in legislation governing Guernsey companies. The Companies (Guernsey) Law 1994 as amended does not make provision for the appointment of an administrator.

8. On 29<sup>th</sup> March 2004 the English High Court had made an unlimited freezing order against the entirety of the Applicant and later that same day the Court made an unlimited freezing order against the Applicant in Guernsey. There will be arguments alleging breach of the provisions of the Ordinance arising from the way that the Applicant had carried on business.

### **The Administration Order – 11th May 2005**

9. On 11<sup>th</sup> May 2005 the Court heard the Applicant’s application for the Guernsey Freezing Order to be discharged and for orders to be made in relation to the funding of future costs in the administration. A protected cell company cannot be incorporated except under the authority and in accordance with the terms and conditions of a written consent given by the Commission. Notice of an application to the Court for an administration order in respect of a protected cell company must be served on the Commission and the Commission shall be given an opportunity of making representations to the Court before an order is made.
10. A cross application for an Administration Order in respect of the Applicant and for the appointment of an administrator was filed by Cable & Wireless PLC, Pender Insurance Limited, Zurich Insurance Company Switzerland, QBE International Insurance Limited, Pender Telecommunications Facility Members Association and Pender Mutual Insurance Company.
11. The application and cross-application were made under Section 21 of the Ordinance. The application made on behalf of the Applicant was made at the instance of John Twizell and Geoffrey Martin the administrators of the ultimate parent company of the Applicant, an English company Inscom Investments Limited.
12. The application for the appointment of Mr Twizell and Mr Martin, both of whom were resident in England, and Mr Stuart who was resident in Guernsey, as joint Administrators was contested. It was contested by Cable & Wireless / Pender, Zurich Insurance Company, Switzerland (“Zurich”), QBE International Insurance Limited (“QBE”), Pender Communications Facility Members Association (“PTFMA”) and Pender Mutual Insurance Company (“PMIC) who in this judgement are called the Respondents. They claimed to be creditors of the Applicant and to that extent were treated as interested parties. They had filed a cross application also seeking an Administration Order but seeking the appointment of Peter Andrew Franks and Gareth Howard Hughes, partners of Ernst & Young Chartered Accountants as administrators. Mr Franks was a partner of the Guernsey office and Mr Hughes a partner of the London office. Mr Hughes is a Licensed Insolvency Practitioner and head of the London based financial services corporate restructuring team of Ernst & Young.
13. On 11<sup>th</sup> May the Court after hearing briefly from the Applicant and the Respondent ordered that an Administration Order should be made.
14. The Court then proceeded to hear submissions with regard to who should be appointed as administrators. It took into account a range of matters including conflicts of interest, expertise, experience, comparative costs and the ability to progress the administration quickly and efficiently. It resolved that Mr Franks and Mr Hughes should be appointed as Joint Administrators (“the Administrators”). The Court cautioned that it was imperative that careful attention should be paid to costs likely to be incurred. In Guernsey there is no public funding for administrations. The Court intended to maintain close supervision of the conduct of the administration.

#### **The Preliminary Report – 10th June 2005**

15. The Court required that the Administrators should prepare and lodge with the Court not later than 4.00 p.m. on Friday 10<sup>th</sup> June 2005 a preliminary report on the affairs of the Applicant, the actions that they had taken and their future recommendations.
16. The Court also ordered that the Administrators should for the time being take the fees and expenses which they would incur out of a £260,000 fund which Cable & Wireless, Pender, PTFMA and PMIC had volunteered forthwith to provide. It had been provided by the Respondents on the basis that it would in due time be recoverable from the assets of the Applicant as an expense of the administration. The

contributions were not to be taken as an indication in any way that the Respondents proposed jointly to fund each step of the administration. The sum had been provided so that the Administrators could make an immediate start. The Court also ordered that once the £260,000 had been exhausted the Administrators should return to the Court for directions as to the further funding of the administration.

