

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2015/0132

IN THE MATTER OF SECTION 170 (1) (E) OF THE INTERNATIONAL BUSINESS COMPANIES
(AMENDMENT AND CONSOLIDATION) ACT, CHAPTER 149 OF THE REVISED LAWS OF SAINT VINCENT
AND THE GRENADINES 2009

AND

IN THE MATTER OF AN APPLICATION BY THE FINANCIAL SERVICES AUTHORITY FOR AN ORDER OF
LIQUIDATION AND THE APPOINTMENT OF JOINT LIQUIDATORS OF DUX INVESTMENT FUNDS
LIMITED

Appearances:

Mrs. Cerepha Harper-Joseph and Ms. Heidi Badenock for the Applicant.

2016: Feb. 1
Apr. 14

DECISION

BACKGROUND

- [1] **Henry, J.:** This is an application¹ by the Financial Services Authority ('FSA'). The FSA seeks an order for the liquidation and dissolution of DUX Investment Funds Limited ('DUX Investment') and the appointment of two liquidators (Marcus Wide and David Holukoff) for the purpose of winding up DUX Investment. The FSA also requests that the liquidators be ordered to perform their duties pursuant to sections 165 (2) and 166 of the International Business Companies (Amendment and Consolidation)

¹ Filed on 3rd September, 2015.

Act, ('the Act').² The application is undefended. The order granting liquidation of DUX Investment and the appointment of liquidators is made as requested, with certain pre-conditions.

Preliminary Observations

- [2] No respondent was named in the application and there is no evidence that it was served on DUX Investment. The FSA has provided no reason for these failures. The general rule is that an applicant must serve notice of an application at least 7 days before the court is to deal with it.³ Accordingly, DUX Investment should have been named as a respondent, and served with the application. If appropriate, the court may dispense with such service.⁴ No order was made dispensing with service in this case.
- [3] An applicant may make an application without notice if this is permitted by a practice direction or rule.⁵ The FSA has not identified any practice direction or rule which permits it to make this application without notice to DUX Investment. No such practice direction or rule exists. Notwithstanding, the court may dispense with compliance of the rules in special circumstances⁶ provide that it gives the other party an opportunity to make representations.⁷ If the court entertains the application and grants the orders sought, the CPR mandates that the FSA must serve the application and supporting documentation on DUX Investment, which may then apply to have them set aside or varied.⁸ The court office is also required to serve a copy of the order on DUX Investment.⁹

² Cap. 149 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

³ Civil Procedure Rules 2000 ('CPR') 11.11 (1) (b).

⁴ CPR 6.8 (1).

⁵ CPR 11.8 (2).

⁶ CPR 26.1 (6).

⁷ CPR 26.2

⁸ CPR 11.15 and 11.16.

⁹ CPR 42.6 and 42.12.

[4] In exercising its discretion under the CPR, the court must give effect to the overriding objective to act justly.¹⁰ In considering whether to proceed with the application in the absence of such service and notice, the court must also have regard to any likely prejudice an order would have on DUX Investment or the FSA. Additionally, it must ensure that neither party obtains an unfair advantage by its non-compliance with the rules, and balance this factor against the likely benefits and cost of taking a particular step.¹¹

[5] Having regard to the circumstances outlined below, I am satisfied that consideration of the application without DUX Investment will:

(1) not unduly prejudice it as it would have an opportunity to make representations subsequently and apply to vary or set aside any such order;

(2) therefore the FSA would not have an unfair advantage;

(3) neither DUX Investment nor the FSA will be unduly prejudiced;

(4) it is just to proceed with the application as it appears to be urgent for the reasons provided below;
and

(5) failure to act may result in loss to innocent persons.

In these exceptional circumstances, I have decided to consider the application without hearing from DUX Investment at this juncture.

ISSUES

[6] The issues are:-

(1) whether it is just and equitable to order the liquidation and dissolution of DUX Investment? and

(2) whether Marcus Wide and/or David Holukoff should be appointed as liquidators to wind up DUX Investment and if so, what duties they should perform?

ANALYSIS

¹⁰ CPR 1.2.

¹¹ CPR 25.1 (b) and (i).

Issue 1 – Is it just and equitable to order the liquidation and dissolution of DUX Investment?

[7] The application for dissolution and liquidation was made under section 170 (1) (E)¹² (sic) of the Act. It states:

‘170 (1) An order for the liquidation and dissolution of an international business company may be made by the Court if-

(a) ...

