England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2006] EWCA Civ 732
Case No: 4519, 4520, 4521 and 4522 of 2001

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
MR JUSTICE DAVID RICHARDS
Case No: 4519, 4520, 4521 and 4522 of 2001

Royal Courts of Justice
Strand, London, WC2A 2LL
9 June 2006

B e f o r e :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE TUCKEY
and
LORD JUSTICE CARNWATH

Between:

IN THE MATTER OF HIH CASUALTY AND GENERAL INSURANCE LIMITED ANTHONY MCGRATH AND CHRISTOPHER HONEY (as the joint liquidators appointed by the Supreme Court of New South Wales)

- and -

AMACA PTY LIMITED
AMABA PTY LIMITED **Appellants**

- and -

ANTHONY MCMAHON, THOMAS RIDDELL AND JOHN WARDROP (as the joint provisional liquidators appointed by the High Court of Justice of England and Wales) **Respondents**

(Transcript of the Handed Down Judgment of Smith Bernal Wordwave Limited, 190 Fleet Street London EC4A 2AG Tel No: 020 7404 1400, Fax No: 020 7831 8838 Official Shorthand Writers to the Court)

Mr Simon Mortimore QC and Mr Tom Smith (instructed by Norton Rose) for the Appellants (Joint Liquidators appointed by the Supreme Court of New South Wales)
Mr Richard Adkins QC and Mr Peter Arden (instructed by Eversheds) for the Appellants (Amaca Pty Limited and Amaba Pty Limited)
Mr William Trower QC and Mr Jeremy Goldring (instructed by Freshfields Bruckhaus Deringer) for the Respondents (joint provisional liquidators appointed by the High Court of Justice of England and Wales)

HTML VERSION OF JUDGMENT

The Chancellor:

Introduction

1. S.426 Insolvency Act 1986, entitled "Co-operation between courts exercising jurisdiction in relation to insolvency" provides, so far as material:

> "(4) The courts having jurisdiction in relation to insolvency in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> (5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.
>
> In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.
>
> [(6) – (9)]
>
> (10) In this section "insolvency law" means –
>
> (a) in relation to England and Wales, provision extending to England and Wales made by or under this Act....
>
> [(b)..
>
> (c)...]
>
> (d) in relation to any relevant country or territory, so much of the law of that country or territory as corresponds to provisions falling within any of the foregoing paragraphs;
>
> and references in this subsection to any enactment include, in relation to any time before the coming into force of that enactment the corresponding enactment at that time.
>
> (11) In this section "relevant country or territory" means –

> [(a)...]
>
> (b) any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument."

By the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 SI 1986/2123 Australia was designated for the purposes of s.426.

2. The HIH Group was the second largest insurance group in Australia until its collapse in March 2001. At that time it comprised 274 companies through which the Group carried on insurance business in many countries including Australia and England. These proceedings relate to four of them ("the Companies"), namely HIH Casualty and General Insurance Ltd ("HIH"), FAI General Insurance Company Ltd ("FAIG"), World Marine & General Insurances Pty Ltd ("WMG") and FAI Insurances Ltd ("FAII"). Each of the Companies was incorporated in Australia. In addition each of HIH, FAIG and FAII is or was registered in England as an oversea company under Companies Act 1985 and was authorised to carry on insurance business in the United Kingdom under Insurance Companies Act 1982. In March and April 2001 each of the Companies presented its own petition for compulsory winding up to the Supreme Court of New South Wales and provisional liquidators were duly appointed by that court. On 27th August 2001 the Supreme Court of New South Wales ordered each of the Companies to be wound up and appointed the provisional liquidators, Mr McGrath and Mr Macintosh, to be the liquidators thereof ("the Australian Liquidators").

3. Contemporaneously with the presentation of winding up petitions to the Supreme Court of New South Wales that court requested the High Court in England, pursuant to s.426, to appoint provisional liquidators to each of the Companies in England. Between 23rd March and 10th April 2001 such appointments were duly made, pursuant to s.426 Insolvency Act, under s.472 Corporations Act 2001 (Australia). On 16th July 2001 the High Court in England authorised another company in the HIH Group to present petitions to the High Court in England for the winding up of each of the Companies by that court. Such petitions were duly presented on 24th July 2001. On 14th September 2001, pursuant to a further request of the Supreme Court of New South Wales to the High Court in England made on 10th September 2001, the latter court discharged the orders for the appointment of provisional liquidators made, pursuant to s.426 under s.472 Corporations Act 2001 (Australia) and reappointed the same individuals, namely Mr McMahon, Mr Riddell and Mr Wardrop, as provisional liquidators in accordance with the provisions of s.135 Insolvency Act 1986 ("the English Provisional Liquidators").

4. Most of the assets and liabilities of the Companies are in Australia but there are also significant assets and liabilities in England. The approximate position (in A$ millions) is shown in the following table:

	HIH	FAIG	FAII	WM&G
Assets				
Australia	864	799	33	15
UK	206	23	10	8
Elsewhere	41	70		
Total	1,111	892	43	23
Liabilities				
Australia	3,488	2,274	1,903	35
UK	882	5	85	12
Elsewhere	129	50	154	0
Total	4,500	2,329	2,142	47

5. The Companies are insolvent but no winding up orders have been made against any of them in England. Nor is it intended to seek such orders if the proposed schemes of arrangement command sufficient support from the creditors of each of the Companies and are sanctioned by the Court in both Australia and England. On 10th December 2004 and 25th February 2005 the Australian Liquidators and English Provisional Liquidators respectively sought orders convening meetings of creditors seeking their approval to schemes of arrangement. Those schemes were designed to reflect the different priorities for distributions to creditors of the Companies in a winding up in England and Australia respectively. Creditors in Australia suggested that it was not necessary to have two schemes for the assets collected by the English Provisional Liquidators which could and should be remitted to the Australian Liquidators for distribution by them in accordance with the insolvency law of Australia. On 14th June 2005 the Australian Liquidators asked the English Provisional Liquidators to remit the assets under their control ("the English Assets") to Australia for distribution by them in accordance with Corporations Act 2001 (Australia). On 20th June 2005 the English Provisional Liquidators replied to the effect that they had no power to do so.

6. On 24th June 2005 the English Provisional Liquidators applied to the High Court in England for directions. The directions sought fall into three categories. The first category sought directions as to how, if the Companies were wound up in England, the English Assets should be distributed having regard, in particular, to certain provisions of Australian law. The second category sought directions, having regard to the directions given in relation to the first category, as to the nature of the scheme of arrangement the English Provisional Liquidators might promulgate. The third category sought directions as to whether creditors should be divided into more than one class for voting purposes depending on the directions given under the first and second categories.

7. On 4th July 2005 Barrett J sitting in the Supreme Court of New South Wales, on the application of the Australian Liquidators, issued a further letter of request to the High Court in England:

> "to assist and to act in aid of and be auxiliary to this Court in this proceeding by hearing and determining an application by the Australian Liquidators for:
>
> (a) directions to the English Provisional Liquidators to pay over to the Australian Liquidators all sums collected, or to be collected, by them in their capacity as English Provisional Liquidators, after paying or providing for all proper costs, charges and expenses of the English Provisional Liquidators, pursuant to the demand of the Australian Liquidators dated 14th June 2005, so that such sums may be applied in the due course of the winding-up of the Company under the provisions of the Corporations Act 2001 or in accordance with a scheme of arrangement, if such scheme is sanctioned by the Supreme Court of New South Wales under s.411 of the Corporations Act 2001 and/or by the High Court of Justice in England and Wales under s.425 of the English Companies Act 1985; and
>
> (b) extension and amendment of the powers of the English Provisional Liquidators as set out in the order of the High Court of Justice of England and Wales dated 14th September 2001 so as to enable them to pay over to the Australian Liquidators all sums collected, or to be collected, by them in their capacity as English Provisional Liquidators, after paying or providing for all proper costs, charges and expenses of the English Provisional Liquidators;"

On the same day as the request was made the Australian Liquidators issued the application to this court which the Letter of Request envisaged.