17. On 16<sup>th</sup> February 2005 the Applicant had made application in Guernsey to vary the Guernsey Freezing Order. A related application for a variation of the freezing order made in the English High Court had been made in London on 6<sup>th</sup> April 2005. In the event following in part a delay in scheduling a hearing date and as a result of continuing discussion between the parties that application had not been dealt with by 11<sup>th</sup> May 2005. It had become clear during the course of argument on 11<sup>th</sup> May that there was a real likelihood that the Administrators would soon make application to the Court for the Guernsey Freezing Order to be set aside but that was a matter which ought to be considered by the Administrators.
18. The Court had therefore ordered that those applications should not be pursued without leave of the Court and that the Commission and the Respondents should be given notice of any such application.
19. On 11<sup>th</sup> May the parties had agreed to a four-week standstill to 10<sup>th</sup> June 2005 pending the preparation of the preliminary report. On 6<sup>th</sup> June 2005 the Administrators produced a 32 page report. It was evident from the report that a number of matters needed to be dealt with urgently. That came as no surprise to the Court nor one could reasonably assume to the Respondents.
20. On 16<sup>th</sup> June the Administrators had sent a letter raising the subject of further adequate funding to the Respondents. By then much of the £260,000 had been expended and additional costs had been incurred in the running of the Applicant and in seeking legal advice in both England and Guernsey. Of considerable importance was the fact that the trial in the English High Court was scheduled to be heard in October 2005. The Administrators claimed that they needed to obtain legal advice in order to determine how they should deal with the proceedings there. They asserted inter alia that they needed to obtain advice on the proprietary claim that the Applicant faced in the Cable & Wireless/Pender litigation in the English High Court and other proprietary claims.
21. It is to be recalled that on 8<sup>th</sup> April 2005 QBE had applied unsuccessfully to be joined into the proceedings in the English High Court. Mr Justice Morison rejected QBE's application but in so doing had observed that it was his understanding that the proprietary claim would be fully argued. He said that if

*“there was a real danger that the rights or wrongs of the proprietary claim were not going to be fully argued, then I would have immediately allowed the joinder.”*
22. This observation had caused QBE's solicitors to write to the Administrators enquiring whether they intended to contest the Cable & Wireless/Pender proprietary claims and if so the basis on which they were to be able to fund the same. There were also other issues which needed speedy resolution including arbitration proceedings involving Zurich's dealings with the Applicant.
23. The Administrators in their letter of 16<sup>th</sup> June also emphasised that the Applicant had no substantial non-cellular assets. Only Cell GP12 and Cell Pender had material cash or investments by way of assets. The Administrator succinctly reviewed the statutory context, the principles and their practical application.

24. The Administrators had stressed the need for a reasonable degree of freedom of action. They had also stressed the need for their legal advisers and themselves to have a reasonable degree of certainty when embarking on any course of action during the course of the administration. They had asserted that they would require funds to carry forward any course of action on which they might embark and see it through to its logical conclusion. They pointed out that in the conduct of the administration they were subject to the oversight of the Royal Court and also as a regulated body under Guernsey law to oversight by the Commission. The Commission had put in place a strict regime of control on business to be transacted by the Applicant. The Administrators stressed that their conduct of the adversarial litigation brought against the Applicant must not be unreasonably fettered by the need to seek from interested parties their consent to each proposed action.
25. With regard to the Guernsey Freezing Order the Administrators in their letter of 16<sup>th</sup> June to the Respondents had said this: -

*“Since the Joint Administrators’ expenditure is, under s 24, already subject to the direct control of the Royal Court in the Administration, no useful purpose is served (and costs are unnecessarily increased) by the continued existence of Freezing Orders, made in other proceedings, establishing a separate and duplicate mechanism for judicial control of the Joint Administrator’s expenditure.*

*We therefore invite your consent to the immediate discharge of the Freezing Orders made by the English High Court and by the Royal Court. In the event that such consent is not forthcoming, the Joint Administrators intend to apply to the Royal Court for it to approve the making of an application for those Freezing Orders to be discharged and/or to discharge the Royal Court’s own order.”*