(e) the court considers that it would be just and equitable for the company to be liquidated and dissolved.’

Section 170 also authorizes ‘any interested person’ to make such application and it provides further that the provisions of the Companies Act and any other relevant Act applies to such liquidation or dissolution. In deciding whether it is just and equitable to order that a company be liquidated and dissolved, the court examines the facts which exist at the time of the hearing.¹³ An example of what are just and equitable considerations in winding up a company include where it is carrying on business at a loss, its remaining assets are insufficient to pay its debts and there is no reasonable hope that it will ultimately make a profit.¹⁴

[8] The FSA is established by the International Financial Services Act¹⁵ as a body corporate. It has primary responsibility for the efficient and responsible administration and supervision of international legislation including the Act. The FSA appoints the registrar and deputy registrars for IBCs. The registrar administers the Act subject to the FSA’s control. It is within this operational framework that the FSA, registrar and other related officials purport to undertake their respective duties as described in this

¹² Presumably section 170 (1) (e).

¹³ Re Fildes Bros Ltd [1970] 1 All ER 923 at 928.

¹⁴ Davis & Co Ltd v Brunswick (Australia) Ltd [1936] 1 All ER 299 at 309, PC.

¹⁵ Cap. 108 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

matter. The FSA with Cabinet's approval appoints the registrar of mutual funds.¹⁶ It also appoints staff to assist in the administration of the Mutual Funds Act.

[9] In support of her application, the FSA filed 3 affidavits¹⁷ sworn by Karen Jackson, Manager of International Financial Services and a document titled 'Further Information'.¹⁸ Ms. Jackson deposed that DUX Investment was incorporated as an IBC on 10th January, 2006 and registered subsequently as an Umbrella Public Mutual Fund with Dux Trading Fund as a sub fund. She averred that Dux Trading Fund was subsequently cancelled and a second sub entity Dux Venture Capital Fund ('Dux Venture Capital') registered, through which DUX Investment conducted mutual fund business. Ms. Jackson exhibited a copy of the DUX Investment's certificate of incorporation as an IBC. She also exhibited copies of certificates of registration of DUX Trading Fund and Dux Venture Capital Fund as public mutual funds. No such certificate of registration was presented for DUX Investment.

[10] Ms. Jackson indicated that Dux Venture Capital's investment objective of was to invest globally in long and short positions in equities, bonds, currencies, commodities, precious metals, derivatives and short term financing in real estate projects. She deposed that Mr. Rudolf Seeger is DUX Investment's sole shareholder and one of its two directors. She averred that by letter dated 17th March, 2011, Mr. Seeger notified the FSA that DUX Investment found itself in illiquidity problems arising from the failure of borrowers to repay their loans to it. He allegedly attributed these failures to the global economic crisis.

[11] For context, it is important to set out the text of that letter and it is reproduced below. It is written on DUX Investment's letter head and addressed to Ms. Alyson Samuel, Registrar International Business Companies. It reads:

'Dear Ms. Samuel

Re: DUX Venture Capital Fund – a sub-fund of DUX Investment Fund Limited (the Fund)

¹⁶ Pursuant to section 3 (1) of the Mutual Funds Act, Cap. 154.

¹⁷ Respectively on 3rd September, 14th October and 21st December, 2016.

¹⁸ On 7th October, 2016.

With reference to your letter dated 1st March 2011 we would like to give you the following explanation as requested by your point (i) and (ii).

Between May and September 2008, the Fund has been financing three projects by granting loans. The major investment (90% of the Funds assets) was granting a loan to a real estate developing company in Germany. The second investment (9% of the Fund's assets) was granting a loan to a wholesale dealer of international brands in the Fashion industry. The third investment (< 1% of the Funds assets) was granting a loan to a precious stones trader in Switzerland.

Due to the economic crisis the borrowers were not able to fulfill the repayment on time. Despite an extension of the term, the borrowers still could not pay back the loan. Engaging in a legal case against the German real estate developer would not lead to any success in terms of the settlement of the loan contract. Moreover, the result of such a legal case would be the insolvency of the borrower combined with additional costs for the Fund and thus for the unit holders. As a result of this the asset manager decided to enter into an agreement with the borrower to liquidate the existing real estate assets at a discount. The proceeds of the sale were 60% of the book value to be credited to the Fund after completion of the legal framework (est. End of May). Concerning the loan to Kembel Fashion AG, the company got into liquidity problem due to cash loss of big wholesale customers in Germany. The company is no liquidating stock positions in order to honour the contractual agreements with the Fund.