8. The English Provisional Liquidators' application for directions and the Australian Liquidators application for an order as sought in the Letter of Request came before David Richards J on 26th to 28th July 2005. Amaca Pty Ltd and Amaba Pty Ltd are parties to both applications as representative Australian insurance creditors ("the Australian Insurance Creditors"). By his order made on 24th October 2005, notwithstanding the Letter of Request from the Supreme Court of New South Wales, the judge directed the English Provisional Liquidators not to pay over to the Australian Liquidators' all or any sums collected or to be collected by them and refused to extend their powers to enable them to do so. In his comprehensive judgment handed down on 7th October 2005 David Richards J explained why he considered that that and other consequential directions should be given. In essence they all stem from the conclusion summarised in paragraph 112 of his judgment that:

> "in an English liquidation of a foreign company, the court has no power to direct the liquidator to transfer funds for distribution in the principal liquidation, if the scheme for pari passu distribution in that liquidation is not substantially the same

as under English law."

The Australian Liquidators and Australian Insurance Creditors submit that David Richards J was wrong. They appeal to this court with the permission of the judge.

9. In the light of the judgment of David Richards J and other matters the schemes of arrangement were redrafted. The respective schemes apply English or Australian rules as to priorities and other rights to distributions to creditors in a liquidation. Provision is made in the English scheme (paras 30.4 – 30.6) for assets subject to its provisions to be aggregated with those subject to the Australian schemes and applied in accordance with the terms of the latter to the extent that any court in England on appeal from the judgment of David Richards J considers to be permissible. The schemes were approved by the requisite majorities at meetings of creditors held in Sydney on 29th March 2006. On 27th April 2006 applications to sanction the schemes came before Barrett J in Sydney and David Richards J in London. The former heard argument and reserved judgment on an issue relating to a provision (para 22) in the Australian schemes. Accordingly the latter adjourned the application until after Barrett J had given judgment. The hearing of this appeal started on 3rd May 2006. After the hearing had been concluded, on 26th May 2006, Barrett J handed down his reserved judgment in consequence of which paragraph 22 in the Australian schemes were modified. The petitions to sanction the English schemes are to be heard by David Richards J on 12th June 2006.

10. The matters raised before David Richards J and before us ranged far and wide. It is, I think, essential to keep in mind that the issue is whether and if so how the High Court in England can and should comply with the letter of request from the Supreme Court of New South Wales I have set out in paragraph 7 above. In order to reach a conclusion on that issue it is necessary to consider a number of preliminary topics. Accordingly I shall consider the following matters in the following order:

    (1) Distributions to unsecured creditors under the insolvency laws of England and Australia;

    (2) Special provisions applicable to insolvent insurance companies in England and Australia;

    (3) Provisions for cross-border insolvencies;

    (4) Ancillary liquidations;

    (5) The issues and the Judge's conclusions;

    (6) The submissions for the parties.

Insolvency Regimes in England and Australia

11. It is convenient to start with a consideration of the insolvency regimes in England and Australia. They are broadly similar. Subject to exceptions, all the assets of the company, wherever situated, are available to pay all its creditors admitted to proof wherever their debts arose. Some creditors have priority over others. Thus there are preferential creditors in both jurisdictions, though the composition of that class is different as a comparison of Schedule 6 to the Insolvency Act 1986 as amended with s.556(1) of Corporations Act (Australia) shows. If the assets available for distribution are insufficient to pay preferential creditors in full their claims abate equally. If they are sufficient, then the preferential creditors are paid in full and what remains is distributed rateably amongst the class of creditors next entitled. In the absence of any special provision the class of creditors next entitled are the ordinary unsecured creditors. The available assets are to be distributed amongst them rateably. Thus in Australia the Corporations Act s.555 provides:

> "Except as otherwise provided by this Act, all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they must be paid proportionately."

Equivalent provision is made in England by s.107 Insolvency Act 1986 in the case of a voluntary winding up and Insolvency Rule 4.181(1) in the case of a compulsory winding up.

Regimes for insolvent insurance companies.

12. In both jurisdictions special provision is made for distributions to creditors of insolvent insurance companies. In England they are contained in the Insurers (Reorganisation and Winding-up) Regulations 2004 SI 2004/353 implementing Directive 2001/17/EC of the European Parliament and of the Council dated 19th March 2001. In the case of the Companies they do not apply because the English Provisional Liquidators were appointed before 20th April 2003, see Regulation 18(4)(b). Nevertheless it is material to note that these regulations provide for the payment of debts of an insolvent insurance company in the following order of priority: (a) preferential debts, (b) insurance debts, as defined in Regulation 2, and (c) all other debts, see Regulation 21(2). Debts of each class rank equally between themselves and are payable in full before any payment to creditors of a lesser priority. Such provisions may extend to a Third Country Insurer as defined in Regulation 48, see Regulation 49. Thus, in cases to which they apply these Regulations substantially alter the usual pari passu principle by conferring priority on insurance creditors over ordinary unsecured creditors.

13. The relevant provisions in Australia are to be found in s.116(3) Insurance Act 1973 and s.562A Corporations Act 2001. The former is in the following terms:

> "In the winding up of a body corporate authorised under this Act to carry on insurance business, or in the winding up of a supervised body corporate, the assets

> in Australia of the body corporate shall not be applied in the discharge of its liabilities other than its liabilities in Australia unless it has no liabilities in Australia."

14. It is common ground that this subsection, of itself, is no impediment to the remission of assets sought by the Australian Liquidators. First, it does not alter priorities between different classes of creditor in a winding-up in Australia. Second, it applies to assets in Australia at the commencement of the winding up not to those subsequently remitted from another jurisdiction. Thus it would not apply to assets remitted from England by the English Provisional Liquidators to the Australian Liquidators. Third, dividends received by a creditor in Australia pursuant to that subsection must be brought into account by way of hotchpot in respect of dividends payable out of non-Australian assets. Thus, assuming there are sufficient non-Australian assets the same level of dividend is payable to all creditors of the same class. As David Richards J concluded in paragraph 43 of his judgment, the position of creditors with non-Australian liabilities would not be prejudiced by the application of this sub-section if the English Assets were remitted by the English Provisional Liquidators to the Australian Liquidators.

15. The problems are created by s.562A Corporations Act 2001 (Australia). That section, so far as relevant provides:

> "(1) This section applies where;
>
> a) a company is insured, under a contract of reinsurance entered into before the relevant date, against liability to pay amounts in respect of a relevant contract of insurance or relevant contracts of insurance; and
>
> b) an amount in respect of that liability has been or is received by the company or the liquidator under the contract of reinsurance.
>
> (2) Subject to subsection (4), if the amount received, after deducting expenses of or incidental to getting in that amount, equals or exceeds the total of all the amounts that are payable by the company under relevant contracts of insurance, the liquidator must, out of the amount received and in priority to all payments in respect of the debts mentioned in section 556, pay the amounts that are so payable under those contracts of insurance.
>
> (3) Subject to subsection (4), if subsection (2) does not apply, the liquidator must out of the amount received and in priority to all payments in respect of the debts mentioned in section 556, pay to each person to whom an amount is payable by the company under a relevant contract of insurance an amount calculated in accordance with the formula:

Particular amount owed/Total amount owed x Reinsurance payment

Where:

"particular amounts owed" means the amount payable to the person under the relevant contract of insurance.

"reinsurance payment" means the amount received under the contract of reinsurance, less any expenses of or incidental to getting in that amount.

"total amounts owed" means the total of all the amounts payable by the company under relevant contracts of insurance.

(4) The Court may, on application by a person to whom an amount is payable under a relevant contract of insurance, make an order to the effect that subsections (2) and (3) do not apply to the amounts received under the contract of reinsurance and that that amount must, instead, be applied by the liquidator in the manner specified in the order, being a manner that the Court considers just and equitable in the circumstances.

(5) The matters that the Court may take into account in considering whether to make an order under subsection (4) include, but are not limited to:

a) whether it is possible to identify particular relevant contracts of insurance as being the contracts in respect of which the contract of reinsurance was entered into; and

b) whether it is possible to identify persons who can be said to have paid extra in order to have particular relevant contracts of insurance protected by reinsurance; and

c) whether particular contracts of insurance include statements to the effect that the contracts are to be protected by reinsurance; and

d) whether a person to whom an amount is payable under a relevant contract of insurance would be severely prejudiced if subsections (2) and (3) applied to the amount received under the contract of reinsurance.