### **The Application on 6th and 7th July**

26. This was the backcloth to the hearing on 6<sup>th</sup> and 7<sup>th</sup> July. Much of what was being sought by the Administrators was in the event not contested by most of the Respondents. However there were issues which were not agreed by Cable & Wireless/Pender. They submitted that the Administration Order should be terminated and the Applicant placed in liquidation. They contended that any application should first be pursued in the High Court in England which was seized of the substantive action, that the Guernsey Freezing Order should not be discharged and that the application for an order subordinating proprietary claims should be dismissed.
27. PTFMA and PMIC had been in discussion with the Applicant. They had suggested a practical way forward which helpfully they had set out in a draft Order of Court which would enable the administration of the Cell Pender, with which they were directly concerned, to proceed smoothly without legal issues having to be determined at that stage. The pragmatic proposals which were advanced by Advocate Davies on behalf of PTFMA and PMIC were to find favour with the Court.
28. As a consequence on 6<sup>th</sup> and 7<sup>th</sup> July I heard argument principally from Advocate Ferbrache representing the Applicant, Advocate Laws representing Cable & Wireless/Pender and from Advocate Wessels representing the Commission which exercised its statutory right to make representations. I also heard briefly from Advocates Davies, Greenfield and Le Cras each of them supporting generally the draft Order which had been put forward by Advocate Davies.

### **Continuation of the Administration Order**

29. The Administrators were of the view that the continuation of the Administration Order offered a real prospect of a more advantageous realisation of the Applicant's business and assets. On that basis and in the light of that reassurance the Commission supported the continued administration of the Applicant and had concluded that at that time liquidation was inappropriate. The Applicant and the Commission submitted that it was not clear what had changed in the eight weeks since 11<sup>th</sup> May 2005 when Cable & Wireless/Pender had supported the making of the Administration Order and had contested the appointment of Mr Twizell and Mr Martin as Administrators and instead in concert with the other Respondents had recommended the appointment of Mr Franks and Mr Hughes as Administrators. Furthermore if the Applicant were to be placed in liquidation the Commission submitted that the same issues would still need to be resolved. There would be no cost savings in pursuing a liquidation.
30. It was acknowledged by the Applicant and the Respondents that a feature of fundamental significance in the case was that although normally an administration would provide a moratorium or breathing space with respect to the enforcement of debts and rights against a protected cell company in this case when the Administration Order was made on 11<sup>th</sup> May 2005 litigation was already underway in England. Arbitration proceedings were also underway on a separate issue. Inevitably the Administrators would have to cope in some way with those proceedings. It was far from ideal. There was no real alternative and the Court ought not to delay progress being made and timetables set in other jurisdictions.
31. The Applicant and all Respondents other than Cable & Wireless/Pender were of the view that if the Administration Order was to continue and the Court was to continue to permit creditors to advance their claims then the Administrators should be sufficiently funded both to investigate the claims including the proprietary aspects of those claims and to take appropriate steps for the time being to preserve the Applicant's position in the face of various claims.
32. Whilst Cable & Wireless/Pender had submitted in their skeleton argument that the Administration Order should end and the Applicant should be placed in liquidation at the hearing this argument was not urged with any real vigour in light of the united stance adopted by the Applicant, the other Respondents and the Commission. The Court concluded that the Administration Order should continue in force.