Concerning (iii) \$ (iv): no investments nor redemptions have taken place since October 2009. No suspension has been enacted so far. We will take care for an immediate suspension, as requested. However, **all unit holders are personally known to us and they have been informed verbally about the illiquidity of the Fund.** Nevertheless, we will send a circular to all Fund's investors upon your request.

We anticipate that the Fund will be settled before 30th June 2011.

We trust that the foregoing information satisfies your requirements. Kindly contact us at any time if you need more information.

Signed Rudolf M. Seeger

Director for DUX Investment Funds Limited' (emphasis added)

[12] It is worth noting that the March 1st letter referenced by Mr. Seeger was not exhibited. Interestingly, DUX Investment and Dux Venture Capital both have the word 'Fund' in their names. While at first

blush, it might be tempting to question which entity Mr. Seeger referred to as 'Fund', I draw the irresistible conclusion that he was writing about Dux Investment. Firstly, the letter refers to Dux Investment as 'the Fund' in the subject heading; and secondly it is signed by Mr. Seeger as DUX Investment's director.

- [13] Ms. Jackson deposed that DUX Investment suspended trading indefinitely on 1st April, 2011 by resolution. A copy of the 'resolution' was exhibited to her affidavit. It was on DUX Investment's letterhead and reads:

'Minutes of the Board of Directors held in Liechtenstein of DUX IINVESTMENT FUNDS LIMITED

held on 1st April, 2011.

PRESENT:	Rolf Seeger	Chairman
	Georg Koenig	Recording Secretary

QUORUM

There being a quorum present the Chairman declared the meeting properly constituted and open for business.

BUSINESS OF THE MEETING

As the assets of the Dux Venture Capital Fund are currently too difficult to value, it is recommended that the fund suspend trading until such time that the assets can be given a proper and reasonable value.

IT WAS RESOLVED to suspend trading of the Dux Trading Fund indefinitely, close the fund in due course and allocate the proceeds to the unit holders. The administrator and registrar/transfer agent shall be instructed accordingly. Furthermore, a letter shall be prepared by the company informing the shareholders of the suspension. The registrar shall deliver such letter to the registered shareholders.

There being no further business, the meeting was closed.

Signed this 1st day of April 2011
Chairman of the meeting'

- [14] Although this document was described by Ms. Jackson as a resolution, it is headed 'minutes of the meeting of the board' and appears to be nothing more than such minutes. It is also to be observed

that the chairman named is Rolf Seeger, not the person identified by Ms. Jackson as the Director. It is not accompanied by a power of attorney or other document appointing Rolf Seeger to act for Rudolf Seeger or to serve as his alternate.¹⁹ The minutes contain no explanation. This situation raises the question whether the meeting was validly constituted and what is the effect of the resolution which was reportedly made at the meeting. In this regard, it is worth noting that no such resolution has been presented to the court. Assuming that Rolf Seeger was duly appointed by Rudolf Seeger or the second director to attend the meeting as Chairman, it appears that the resolution was passed. The converse is also true.

[15] Ms. Jackson indicated that since suspending trading, DUX Investment has taken no steps to enter voluntary liquidation although Rudolf Seeger has on several occasions over the past 4 years, indicated his intention to adopt that approach. She pointed out that the FSA is aware that since 2011 'the Fund' has several liabilities that it has either been unable or unwilling to settle or just has not settled. She urged on the court that it is therefore just and equitable that DUX Investment be liquidated and dissolved to protect investors.

[16] In similar vein, the FSA submitted that it is just and equitable that DUX Investment be liquidated and dissolved because:

1. it has found itself in liquidity problems by reason that its borrowers have failed to repay their debts;
2. it has suspended trading since 1st April, 2011;
3. it indicated to the FSA that it intended to voluntarily liquidate and dissolve the fund and has failed to do so;
4. several years ago, it suspended business activities which it was licensed to undertake and no business is currently being conducted;
5. investors around the world are unable to obtain the status or returns of funds invested; and
6. creditors are seeking monies owed to them.

¹⁹ See sections 97 and 107 of the Act.

I shall examine each contention against Ms. Jackson's testimony.