(6) If receipt of a payment under this section only partially discharges a liability to a person, nothing in this section affects the rights of the person in respect of the balance of the liability.

(7) This section has effect despite any agreement to the contrary.

(8) In this section:

"relevant contract of insurance" means a contract of insurance entered into by a company, as insurer, before the relevant date."

In **AssetInsure Pty Ltd v New Cap Reinsurance Corporation Ltd** [2006] HCA 13 the High Court of Australia determined that the phrase "contract of reinsurance" includes retrocession contracts.

16. Thus s.562A confers on all creditors of an insurance company with insurance claims priority over other creditors in respect of reinsurance, including retrocession, recoveries. Further subsection (4) enables further priority to be conferred on any particular insurance creditor. The section has no territorial limits and its application is mandatory so far as the Australian Liquidators are concerned. Accordingly its benefit is available to English insurance creditors whose debts are proved in the liquidations in Australia. It has been held by Barrett J in the Supreme Court of New South Wales and is not disputed that the principles of 'hotchpot' do not apply in Australia so as to require dividends or other benefits received in accordance s.562A(3) or (4) to be brought into account when proving against other assets of the insolvent insurance company, see **Re: HIH Casualty and General Insurance Ltd** (2005) 215 ALR 562, 591 para 103. On the other hand, it was decided by David Richards J (paras 156-166) and is now common ground that in a winding up in England creditors who had received dividends or other benefits under s.562A in Australia would have to bring them into account by way of hotchpot against distributions payable in the English winding up. Thus the remission of the English Assets to Australia would prejudice non-insurance creditors because it would diminish the assets available for distribution to them and they would lose their right to benefit from the insurance creditors' obligation in a winding up in England to bring their s.562A dividends and other benefits into account. In addition it would diminish the dividend available to English insurance creditors if the value of the English Assets was more than the aggregate debts of Australian Insurance creditors.

17. The approximate effect of the remission of the English Assets to the Australian Liquidators has been estimated to be as shown in the following table:

Type of Creditor	Company	Dividend (cents/A$) if there is no remission of English Assets	Dividend (cents/A$) if there is remission of English Assets
Insurance and reinsurance with liabilities in Australia[1]			
	HIH	25.8	28.5

	WMG	49.0	55.1
	FAII	1.3	13.3
Insurance and reinsurance with liabilities not in Australia			
	HIH[2]	25.4	19.3
	WMG2	49.0	39.49
	FAII[3]	1.3	12.8
Other creditors in Australia[4]			
	HIH	25.4	19.3
	WMG	49.0	44.86
	FAII	1.3	0.9
Other creditors not in Australia [5]	FAII	1.3	0.4

Creditors of FAIG would be unaffected by remission.

Cross Border Insolvency Regimes

18. It is evident that cross-border insolvencies, particularly those involving insurance companies give rise to many problems. It is helpful to understand the way in which such problems have been dealt with in those cases where provision has been made. As David Richards J explained in paragraphs 138-142 of his judgment, EC Regulation on Insolvency Proceedings (Council Regulation 1346/2000) did not seek to harmonise insolvency law within the European Union. That regulation preserves the application of the local insolvency law to assets within the state in which insolvency proceedings have been instituted. By contrast Directive 2001/17/EC as implemented in the United Kingdom by the Insurers (Reorganisation and Winding-Up) Regulations 2004 SI 2004/353 set up a regime for winding up insolvent insurance companies incorporated in any member of the EU but it does not apply in this case as I pointed out in paragraph 12 above.

19. Chapter 3 of the US Bankruptcy Code, as amended by Bankruptcy Reform Act 1978 provided for assistance to foreign liquidators where the proceedings in the United States are ancillary to the foreign proceedings. In such a case by paragraph 304(c)(4) the court might order the remission of the property in the United States to the foreign liquidator if to do so will

> "best assure an economical and expeditious administration...consistent with.... distribution...substantially in accordance with the order prescribed by [the US Code]."

That provision has been superseded by Paragraph 1521 of Chapter 15 of the Bankruptcy Code (US) by which the UNCITRAL Model Law was given effect in the US. That provides by subparagraph (b) that the court may

> "entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative....provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected."

Paragraph 1522 provides that the court may grant relief under the previous three paragraphs

> "...only if the interests of the creditors....are sufficiently protected."

20. As the judge noted, in paragraph 151 of his judgment, the US courts have not construed the requirement formerly imposed by paragraph 304(c)(4) as requiring the foreign distribution to be identical. Thus in **Re Blackwell** 270 BR 814 (Banks WD Tex 2001) the Bankruptcy Court observed:

> "It would be a mistake to construe this provision to mean that a court must find effective congruence between the distribution schemes of the United States and the country in which the foreign proceeding is pending. The problem with such an approach is that every country has its own scheme of priorities, reflecting local public policy choices that may or may not be shared by other countries. One country may give priority to internal tax claims, priming even secured lenders. Yet a third may give special treatment to social claims enforced by governmental entities. Were one to insist on congruence, it is doubtful that any court would ever find it appropriate to grant relief under § 304(b). Congress can be fairly presumed to have been familiar with the wide variety of distributional schemes worldwide. Its provision should not therefore be construed to effectuate an intent clearly at odds with structure and overall purpose of section 304 - - to provide a mechanism for cooperation with foreign proceedings."

21. The Cross-Border Insolvency Regulations 2006 SI 2006/1030 came into force on 4th April 2006. Regulation 2 provides that the UNCITRAL Model Law on Cross-Border Insolvency should have the force of law in Great Britain in the form set out in the Schedule thereto. In ascertaining the meaning of such Schedule consideration may be given to the UNCITRAL Model Law, the papers of the UN Commission on International Trade Law and its working group relating to the preparation of the UNCITRAL Model Law and a guide to its enactment prepared at the request of that Commission. The Schedule provides in Article 21 that:

> "1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including –
>
> [(a)-(d)]
>
> (e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative...
>
> [(f)-(g)]
>
> 2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Great Britain to the foreign representative.... provided that the Court is satisfied that the interests of creditors in Great Britain are adequately protected."

In addition Article 22.1 provides that:

> "In granting or denying relief under Article...21...the court must be satisfied that the interests of the creditors (including any secured creditors or parties to hire-purchase agreements) and other interested persons, including, if appropriate the debtor are adequately protected."

Further Article 32 requires dividends received in a foreign state to be brought into account by way of hotchpot. I refer to these Regulations for the policy they appear to enshrine. They could have no direct application in this case to HIH, FAII or WMG if winding up orders were made against them in England because of the provisions of Article 2(j).

Ancillary winding up

22. The concept of the ancillary liquidation was the first, and judge-made, attempt to provide for cross-border insolvencies. It was dealt with by the Judge in paragraphs 61-114 of his judgment. He pointed out that though the court in England has jurisdiction under s.221 Insolvency Act 1986 to wind up companies incorporated abroad and that in theory the winding up in England had universal application the status and authority of the English liquidator was unlikely to be recognised outside the United Kingdom. He continued (paragraph 62)

> "The reality is therefore that an English liquidator's duty in relation to the collection of assets will be restricted to those assets within the jurisdiction. English

> case law and practice also recognises that, if the company is in liquidation in its place of incorporation, that will be its principal liquidation and the English liquidation will be ancillary to it. This approach enables the English court to recognise the practical limitations on the reach of English insolvency law, to promote cooperation with the liquidator and courts of the principal liquidation with a view to a coordinated approach to the overall winding up of the company in the interests of creditors and shareholders generally, and to defer, where permissible and appropriate, to the law and courts of the principal liquidation."