### **The Application to Discharge the Freezing Order**

33. Argument focused on the applications for the freezing order to be discharged and for an order subordinating the proprietary claims.
34. The Court was greatly assisted by those parts of the skeleton arguments produced by the Applicant, Cable & Wireless/Pender, PTFMA/PMIC and the Commission which were relevant to the contested issues which remained for determination by the Court. It was tacitly accepted by Cable & Wireless/Pender that if its submissions did not find favour with the Court then subject to further scrutiny the revised proposals put forward by PTFMA/PMIC would not be seriously challenged in argument but that that limited pragmatic concession for the purposes of expediting the Guernsey hearings would not be binding on them when application came to be made in London in the English proceedings.
35. The English freezing order in so far as it concerned the Applicant is in the following terms:

*“In relation to [the Applicant] this order does prohibit it from dealing with or disposing of any of its assets in any way, save that it does not prohibit [the*

*Applicant] from spending a reasonable sum on legal advice and representation. But before spending any such sum [the Applicant] must tell Barlow Lyde & Gilbert..... where the money is to come from”.*

36. When a mirror order was sought in Guernsey in aid of the English order the then Bailiff suggested that it be modified in respect of fees for legal advice and representation. The relevant part of the Guernsey order was in the following terms:

*“This order does not prohibit [the Applicant] from spending a reasonable sum on legal advice and representation. But before spending any money [the Applicant] must obtain the permission of Babbé Le Pelley Tostevin... whose permission shall not be unreasonably withheld in the case of reasonable legal expenses”.*

37. It is evident that the Guernsey Freezing Order required the permission of Cable & Wireless/Pender’s Guernsey lawyers first to be obtained before the Applicant could spend any monies on legal advice and representation. The Applicant had contended in the proceedings which it had filed on 16<sup>th</sup> February 2005 that this was oppressive particularly for a licensed insurance company engaged in business. The Guernsey order, like the English order, included no exceptions for ordinary business expenditure. Any such expenditure would require the permission of Cable & Wireless/Pender. It followed that Cable & Wireless/Pender could exercise some control albeit subject to the overall duty of the Court to ensure that they acted fairly and reasonably. Recourse to the Court to resolve any differences would not be instant and would result in increased expenditure. The Applicant whilst awaiting a hearing date for its application to vary the Guernsey Freezing Order had been overtaken by events and its financial position had deteriorated to such an extent that the application for an Administration Order had become necessary. The impact of the provisions of the two freezing orders and particularly the Guernsey Freezing Order had in the view of the Applicant been a significant factor in contributing to it incurring greater expenses and thus to the deterioration of its financial position.

### **Preliminary Point on Jurisdiction**

38. Cable & Wireless/Pender submitted that the application to discharge the order should be made first to the English High Court as the Guernsey Freezing Order was made in aid of the English freezing order and the substantive proceedings were in England. Counsel for the Applicant and for the other interested parties could see no reason why the Applicant should apply firstly in England for the freezing order made there to be lifted even though that was the jurisdiction where the substantive proceedings were underway and the first freezing order had been made. It was evident that the discharge of the Guernsey Freezing Order would be of no practical affect so long as the English freezing order remained in place.

39. The Commission considered it appropriate that the application should be made firstly in Guernsey. That was where the Administration Order had been made under the provisions of the Ordinance.

40. It emerged as common ground that if the Court should order that the Guernsey Freezing Order be discharged then it should be on the Applicant’s undertaking to apply to the English High Court for a similar order within 14 days. The Applicant would of course need leave to apply within that period to the English High Court for the freezing order made and varied there to be discharged.

### **Should the Guernsey Freezing Order be maintained following the making of an Administration Order in Guernsey?**

41. The Applicant contended that Cable & Wireless/Pender had no grounds to believe that the Administrators, one of whom is resident within the jurisdiction of the Court

and the other within the jurisdiction of the English High Court, might expend money otherwise than reasonably in the lawful and proper administration of the Applicant. After all Cable & Wireless/Pender had recommended to the Court the appointment of the Administrators whom the Court had appointed after a strongly contested hearing.

42. The submissions of the Applicant and the Commission implicitly supported by the Respondents, other than Cable & Wireless/Pender, may be summarised as follows -

A freezing order is made by a Court not to give control to a plaintiff but to ensure that the Court exercises an appropriate degree of control taking into account the legitimate interests of all interested parties.