- [17] The FSA has provided no information regarding DUX Investment's share capital. However, based on Ms. Jackson's assertions, the FSA has submitted that DUX Investment is illiquid. The FSA has relied on the contents of the March 17th letter and the 'resolution' to support this conclusion. The letter provides compelling data from which to conclude that DUX Investment is indeed insolvent and unable to pay its debts including investors. The minutes on their face suggest that Dux Venture Capital is illiquid. They do not mention DUX Investment. On the available evidence, I find that DUX Investment is insolvent and unable to pay its debts.
- [18] Has DUX Investment suspended trading since 1st April, 2011? The only 'independent' indication of this is the 'resolution' exhibited by Ms. Jackson. Not only is that document not a resolution, it is purportedly signed by someone not known to be a director or officer of the company or appointed by such person. Reliance on that document is therefore tenuous and ill-advised. I therefore place no reliance on it for the purposes of determining the issues in this case.
- [19] In the absence of representations by DUX Investment, I accept Ms. Jackson's assertions that DUX Investment has verbally communicated to the FSA its intentions to voluntarily liquidate and dissolve but has not yet done so. It also seems that DUX Investment is currently conducting no business. The FSA presented no evidence that investors around the world are unable to obtain the status or returns of funds invested in Dux Venture Capital or DUX Investment; or that creditors are seeking monies owed to them. I therefore reject those averments as being baseless. The FSA has not indicated what (if any) steps have been taken under the Mutual Funds Act to contain any possible erosion of DUX Venture Capital's capital and investments and by extension DUX Investment's capital base. Suffice it to say, the court observes that the registrar of mutual funds has certain statutory administrative powers which can be brought to bear to address situations where a fund's revenue base is being mis-managed or otherwise compromised. It is not apparent if any such action has been taken.
- [20] Having regard to the totality of the evidence supplied in this matter, I have concerns regarding the administration of Dux Venture Capital by DUX Investment. I am left with a very unsettling feeling as to

the apparent indifference and nonchalance displayed by Mr. Seeger in his letter to Ms. Samuel. This is particularly so because it seems that 100% of the funds invested in and entrusted to DUX Investment to manage were dissipated in bad investments almost 6 years ago. It is not clear if any of those sums have been recovered although Mr. Seeger intimated that approximately 60% were to be realized by end of May 2011.

[21] If as appears from the records, DUX Investment is an umbrella public mutual fund of which Dux Venture Capital is its sole sub fund and investment vehicle, their alleged investment mis-steps would have dire consequences for the entire group's stability and continuity. Moreover, the funds committed to it by investors could disappear totally unless preventative action is taken to preserve what remains. Ms. Jackson deposed that DUX Investment's main asset amounts to approximately EUR€1.7 million in a bank account in Liechtenstein. This is astounding and leads me to conclude that these circumstances exist currently and vociferously clamour for an order of liquidation and dissolution on the ground that it is just and equitable to make such an order.

[22] I am mindful that DUX Investment has had no opportunity to respond to the allegations made by the FSA. It is also worth noting that since the findings of fact in this decision have been arrived at *ex parte*, different conclusions may arise on a future application by DUX Investment to vary or set aside this decision. With that in mind, I am of the view that an appropriate order for liquidation and dissolution of DUX Investment at this time must be subject to conditions including:

(1) the stipulation that it be granted an opportunity to make representations to the court before the order takes full effect; and

(2) an undertaking in damages.

It is accordingly ordered that DUX Investment be liquidated and dissolved with immediate effect on condition that the FSA files an undertaking in damages. DUX Investment may apply to set aside or vary this order within 14 days.

Issue 2 – Should Marcus Wide and/or David Holukoff be appointed as liquidators to wind up DUX Investment and if so, what duties should they perform?

[23] This issue raises primarily the question whether Marcus Wide and David Holukoff have the requisite education, training and experience to serve as liquidators for DUX Investment. The duties component is largely academic. Ms. Jackson has outlined the respective qualifications of both gentlemen. They are both eminently qualified and experienced in company liquidation processes. They are currently engaged in liquidation of 17 and 2 companies respectively. Likewise, they have indicated through Ms. Jackson that they anticipate the liquidation of DUX Investment to be finalized in 6 to 12 months which the FSA submits is reasonable. They have also indicated that they are assisted in the conduct of liquidation by staff members. Their combined estimated fees are projected to range between US\$50,000.00 and US\$75,000.00.

[24] It appears to the court that Mr. Wide is already significantly committed as liquidator of other companies. It would therefore not be prudent to appoint him to participate in a liquidation which from all accounts demands urgent attention. Mr. Holukoff is not so constrained. It is accordingly ordered that Mr. David Holukoff be and is hereby appointed to conduct the liquidation of DUX Investment. I make no appointment in respect of Marcus Wide. Mr. Holukoff is required to file with the court within 21 days (i.e. on or before 6th May, 2016), a proposed schedule of duties, anticipated completion timelines and associated fees and expenses, for the court's approval.