He then considered the decision of Sir Richard Scott V-C in **Re: BCCI (No.10)** [1997] Ch 213 from which he extracted the following principles (paragraph 74):

> "i) Where a foreign company is being wound up in the jurisdiction of its incorporation, and a winding up order is made in England, the English Court will normally treat the foreign liquidation as the principal liquidation and the English liquidation as ancillary to it.
>
> ii) It is implicit in the concept of an ancillary liquidation that the English Court will generally direct the English liquidator to remit the proceeds of any realisations by him to the principal liquidator, after deduction of the costs of the English liquidation and the amounts needed to pay the debts which under English law have preferential status. It is the precise circumstances in which such a direction will be made that is at issue in this case.
>
> iii) The English Court must apply English law, including English insolvency law, to the resolution of any issue arising in the winding-up which is brought before the court.
>
> iv) The court has no power to disapply any substantive rule forming part of the English statutory insolvency scheme under the Insolvency Act and Rules 1986.
>
> Earlier authorities establish that the ancillary nature of the English liquidation does not make the English liquidator an agent of the principal liquidator. He is an office-holder charged with duties under the English insolvency legislation and he is bound to carry out his duties in accordance with the statutory scheme."

After considering the submissions of the parties, a number of earlier authorities, the views of various commentators he reached the conclusion I have already quoted in paragraph 8 above.

The Issues and the Judge's conclusions

23. In paragraph 57 of his judgment the Judge formulated the issues in these terms:

"1. Does the English Court have power to direct the English liquidator of a foreign company to transfer the assets recovered by him to the liquidator of the company in its principal liquidation (usually in its place of incorporation), where the legal regime applicable to the distribution of those assets among creditors is materially different from the regime which applies in England? If so, would that power be exercised in the circumstances of these Companies?

2. If no transfer is ordered, would the English Court apply the principle of hotchpot as regards the claims of creditors who had received distributions under section 562A in the Australian liquidation?

3. Does it make any difference that the Australian liquidators' applications for directions requiring transfers to them are made under section 426 of the Insolvency Act 1986, pursuant to letters of request from the Australian Court?

4. Does it make any difference, in the case of these applications, that the Companies have not as yet been ordered to be wound up in England but are in provisional liquidation?"

24. The answers to these questions given by David Richards J were as follows:

1. "My conclusion on the first issue is that in the event of a winding-up order being made against the Companies the English Court would not direct or authorise the English liquidators to remit the assets collected by them to the Australian liquidators, having regard to section 562A of the Corporation Act 2001 and section 116 of the Insurance Act 1973, unless some means could be found of ensuring that those assets could be distributed as if in an English liquidation. In default, they would be distributed in the English winding-up, in accordance with English insolvency law." (para 155)

2. The English Court would apply the principle of hotchpot as regards the claims of creditors who had received distributions under section 562A in the Australian liquidation. (paras 158 and 165)

3. The fact that the Australian liquidators' applications for directions requiring transfers to them are made under section 426 of the Insolvency Act 1986, pursuant to letters of request from the Australian Court makes no difference. "If the Companies had already been ordered to be wound up, it is, I think, clear that the English Court could not accede to the Australian Court's request for a transfer of funds. This follows from my decision on the first issue, that the substantive rules of distribution under the English statutory scheme are mandatory and the court has no

> power to make an order which has the effect of disapplying them. The power to make the order does not exist in English law and any power under Australian law could not be exercised by this court in a manner which was contrary to English law." (para 175)
>
> 4. It makes no difference that the Companies have not as yet been ordered to be wound up in England but are in provisional liquidation because "the existence of section 562A with its adverse consequences for reinsurance and general creditors would be a substantial ground in favour of making winding-up orders. I therefore conclude that there is a significant prospect that, in the absence of schemes of arrangement, winding-up orders would be made." (paras 183 and 184)

As I have already indicated there is no appeal against the conclusion set out in paragraph 24(2) above.

The submissions of the parties

25. The Australian Liquidators challenge the conclusions set out in paragraph 24(1),(3) and (4). They submit that the judge was wrong to refuse to accede to the request made by the Supreme Court of New South Wales. They accept that he correctly directed himself by reference to the decisions of this court in **Hughes v Hannover Re** [1997] 1 BCLC 497 and **England v Smith** [2001] Ch.419 but, they suggest, gave no sufficient reason for refusing to accede to the request. They point out that there are no orders to wind up any of the Companies in England; they submit that there is no good reason to think that there ever will be, but even if there are the winding up in England would be ancillary to the winding up in Australia and in those circumstances differences between the rules for distribution to creditors in a winding up in England and a winding up in Australia would not be a sufficient reason to refuse the request if, as they submit, the transfer sought would be for the benefit of "the estate as a whole".

26. The Australian Insurance Creditors are insurance creditors in Australia with the benefit of s.116 (3) Insurance Act 1973 (Australia) and s.562A Corporations Act 2001 (Australia). They challenge the same conclusions on substantially the same grounds. They submit that if the Companies were wound up in England such winding up would be ancillary to the winding up in Australia. They contend that liquidators in an ancillary winding up should be ordered to remit the assets collected by them to the liquidators in the principal winding up unless either the law of the principal liquidation would infringe a principle of English public policy or such a distribution would involve a manifest injustice to a creditor. They submit that neither exception is applicable in this case. In particular they contend that because the Australian insolvency rules provide broadly for pari passu distributions to ordinary unsecured creditors there could be no injustice to a creditor if the assets were remitted from England to Australia. They point out that none of the Companies is in liquidation in England and there is no reason to think that they ever will be.

27. The Australian Insurance Creditors have an additional ground of appeal. In his order made on 24th October 2005 David Richards J declined to make any order as to these creditors' costs of the proceedings. In the judgment he gave on that day he explained his reasons for refusing to do so. One of them was that the Australian Insurance Creditors might well be entitled to apply to the court in Australia for their costs to be paid out of the assets in Australia. The Australian Insurance Creditors submit that the judge was wrong. They contend that there was no reason not to follow the normal rules where an application is made for directions as to the proper administration of an insolvent estate. In such cases, they submit, the costs of all parties are paid out of the estate as an expense in the liquidation. On the third day of the hearing their counsel sought to adduce fresh evidence with regard to the ability of the Australian Insurance Creditors to recover their costs out of the assets in Australia. We refused permission and indicated that we would give our reasons in our judgments on the appeals as a whole.

28. The English Provisional Liquidators submit that the judge was right for the reasons he gave. They submit that a winding up in England gives rise to a statutory scheme for the distribution of the assets of the company amongst its unsecured creditors in the manner for which the law, primarily the Insolvency Act and Rules, provides i.e. pari passu amongst creditors of the same priority or class. They contend that such scheme confers rights on individual creditors. They point out that the Australian Liquidators and the Australian Insurance Creditors accept that on any remission of assets by the English Provisional Liquidators to the Australian Liquidators the rights of the preferential creditors and if the Insurers (Reorganisation and Winding-Up) Regulations 2004 were applicable, English Insurance Creditors also would have to be fully provided for. They contend that the rights of ordinary unsecured creditors should be similarly protected. They accept that a winding-up of the Companies in England would be ancillary to their winding-up in Australia but contend that such consideration is insufficient to justify the remission of assets from the former to the latter if it would prejudice the rights of creditors in the former. They contend that as the Companies are plainly insolvent, in the absence of a scheme of arrangement, it is almost inevitable that they will be wound up in England in due course. They submit that in these circumstances either there is no jurisdiction under s.426 to comply with the request from the Supreme Court of New South Wales or if there is the court, in its discretion, should refuse to do so.

29. In relation to the separate appeal of the Australian Insurance Creditors they submit that the judge was right for the reasons he gave. They point out that the reason to which I have referred in paragraph 27 above was one only of a number of reasons given by David Richards J for his conclusion that an order for costs out of the estate in England should not be made in favour of the Australian Insurance Creditors.

30. The submissions set out above are but a bare summary. Each party embellished its argument with a large number of ancillary points. It is not necessary to deal with all of them. Insofar as it is necessary, I shall refer to them when reaching my conclusions on the relevant part of the argument.

Conclusions on the main appeals

31. In my view the starting point must be to consider the scope of s.426. That section is a part of the statutory scheme to which the assets of a company incorporated overseas and put into liquidation in England becomes subject. If the section authorises the transfer by the liquidators in an ancillary liquidation in England to the liquidators of the principal liquidation in Australia notwithstanding its effect on the creditors proving in the ancillary liquidation then it does not advance the argument to point out that such a transfer would prejudice the rights of those creditors. I have set out the material parts of s.426 in paragraph 1 above and of the request from the Supreme Court of New South Wales in paragraph 7 above.