43. In their dealings with the funds held by the Applicant and its cells the Administrators would be governed by the laws of Guernsey where the Applicant had been incorporated and carried on business. There was no reason to believe that the Administrators would not carry out the administration with professional care and diligence taking into account the representations made from time to time by all Respondents. The Court had demonstrated its intention to maintain tight supervision by its requirement for periodic reports, giving focused directions and the requirement that the Administrators should keep each and every one of the Respondents fully informed concerning the progress of the administration. That would provide on a timely basis adequate and balanced protection for all Respondents. The Court now had appropriate controls and was actively demonstrating control and so the Guernsey Freezing Order was superfluous and resulted in duplication leading to extra inconvenience and expense.

44. Advocate Wessels referred to Gee, Commercial Injunctions, 5<sup>th</sup> Edition para. 3.007 and Deputy Commissioner of Taxation v Advanced Communications Technologies (Australia) Pty Limited (2003) V.S.C. 67. Furthermore he pointed out that section 24 (b) of the Ordinance provides that only the Royal Court has jurisdiction concerning the remuneration of an Administrator of a Guernsey protected Cell company, a matter of some importance in considering the totality of the application.

45. It was contended that on ordinary principles the Guernsey Freezing Order could be varied or discharged by the Court to enable the Applicant to defend itself and so to be free to fund its legal expenses out of funds over which a proprietary claim had been asserted. It was noted that there had been no mini-trial of the merits of any proprietary claim against the Applicant conducted in Guernsey and so the Court could not conclude categorically that any such claims against the Applicant must be successful.

46. Counsel for the Commission also referred the Court to Sundt Wrigley & Co. Limited v Wrigley, (1993) Unreported Judgement of the Court of Appeal in England and also to Armco Inc and others v Donahue and Others, a Judgement of the Jersey Court of Appeal, 24<sup>th</sup> September 1998 which was followed in that jurisdiction in the Key Trust (2003) JLR 437. The judgement delivered by Gloster JA in the Armco case contained useful review of a non exhaustive list of the principles governing the subordination of proprietary claims to which the Court should have regard when considering whether or not to exercise its discretion.

47. It should also be clear to the Court that the Administrators were actively involved on a number of fronts including inter alia assessing the Applicant's stance in the English High Court proceedings including the possibility of alternative dispute resolution, the Zurich arbitration proceedings, without prejudice negotiations with PTFMA and PMIC which were underway and discussions with QBE. The conduct of such negotiations and discussions would inevitably be hampered if the freezing order

remained in place to the detriment of the speedy and effective resolution of the issues set out in their report.

48. It was contended that the Court should exercise its discretion to discharge the freezing order to enable funds to be drawn down for the purpose of obtaining legal services.
49. Counsel for Cable & Wireless/Pender reminded the Court that even though Inscom Investments Limited and Inscom Group Limited were in administration in England the English freezing order had not been discharged. It was however acknowledged that the Royal Court was directly and actively involved in the administration of the Applicant and the orders which were now being sought would further demonstrate the intention of the Court to exercise detailed supervision of the Administrator. It was put to Counsel for Cable & Wireless/Pender that the orders now being sought coupled with undertakings which had been offered would ensure that the Respondents including his clients would be kept adequately informed. Furthermore the Applicant would also be the subject of conditions imposed by the Commission. Counsel for the Commission confirmed that these conditions would remain in force even if the Guernsey Freezing Order was discharged. Accordingly the position in Guernsey following the making of the Administration Order was significantly and materially different from that in England when the English freezing order had been made. Put another way would the English High Court have seen fit to put in place a freezing order if the application had been made in the English High Court at a time when there was in place an actively supervised Administration Order in Guernsey with one of two reputable well qualified Administrators resident within the jurisdiction of the English High Court?
50. Counsel for Cable & Wireless/Pender submitted that in circumstances where Cable & Wireless/Pender were advancing proprietary claims the issue for the Court when determining whether to discharge the Guernsey Freezing Order was not one of possible dissipation of funds that might be available to satisfy a future judgement but in order to prevent any dealings in the funds which are the subject of a strong proprietary claim. The Applicant it was argued had not attempted to date to demonstrate that it had even an arguable claim to the monies held in Cell GPI2 or any other cell or part of the Applicant. Counsel for Cable & Wireless/Pender in his skeleton argument had outlined the position adopted to date in proceedings in the English High Court and referred to case law which he submitted was relevant. During the course of the hearing he developed his clients' arguments stressing that an administration order by itself does not override third party proprietary rights. Cable & Wireless/Pender had every reason to be concerned because the funds in Cell GPI2 did not exceed the sum of the proprietary claims made by Cable & Wireless/Pender. Accordingly if the Administrators were to be permitted by the Court to use GPI2 funds it would be at the expense of the proprietary claimants. This was of particular concern in this case. If funds were to be taken by the Administrators from GPI2 such funds would be used in order to fund the defence of the action brought against the Applicant by Cable & Wireless/Pender. It was however acknowledged when pressed that the Applicant was seeking advice in order to determine the extent of the defence that it might adopt.
51. Concern was expressed by Counsel for Cable & Wireless/Pender at the legal fees expended to date by the Applicant which mainly had been incurred prior to the 11<sup>th</sup> May Administration Order but also had been significant since then.
52. It was submitted that the Applicant could not discharge the burden on it to satisfy the Court that the funds held by the Applicant should be applied in the way sought by the Applicant.