[25] The duties of liquidator are substantially statutory and can be summarized under three broad headings:

- (1) identifying, locating and securing the company's assets;
- (2) paying the company's debts in order of priority as stipulated by statute or other law; and
- (3) distributing remaining assets among shareholders.

As court appointed liquidator, Mr. Holukoff is therefore required to carry out those duties and provide periodic reports to the court. He is to file those reports and serve copies on DUX Investment every three months after commencement of the liquidation, the first such report to be filed on or before 14th August, 2016. Specifically, Mr. David Holukoff is directed to immediately or as soon as reasonably practicable, take control of and secure:

- (1) the EUR€1.7 million or other sum in the referenced bank account in Liechtenstein and all other bank accounts anywhere in the world, held in the name of DUX Investment Funds Limited and/or DUX Trading Fund; and
- (2) any other assets belonging to DUX Investment Funds Limited and/or DUX Trading Fund wherever located.

[26] DUX Investment's registered agent and officers, and Dux Venture Capital's officers are directed to:

- (1) give to Mr. David Holukoff all information he may reasonably require relating to DUX Investment's and Dux Venture Capital's affairs including any property owned by them; and
- (2) to attend on him at such times as he may reasonably require.

ORDER

[27] It is accordingly declared and ordered:

(1) DUX Investment be and is hereby liquidated and dissolved with immediate effect:

(1) on condition that the FSA executes and files by 3.30 p.m. today's date (i.e. 14th April, 2016) an undertaking to abide by any order which the court may make as to damages that the court determines that DUX Investment shall have sustained by reason of this order and which the FSA ought to pay;

(2) provided that:

(a) DUX Investment has the right to and may apply to vary or set aside this order by application to the court which must be filed and served within 14 days of today's date (i.e. on or before 29th April, 2016).¹⁶

(b) this liquidation and dissolution order remains in force until and unless set aside or varied.

(2) The FSA shall serve a copy of its Notice of Application filed on 3rd September, 2015 and all affidavits in support and all supporting documentation on DUX Investment at its registered office before 3.30 p.m. today's date (i.e. 14th April, 2016).

- (3) The FSA shall serve a copy of this order on DUX Investment and Dux Venture Capital at their registered office before 3.30 p.m. today's date (i.e. 14th April, 2016).
- (4) The FSA shall on or before 6th May, 2016 file affidavits in response to any application made by DUX Investment under paragraph [27] 1 (2) (a) accompanied by skeleton arguments and list of authorities.
- (5) Return date is 10th May, 2016.
- (6) Mr. David Holukoff be and is appointed as liquidator of DUX Investment with immediate effect.
- (7) Mr. David Holukoff is directed to file with the court within 21 days (i.e. on or before 6th May, 2016), a proposed schedule of duties, anticipated completion timelines and associated fees and expenses, for the court's approval.
- (8) Mr. David Holukoff is directed to immediately or as soon as reasonably practicable, take control of and secure:
 - (1) the EUR€1.7 million or other sum in the referenced bank account in Liechtenstein and all other bank accounts anywhere in the world, held in the name of DUX Investment Funds Limited and/or DUX Trading Fund; and
 - (2) any other assets belonging to DUX Investment Funds Limited and/or DUX Trading Fund wherever located.
- (9) Mr. Marcus Wide is not appointed as co-liquidator of DUX Investment.
- (10) No order as to costs.

[28] The delay in rendering this decision is regretted. Inexplicably, the written submissions filed by the FSA did not get it to me until 12th April 2016. Counsel's forbearance is appreciated. I wish to record thanks to Ms. Heidi Badenock and Mrs. Cerepha Harper-Joseph for their written submissions.

.....
Esco L. Henry
HIGH COURT JUDGE

N.B. Notes to DUX Investment Funds Limited:²⁰

1. The Financial Services Authority ('FSA') has obtained an order for your liquidation and dissolution and the appointment of a liquidator.
2. You may apply to the court to vary or set aside this order.
3. If you do not make an application to vary or set aside the order, the liquidation and dissolution will proceed in accordance with the order.
4. If you decide to apply for the order to be varied or set aside, you must file your application at the Court Office and serve a copy on the FSA on or before 29th April, 2016.

²⁰ The notes are appended as required by CPR 11.16.

5. You should consider obtaining legal advice with regard to this case.