32. The purpose of these provisions, as described by subsection (4), is to enable the court in England having jurisdiction in relation to insolvency to assist the court in the relevant territory having jurisdiction in relation to insolvency. There is no express limitation on the assistance which may be given. The courts in England to which this subsection applies are the High Court and certain nominated county courts, see ss.117 and 373 Insolvency Act 1986. The means by which such assistance may be provided by the court in England are those prescribed in subsection (5). I explained them in my judgment in **Hughes v Hannover Re** [1997] 1 BCLC 497, 516 in the following terms:

> "The reference to 'insolvency law' in sub-s (4) serves to identify the courts in any part of the United Kingdom on which the obligation to assist is cast. Those courts have their usual jurisdiction and powers as such courts; in England they are the High Court and certain county courts. There is nothing in s 426 to exclude the general jurisdiction and powers vested in those courts as such under the laws of England and Wales. The purpose of sub-s (5) is not to reduce that jurisdiction or those powers but for the purposes of sub-s (4) only to extend them. Thus the court in England, faced with a request from a relevant country may in respect of the matters specified in the request apply either the insolvency law of the relevant country concerned or its own insolvency law.
>
> By itself this would not be of much help for the courts of the relevant country would not normally see much point in making a request to the courts of England in preference to applying its own insolvency law; and if it could not do so it would be unlikely that the court in England could. Moreover the court in England would not require the further authority of sub-s (5) to apply all the provisions of the Insolvency Act 1986 in accordance with their terms. Consequently the concluding words of sub-s (5) introduce the hypothesis that the matters specified in the request fall within the jurisdiction of the court applying the insolvency law under consideration in so far as 'comparable matters' would do so. I agree with the analysis of Chadwick J in *Re Dallhold Estates (UK) Pty Ltd [1992] BCLC 621* at 626 which I have already quoted. Thus there is available to the court in England when asked for assistance by the court of a relevant country under s 426 (a) its own general jurisdiction and powers and either (b) the insolvency law of England and

> Wales as provided for in the Insolvency Act 1986, the specified sections of the Company Directors Disqualification Act 1986 and the subordinate legislation made under any of those provisions or (c) so much of the law of the relevant country as corresponds to that comprised in (b). In the case of (b) and (c) but not (a) the court in England is entitled to apply such law on the hypothesis as to jurisdiction concerning the matters specified in the request to which I have referred."

33. Later in the same judgment, with which Roch and Thorpe LJJ agreed, I considered the role of the court in England in receipt of a request from a court having jurisdiction in relation to insolvency in a relevant territory. At page 517 I said:

> "The obligation to assist is imposed on a court, not some executive agency. It would in my view require very clear words to justify a conclusion that the court in England was not intended by Parliament to perform its normal function of seeking to do justice in accordance with the law. There is no such indication. Accordingly the function of the court under s 426 must be to consider whether in accordance with the three sources of law I earlier identified as (a), (b) and (c) the assistance may properly be granted. If it may then it should be, thereby discharging the statutory duty imposed by s 426. But if it may not be properly granted then it should be withheld for it must be implicit in the fact that the duty is cast on a court that the duty is qualified by reference to what the court may properly do as a court. Of course if the court in England cannot do exactly what is sought then it should consider whether it can properly assist in some other way in accordance with any of the available systems of law. Thus the reasons for withholding assistance either as sought or in any other way are not limited to reasons of public policy. Of course public policy is a reason why assistance may be impossible under (a) or (b). But it is by no means the only reason. Further public policy might prevent assistance being given under (c) if the provision of the insolvency law of the country the court of which requested the assistance were contrary to the public policy recognised by the court in England. In my view the court must consider in all cases whether the assistance sought or any other comparable assistance may be properly granted in accordance with the laws the court is authorised to apply on the hypotheses likewise permitted.
>
> In some cases the assistance sought is, in accordance with the system of law (sc (a), (b) and (c)) under which it is available, discretionary. Obviously the fact of the request for assistance is a weighty factor to be taken into account. Further the court in England may be expected, as Knox J did in this case, to accept without further investigation the views of the requesting court as to what was required for the proper conduct of the bankruptcy or winding up. But I do not think that the request can ever be conclusive as to the manner in which the discretion of the court should be exercised. It would be incompatible with the principle of the law which was being applied that the decision was one for the discretion of the court if the fact of

the request was anything more than a factor however weighty."

34. Counsel for the English Provisional Liquidators suggested, albeit somewhat tentatively, that the request in this case was not a request for assistance within the scope of s.426. He submitted that it was not a request for assistance by the application of English law or the insolvency law of Australia but was a request for the disapplication of English law to the assets of the Companies collected by the English Provisional Liquidators in order that they might be transferred to the Australian Liquidators free from the rights of creditors which will arise if the Companies are wound up in England. That, he suggested, is a step too far.

35. I do not accept this submission. First, given the evident purpose of the section, the concept of "assistance" should not be restrictively construed so as to limit the jurisdiction of the court. Second, I do not think that the request I have quoted in paragraph 7 falls outside the ambit of that concept. The request is twofold. First, it invites the High Court in England to hear and determine an application in relation to the relative rights and obligations of the English Provisional Liquidators under English law. This is to assist the Australian Liquidators in the formulation of the schemes of arrangement. Plainly that is authorised by the section. Second, it invites the High Court to conclude that it may properly direct the English Provisional Liquidators to transfer the English Assets to the Australian Liquidators so that such assets may be applied in the due course of the winding up of the companies under the Corporations Act 2001 or in accordance with a scheme of arrangement sanctioned by the Court under s411 Corporations Act 2001 and to confer power on the English Provisional Liquidators enabling them to do so. If the court came to the conclusion that it could properly give that direction it would also be properly regarded as "assistance" provided by the High Court in England to its counterpart in Australia subject to whose jurisdiction the Companies are being wound up. It may be that the consequence of such assistance is to disapply English law in the manner suggested by counsel for the English Provisional Liquidators. If so that is a matter to be considered in the exercise of the discretion conferred by s.426 whether such assistance may be properly given. It does not, in my view, limit the jurisdiction conferred by s.426 so as to preclude the High Court in England from a proper consideration of the request at all.

36. It follows that the question is whether the High Court in England may properly accede to the request. Plainly it can and has done so in relation to the first part. But can it properly direct and empower the English Provisional Liquidators to remit the assets collected by them to the Australian Liquidators to be applied in the winding-up in Australia or in accordance with a scheme of arrangement sanctioned by the court in New South Wales? In my view that question must be approached in two stages, (1) could such a direction be given if the Companies were in liquidation in England? If so (2) does it make any difference that they are not currently being wound up in England?

37. The jurisdiction to wind-up foreign companies in England arises under s.221 Insolvency Act 1986. It will be exercised if three core requirements are met, namely:

> "(1) There must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction.
>
> (2) There must be a reasonable possibility, if a winding up order is made, of benefit to those applying for the winding-up order.
>
> (3) One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction."

See **Stocznia Gdanska v Latreefers** (No.2) [2001] 2 BCLC 116, 137.

38. In the event of a winding up order being made then all the provisions of the Insolvency Act with regard to winding up, with immaterial exceptions, apply to that foreign company, see **Re International Tin Council [1987]** Ch.419, 446. Those are the provisions which give rise to the statutory scheme referred to in **Re Lines Bros** [1983] 1 Ch.1. The statutory scheme does not confer on an individual creditor a beneficial interest in any asset of the company or, at least before the declaration of a dividend, the right to payment of any specific sum. But it does confer on him the right to have the assets of the company administered by the liquidators in accordance with that scheme, see **Mitchell v Carter** [1997] 1 BCLC 673, 686.