53. It was contended that these submission made out a compelling case for the matter to be dealt with in the English High Court before application was made in Guernsey for the lifting of the Guernsey Freezing Order which was fully appraised of the proceedings. The English High Court was better placed to look at the case in the round. The submissions made by Counsel were of course also of relevance to the issue of subordination just as the submissions made with respect to subordination were relevant to this issue.

#### **Proprietary Claim – the issue of subordination**

54. It was common ground that a court had a limited discretion which it could exercise in an appropriate case where a proprietary claim had been advanced but the Court’s discretion should be exercised sparingly. It was also common ground that English and Jersey Court of Appeal case law is of persuasive authority in Guernsey in dealing with cases where subordination is an issue.

55. The Applicant submitted that this was a case where the Court should exercise its discretion and permit subordination. Cable & Wireless/Pender held a different view. That was perhaps unsurprising given the fact that if their proprietary claims were to be sustained in the English High Court proceedings and in Guernsey then the funds held in Cell GPI2, including funds to which they claim GP12 is entitled from Cell Pender, would not be sufficient to satisfy any judgement.

56. Cable & Wireless/Pender asserted that their proprietary claim is so strong that the Court in this case has no discretion. He cited Gee, Commercial Injunctions 5<sup>th</sup> Edition paras 20.057 – 20.060 and 20.068. To permit the Applicant to expend monies for the benefit of the administration of what Cable & Wireless/Pender’s boldly asserted was its substantive property was not permissible.

57. It followed that if the Applicant was to benefit from the limited discretion that the Court might exercise the Applicant must show an arguable case for denying that they belong to the claimant. No person has the right to use a plaintiff’s monies to pay for his own defence and that was what was being sought by the Applicant in this case (Ostrich Farming Corporation Limited v Ketchell, Unreported 10<sup>th</sup> December 1997 (CA)). As Gee states at 20.057

*“Where there are assets which may belong to the claimant, the Court will not allow those funds to be used for legal costs until the dependent has shown by ‘proper evidence’ that he has no other asses which can be used for the purpose. If there are such funds, then the defendant must use these first before any question arises of his having access to funds which are the subject of the proprietary claim. But once it is shown there are no other assets except those subject to a proprietary claim, the court must make a difficult decision in the exercise of its discretion as to what is to be done.”*

58. Advocate Laws also referred the Court to a number of other cases as he developed his argument concerning the strength of his clients’ proprietary claims and the way in which the Court should proceed. They had been appended to his skeleton argument. I do not identify a need now to review them.