39. The statutory scheme includes priorities, see s.175 Insolvency Act, and pari passu distribution between members of the same class of creditor whether preferential or ordinary unsecured, s.175 and Insolvency Rule 4.181. It is true, as counsel for the Australian Liquidators submitted, that these elements of the scheme may be varied in accordance with the specific statutory provisions to which he referred if and where the justice of the case so requires. Thus strict priorities and pari passu distribution may be varied by the court, for example, in sanctioning payment of a class of creditor in full under Schedule 4 para 1 Insolvency Act 1986, sanctioning a scheme or compromise to that effect under s.167(1) and s.425 of the Companies Act 1985 and in a number of other varied circumstances, sanctioning the payment of provable claims of a landlord as expenses of the liquidation, see **Re Toshuku Finance UK plc** [2002] 1 WLR 671, authorising payments for services beneficial to the estate, see **Re Associated Travel Leisure Ltd** [1978] 2 AER 273 and payments authorised under the Rule in Ex parte James, see **Re TH Knitwear (Wholesale) Ltd** [1988] Ch. 275, 288C. It has done so by authorising the transfer of assets to a foreign office holder for him to distribute them in accordance with foreign law. Thus in **Daewoo Motor Co.Ltd** [2005] EWHC 2799 (Ch) Lewison J authorised the transfer of the assets collected by provisional liquidators in England to a receiver appointed by the Korean Court. He did so because such a transfer was with the consent of the three creditors whose interests might be prejudiced and to the overall advantage of all the others. In **MG Rover Belux SA/NV** and **Re Collins & Aikman** HH Judge Norris QC and Lindsay J respectively authorised administrators to pay creditors in accordance with the priorities afforded by the law of the place of the company's incorporation.

40. The conclusion of David Richards J I have quoted in paragraph 8 above was substantially repeated in paragraph 175 where he said:

> "If the Companies had already been ordered to be wound up, it is, I think, clear that the English Court could not accede to the Australian Court's request for a transfer of funds. This follows from my decision on the first issue, that the substantive rules of distribution under the English statutory scheme are mandatory and the court has no power to make an order which has the effect of disapplying them."

In paragraph 184 he reiterated that:

> "A principal function of provisional liquidators at this stage is to safeguard the assets of the Companies for the benefit of those interested in their distribution in the event of a winding-up. In these circumstances it would in my view be inconsistent with their present function to direct the JPLs to transfer the assets to the Australian liquidators, and it would not be proper to do so. Its effect would be to undermine the proper working-out of the statutory insolvency scheme which would be mandatory if winding-up orders were made."

41. In my view these statements of the relevant principle go too far in that they limit the jurisdiction conferred by s.426 without statutory justification. There may be circumstances in which it is for the benefit of the creditors that a transfer should be made, notwithstanding that their interests in the liquidation in England, when viewed in isolation, would be adversely affected. For example, the savings in cost by avoiding duplication may offset any reduction in prospective dividend. Similarly a loss of priority may be sufficiently offset by an increase in the pool available for distribution to those whose priority was changed. The admission of further creditors may be offset by an increase in the assets available for distribution to that class of creditor. In such cases it may be that an order sanctioning the transfer may properly be made. But it is not suggested that this case is one of them. The figures given in the table set out in paragraph 17 above show that the proposed transfer would substantially prejudice all creditors of each of the Companies except FAIG and except Australian Insurance and Reinsurance Creditors of HIH, WMG and FAII and Non Australian Insurance and Reinsurance Creditors of FAII.

42. David Richards J referred to a number of authorities and academic commentators in support of his unqualified statement of principle. I should refer to them briefly. In my view all the cases and all the academic commentators demonstrate clearly that the Court will not order the transfer of assets by liquidators in an ancillary winding up in England to the liquidators in the principal liquidation abroad if the rights of creditors would be prejudiced and they would obtain no countervailing advantage in the principal liquidation. They do not show, because the situation has not arisen, that if there is sufficient countervailing advantage the court will still not order a transfer pursuant to s.426 because it would disturb the implementation of the statutory scheme arising under English law in consequence of the order or resolution to wind up the company.

43. Thus in **Re Matheson Bros Ltd** (1884) 27 Ch.D 225, 231 Kay J was concerned to preserve the assets in England of a company incorporated in New Zealand until he could be satisfied that the English creditors would share pari passu with those in New Zealand. In **Re Alfred Shaw and Co Ltd, ex parte MacKenzie** [1897] 8 WLJ 93 Griffiths CJ emphasised the principle that all creditors of the same degree in different jurisdictions should be treated the same but he was not considering whether a transfer should be permitted if the different treatment afforded to creditors abroad were compensated by some countervailing advantage. Similarly in **Re P.MacFadyen & Co, ex parte Vizianagaram Co Ltd** [1908] 1 KB 675 the Court in England authorised a transfer to an official assignee in India on being satisfied that creditors in England and India would be treated the same. To the like effect are the Canadian cases to which the Judge referred in paragraphs 100 and 101. After the arguments concluded counsel sent us copies of the advice of the Privy Council in **Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc** [2006] UKPC 26. That case was concerned with what assistance might be given by the Manx Court to the New York Court in respect of a company subject to Chapter 11 of the US Bankruptcy Code in the absence of any statutory provision such as s.426. In paragraph 21 Lord Hoffmann giving the advice of the Privy Council accepted that assistance might be given as there was no suggestion of any prejudice to a creditor in the Isle of Man or any infringement of a local law.

44. By contrast a transfer of assets to the principal liquidation was refused in **Re The Australian Federal Life and General Assurance Co Ltd** [1931] VLR 317 because it would have the consequence of creating a security over the assets transferred thereby precluding the distribution of those assets amongst all creditors pari passu. There was no suggestion in that case of any countervailing advantage. Similarly in **Re Standard Insurance Co Ltd** [1968] Qd R 118 a transfer was only ordered on undertakings designed to secure pari passu distribution amongst all creditors.

45. The authority on which David Richards J primarily relied was the decision of Sir Richard Scott V-C in **Re BCCI (No.10)** [1997] Ch 213. In that case the liquidators of BCCI in England, Luxembourg and the Cayman Islands had created a pooling agreement in the liquidation of the place of the company's incorporation, namely Luxembourg to which all assets were to be remitted and in which all creditors were to share pari passu. Two problems arose, first English law allowed set-off so that to the extent of the set-off a creditor was in effect secured but the law of Luxembourg did not. Second some creditors were entitled to prove in England but not in Luxembourg. The English liquidators applied to the court in England for directions. Sir Richard Scott V-C considered that the court in England had no inherent power to disapply at its discretion what he referred to as substantive parts of the statutory scheme. He concluded (page 247):

> "The accumulation of judicial endorsements of the concept of ancillary liquidations have, in my judgment, produced a situation in which it has become established that in an "ancillary" liquidation the courts do have power to direct liquidators to transmit funds to the principal liquidators in order to enable a pari passu

> distribution to worldwide creditors to be achieved. The House of Lords could declare such a direction to be ultra vires. But a first instance judge could not do so and I doubt whether the Court of Appeal could do so.
>
> But the judicial authority which has established the power of the court to give, in general terms, the direction to which I have referred has certainly not established the power of the court to disapply rule 4.90 or any other substantive rule forming part of the statutory scheme under the Act and Rules of 1986. Nor, in my opinion, has this line of judicial authority established the power of the court to relieve English liquidators in an ancillary winding up of the obligation to determine whether proofs of debt submitted to them should be admitted or to see to it, so far as they are able to do so, that creditors whose claims they do admit receive the pari passu dividend to which, under the statutory insolvency scheme, they are entitled."

46. There was no issue in that case whether any interference with the statutory scheme consequential on a transfer to the liquidators in the principal winding up was sufficiently compensated by any countervailing advantage. Nor was Sir Richard Scott V-C considering a request from the Luxembourg liquidators under s.426.

47. David Richards J also referred to three academic commentators, namely Professor Smart in an article entitled *International Insolvency: Ancillary Winding Up and the Foreign Corporation* (1990) 39 ICLQ 827, the editors of Dicey & Morris: The Conflict of Laws (13th Ed) para 30-075 and the authors of Totty and Moss on Insolvency para H9-15. The passages cited by the judge from the work of the first and the third are consistent with the view I have expressed. At first sight the second is not. At para 30-075 the editors state in relation to the judgment of Sir Richard Scott V-C in **BCCI No.10**:

> "The court had power in an ancillary liquidation of this nature to direct liquidators to transmit funds to the principal liquidators in the country of incorporation in order to enable *pari passu* distribution to worldwide creditors to be achieved. But the court had no power to disapply the English rule on set-off or any other substantive rule forming part of the statutory insolvency scheme contained in the Insolvency Act 1986 and the Insolvency Rules 1986. Further, the court had no power to relieve English liquidators of the obligation to determine whether proofs of debt submitted to them should be admitted or of the obligation to ensure the creditors whose claims have been admitted receive the *pari passu* dividend to which they were entitled."

I read this passage as descriptive of the decision in **Re BCCI No.10**. Accordingly my comments in paragraph 46 above are equally applicable to this observation.

48. In paragraph 22 above I have quoted paragraph 74 of the judge's judgment. Basing himself on the

judgment of the Vice-Chancellor in **Re BCCI No 10** he concluded in sub-paragraph (iv) that the court has no power to disapply any substantive rule forming part of the English statutory insolvency scheme. He applied that proposition in his conclusion on the third issue before him which I have quoted in paragraph 24(3) above and again in paragraph 175 which I have quoted in paragraph 40 above.

49. These statements led to considerable argument before us as to whether certain parts of the statutory scheme were substantive or procedural and if procedural whether the court can and, if so, should disapply them. In my view these arguments are beside the point. If s.426, which is itself part of the statutory scheme, can authorise a transfer from the liquidators of an ancillary winding up to the liquidators of the principal winding up the only question will be whether such authority or jurisdiction should be exercised. In exercising that discretion the effect of the transfer on creditors will be a most material consideration, but whether the provisions for priority and pari passu distribution are substantive or procedural will be immaterial.

50. Accordingly I conclude that if the Companies were in liquidation in England the Court in England would have jurisdiction to entertain a request under s.426 for directions to the liquidators in England to transfer the assets collected by them to the liquidators in the principal liquidation even though the result of such a transfer would be to interfere with the statutory scheme imposed on those assets by Insolvency Act 1986. Whether or not to sanction such a transfer would be a matter for the discretion of the court.

51. There were also diverging views as to how the discretion should be exercised. In paragraphs 90, 111 and 112 the judge suggested that the test was whether if the assets were transferred to the liquidators in the principal winding up they would be distributed "substantially in accordance with the English rules". For the Australian Liquidators it was submitted that the transfer should be authorised if it is for the benefit of the estate or the creditors as a whole. The Australian Insurance Creditors suggested that the transfer should be approved unless it is contrary to English public policy or would give rise to manifest injustice to a creditor. The English Provisional Liquidators submit that the transfer should not be sanctioned if it would prejudice the rights of creditors.

52. The nature of the court's discretion was considered by this court in **Hughes v Hannover Re** [1997] 1 BCLC 497 and **Smith v England** [2001] Ch 419. Thus the court should comply with the request if it may properly do so. That will involve a consideration of all the circumstances including whether the transfer sought will prejudice the creditors or any class of them and whether there would be other advantages sufficient to counteract such prejudice. In relation to the facts of this case it is quite clear that the transfer sought would prejudice all creditors of each of the Companies except FAIG and except Australian Insurance and Reinsurance Creditors of HIH, WMG and FAII and non-Australian Insurance and Reinsurance Creditors of FAII. The advantage to the latter classes of creditor cannot counteract the prejudice suffered by all the other classes. Nor can those advantages and any benefit obtained from avoiding duplication enable the court to conclude that a transfer would be for the benefit of the estate as a whole.

53. The test adopted by the judge of substantial compliance with the English rules could be misleading in that it appears to exclude from consideration any countervailing advantage creditors might obtain from the transfer. Such a test was introduced by paragraph 304(c)(4) of the US Bankruptcy Code (quoted in paragraph 19 above) but that led to the problems of the degree of 'congruence' required referred to by the Bankruptcy Court in **Re Blackwell** 270 BR 814 (Banks WD Tex 2001) (see paragraph 20 above). Consistently with the UNCITRAL Model law, US Bankruptcy Code has now adopted the test of whether "the interests of the creditors are sufficiently protected" (see paragraph 19 above).

54. In cases regulated by the Cross-Border Insolvency Regulations 2006 SI 2006/1030, which came into force on 4th April 2006, the test is whether "the interests of creditors in Great Britain are adequately protected". This is not the occasion on which to determine what degree of protection would be "adequate". Nor are we concerned with whether that test is the same as that contained in the US Bankruptcy Code which requires the protection to be "sufficient".

55. Counsel also addressed us on the ambit of the requirement at the end of s.426(5) that in exercising its discretion under that subsection the court should have regard in particular to the rules of private international law. I share the views of Lawrence Collins J expressed in **Re Television Rentals Ltd** [2002] BCC 807, para 17 that this provision is obscure and ill-thought out. There was some debate as to how that requirement could be satisfied in a case such as this. What relevant rule is there? How is the relevant rule to be ascertained? How is it to be applied? The inclusion of such a requirement in a provision for cross-border co-operation which can be activated merely by a request from the insolvency court in one jurisdiction to the insolvency court in another will serve a useful purpose where the request relates to a matter in which the rules of private international law may operate. One area of operation would be in the choice of insolvency law the subsection envisages. There may be many others. But in this case there is no suggestion that such rules preclude the presentation of winding up petitions, the appointment of provisional liquidators or orders for winding up any of the Companies in England. The winding up of insolvent companies attracts the **lex fori** see, Dicey & Morris 13th Ed. Para 7-032. If the interests of creditors would be prejudiced by the transfer sought then the fact that the principal liquidation is in Australia is immaterial. There is no rule of domestic or private international law which entitles the court to disregard the interests of creditors or any class of creditors. In my view the requirement to have regard to the principles of private international law can have no effect in a case such as this.

56. For all these reasons my answer to the first question I posed in paragraph 36 above is that if the Companies were in liquidation the Court would (a) have jurisdiction to consider the request, but (b) would not, in the exercise of its discretion, direct a transfer of the English assets by the English Provisional Liquidators to the Australian Liquidators because so to do would prejudice the interests of all the creditors except those of FAIG and except Australian Insurance and Reinsurance Creditors of HIH, WMG and FAII and Non Australian Insurance and Reinsurance Creditors of FAII. So the second question arises whether it makes any difference that the

Companies are not in liquidation in England. The judge concluded that it did not. In paragraph 181 of his judgment he considered the extreme cases where it is obvious that a winding up order either will or will not be made. In paragraph 182 he turned to consider the probability of such an order being made. In paragraph 184, for the reasons he explained in paragraph 183, he concluded that

> "....there is a significant prospect that, in the absence of schemes of arrangement, winding-up orders would be made. A principal function of provisional liquidators at this stage is to safeguard the assets of the Companies for the benefit of those interested in their distribution in the event of a winding-up. In these circumstances it would in my view be inconsistent with their present function to direct the [English Provisional Liquidators] to transfer the assets to the Australian liquidators, and it would not be proper to do so. Its effect would be to undermine the proper working-out of the statutory insolvency scheme which would be mandatory if winding-up orders were made. [Counsel for the Australian Liquidators] referred to the power of the court to stay the English winding-up after an order has been made, but that power would be exercised only if the court could and did order the transfer of assets."

57. This conclusion is criticised by counsel for the Australian Liquidators. He contended that the judge failed to give adequate weight to the fact that it had always been recognised that a winding up in England would be ancillary to that in Australia. Consequently, he submitted, it was by no means certain that a winding up in England would proceed and it would be contrary to the principle of comity to insist that it did. He suggested that Australia is the most convenient forum for the winding up of the Companies so that, in accordance with the principles established in **Spiliada Maritime Corpn v Cansulex** [1987] AC 460, the consequences of any less favourable treatment of any particular class of creditor would have to be accepted.

58. The Australian Insurance Creditors criticised the judge's conclusion on similar grounds. They point out that in the absence of winding up orders in England the statutory scheme on which the English Provisional Liquidators rely has not been engaged. They suggest that it never will be because the Companies are being wound up in the place of their incorporation. Except for providing a different scheme for distribution, they suggest, there is no reason why the Companies should be wound up in England.