59. Advocate Le Cras reminded the Court as did Advocate Ferbrache that Mr Justice Morison in his order dated 20<sup>th</sup> May 2005 when dealing with QBE’s application to be joined in the English High Court proceedings had stated his view that it is

*“inconceivable that the Administrators of Inscom and the Administrators of Messenger will not wish to contest the proprietary claim”.*

60. As the Administrators had also pointed out to the Court in their Preliminary Report (at p.23 para 7.2) and as cited above Mr Justice Morison’s judgement contained the following statement which bears repeating:

*“If I had thought that, at the present time, there was a real danger that the rights or wrongs of the proprietary claim were not going to be fully argued, then I would immediately have allowed the joinder”.*

61. Mr Justice Morison was better placed than this Court to consider whether there is a case which ought to be argued.
62. It is inconceivable that the Administrators would not in light of Mr Justice Morison’s observations consider it necessary to consider fully the proprietary claims and take appropriate legal advice from Leading Counsel on an urgent basis. Mr Ferbrache on behalf of the Applicant affirmed that although a considerable sum had been spent on legal fees prior to the Administration Order the legal focus at that stage had been primarily on other matters.

### **Conclusion**

63. Having given careful consideration to Counsels’ arguments the Court was satisfied that not only did the Court have jurisdiction to hear the application but it was right in this case to do so. This is an exceptional case.
64. The Applicant had carried on insurance business and there are many matters arising from that business which have to be resolved. An Administration Order has been made by this Court and the Commission is actively engaged. This Court has a duty to ensure that the Administrators appointed by it are not unduly fettered in the timely discharge of their duties, that there should be no duplication of effort and that costs should not be incurred unnecessarily.
65. The Court concluded that there are in place a number of controls and it is clear that the Court has exercised and will continue to exercise close supervision of its own orders and of the administration.
66. In all the circumstances the Court concluded on balance that it was appropriate to discharge the Guernsey Freezing Order. To vary it in some way that may have provided more but nevertheless limited flexibility would have been an unsatisfactory compromise.
67. At this stage it is far from clear that Cable & Wireless/Pender will be able to justify their proprietary claims to funds held by the Applicant.
68. It is important that the Administrators should give most careful consideration to the proprietary claims that are asserted and should take the advice of Leading Counsel. The sooner they do so the better. Possessed of expert advice the Administrators will be in a position to consider not only their stance in the English High Court proceedings but also actively to engage in alternative dispute resolution on a number of fronts.
69. It is apparent in the absence of further outside funding, which it would appear will not be injected voluntarily by one or more of the Respondents, that Administrators must at this stage look to funds held by the Applicant in order to meet legitimately incurred expenses including legal fees and in order to pay running costs. There are no other assets to which the Applicant can resort because the Cable & Wireless/Pender claim extends to all assets of the Applicant. The Court also relied, as it was entitled to do, on paras 1.9, 7.2 and 7.5 of the preliminary report made by the Administrators to the

Court which deal with the need for urgent funding. The Applicant satisfied the burden of proof which it had to discharge.

70. The Court also relied on Mr Justice Morison's observations in his judgement on the QBE joinder application. He stated that he expected that the rights or wrongs of the proprietary claim would be fully argued in the Cable & Wireless/Pender Insurance litigation in the English High Court.
71. In the circumstances the Court was satisfied that this was a case where exceptionally it should exercise its discretion and make orders. Those orders should be in the form and subject to the undertakings which emerged during the course of the hearing and received the support of all interested parties other than Cable & Wireless/Pender.
72. This Court is mindful that this case is fraught with difficulties and in the exercise of its discretion it has arrived at what it considers to be a sensible and pragmatic decision mindful that it has not imposed a stay which would have frustrated the progress of the proceedings in the English High Court.
73. Finally, the Court records that if the English High Court when it deals with this case should come to a different view then the Court will be prepared to consider with great care and respect any observations the English High Court may make. The Applicant and the Respondents are at liberty to return to the Court.