59. The English Provisional Liquidators submit that the judge was right for the reasons he gave. He was right to conclude that the Companies are insolvent and in the absence of schemes of arrangement duly approved are likely to be wound up in England. The courts in England have the jurisdiction to do so, see **Stocznia Gdanska v Latreefers (No.2)** [2001] 2 BCLC 116, 137 and the need to protect the rights of the creditors except Australian Insurance and Reinsurance Creditors of HIH, WMG and FAII and Non Australian Insurance and Reinsurance Creditors of FAII would be a very good reason to exercise it. They submit that the principle of forum non

conveniens does not apply to the winding up of insolvent companies.

60. In my view the approach of the judge was correct. The Companies were and are insolvent. Any creditor of the classes of creditor which would be prejudiced if there were no winding up orders in England could after an order for substitution, in the absence of schemes of arrangement duly approved by all the creditors, seek a winding-up order on the petitions already presented. On the hypothesis of no schemes there would be good reason for the Court in England to make such orders. The fact that there are no such orders at present is no reason to disregard the justified concerns of all the creditors other than Australian Insurance and Reinsurance Creditors of HIH, WMG and FAII and Non Australian Insurance and Reinsurance Creditors of FAII. It is necessary to bear in mind why the point has arisen at all. If the separate rights of the English creditors are recognised in the schemes of arrangement then the schemes will go ahead and there will be no winding-up orders in England. If they are not then the schemes will not be approved and orders for winding up the Companies in England are likely to follow so that full effect may be given to the rights of the English Creditors. The Australian Liquidators are seeking to ignore both the separate rights of the English Creditors and the likely consequences if they do. They cannot have it both ways.

61. In the form I prefer to pose this question, in my view the fact that there are no winding up orders in England at the present is no reason to take a different view of the propriety of the direction for transfers currently sought by the Australian Liquidators or the Australian Insurance Creditors. For all these reasons, which are not quite the same as those given by the judge, I would dismiss the appeal from the substance of his order made on 24th October 2005. If the other members of the court agree with me it may be, and I will rely on counsel to bring it to our attention, that the terms of the declarations made by the judge require some alteration.

The Costs Appeal

62. I turn then to the appeal of the Australian Insurance Creditors against the refusal of the judge to allow them their costs of the application out of the English Assets. The judge gave a number of reasons for his refusal. He accepted that the applications raised issues relating to the proper administration of the assets collected in England. He pointed out that there were, in effect, two estates one in Australia and one in England, that the Australian Liquidators and the Australian Insurance Creditors had advanced arguments in the interests of the former and the English Provisional Liquidators the latter. He considered that in doing so the Australian Insurance Creditors sought to advance their own interests. He continued:

> "14. In all the circumstances, I do not think it appropriate to order that the costs of all parties should be borne out of the English assets, principally, as I have said, because the Australian Liquidators and [the Australian Insurance Creditors] have been concerned to argue for interests which are adverse to those of creditors proving in the English liquidation and have been concerned to argue in a way

> which would benefit a particular class of creditors, namely, those with the benefit of s.562A.
>
> 15. The Australian Liquidators will presumably be able to recoup their costs out of the Australian Estate, on whose behalf, as I say, they appeared before this court, and it may well be that Amaca is entitled to apply to the Australian Court for its costs to be treated in a similar way.
>
> 16. Equally, however, in view of the particular circumstances of this application, I do not think it appropriate that the costs of the [English Provisional Liquidators] should be paid out of the Australian estate. An order that their costs be paid out of the English estate seems to me to give proper recognition of the fact that the issue once raised did require resolution, both for the purpose of promoting the proposed schemes of arrangement and for determining what, if those schemes failed, would be the proper administration of the English estate.
>
> 17. Accordingly, I will make no order so far as the Australian Liquidators and [the Australian Insurance Creditors] are concerned, and I will order that the costs of the [English Provisional Liquidators] be paid as an expense in the provisional liquidation."

63. In relation to the ground set out in paragraph 15 of his judgment, on the second day of the hearing before us counsel for the Australian Insurance Creditors submitted that there was no evidence to support the statement that the Australian Insurance Creditors would be entitled to apply for payment of their costs out of the Australian assets. There followed an interchange between counsel and the bench as to whether the judge's tentative conclusion set out in paragraph 15 above was a proper inference to be drawn from the facts and matters properly before him. On the third day counsel for the Australian Insurance Creditors sought permission to adduce further evidence on this point. We refused it and indicated that we would give our reasons in our judgments on the appeal.

64. I can state my reasons quite shortly. The issue whether or not there was evidence or other matter before the judge entitling him to make the inference he did in paragraph 15 of his supplemental judgment was not raised in the appellants' notice issued by the Australian Insurance Creditors nor in the written arguments of their counsel. The question of further evidence plainly never occurred to those advising the Australian Insurance Creditors. Yet if the point was a real one it should have been in the appellants' notice and the application to adduce further evidence should have been made long before it was. I am unable to assess whether the new evidence would be prima facie credible but counsel for the English Provisional Liquidators indicated that if we admitted it then his clients would have to consider adducing further evidence in reply. In any event, given all the other reasons given by the judge it is doubtful if it would have a sufficient impact on the outcome of this part of the appeal.

65. On the appeal itself the Australian Insurance Creditors submit that the judge was wrong to have rejected their application for costs out of the English estate. They contended, as they did before the judge, that the rules applied in cases of applications by trustees for directions, exemplified in **McDonald v Horn** [1995] 1 AER 961, 968g-975f and **Re AXA Equity and Law** [2001] 2 BCLC 447, 460g-466g should apply to them. The English Provisional Liquidators were in effect trustees and seeking directions as to how to deal with assets in their hands by analogy with cases where a trustee seeks the directions of the court, cf **Craig v Humberclyde Industrial Finance Ltd** [1999] 1 WLR 129, paras 18 and 19. They point out that they were joined as parties to both applications by the English Provisional Liquidators and the Australian Liquidators respectively.

66. This is disputed by the English Provisional Liquidators. They point out that the costs order was one for the discretion of the judge and no error of principle has been shown. I agree. The judge considered the relevant authorities and was well aware of the relevant facts. The order he made was within his discretion and, if I may say so, eminently sensible. No ground has been shown which would justify this court interfering with it. Accordingly I would dismiss the appeal of the Australian Insurance Creditors against the judge's refusal to make any costs order in their favour.

Summary of conclusions

67. For all these reasons I would dismiss all the appeals. I would invite counsel to consider whether the form of the order made by David Richards J on 24th October 2005 requires amendment in the light of our conclusions.

Lord Justice Tuckey:

68. I agree with both judgments.

Lord Justice Carnwath:

69. Having regard to the way in which the case was argued before us, I agree entirely with the Chancellor's analysis, and his reasons for concluding that the appeal must be dismissed.

70. I would only add (without disrespect for the depth and quality of those arguments) that I am left with a feeling that the matter might have been approached more simply. I start from the request made by the Australian court. As I read it, the "assistance" requested is to determine how the English assets are to be dealt with, and to make consequential directions, if we think appropriate, for transfer of assets. I do not read the request as calling for any particular solution. That is properly left to us to determine as the court with direct jurisdiction over the English assets. As an English court, exercising a jurisdiction conferred by English insolvency law, our starting point must be the policy and principles of that law (see per Wynn-Parry J, **Re Suidair International Airways Ltd** [1951] Ch 165, 173-4). Although section 426 now gives us a degree of discretion as to the law to be applied, that discretion must be exercised in a principled way.

71. The section gives us the power to apply the Australian law, if there is some good reason to do so "having regard in particular to the rules of private international law…". I share the difficulties of others in understanding the precise import of that expression. (There is an illuminating discussion of this subject in Totty and Moss, *Insolvency* Cap H9, by Ian Fletcher and Nick Segal). It needs to be borne in mind that the forms of assistance requested may take many forms, procedural or substantive, to some of which Private International Law may provide a more obvious solution than others. However, in my view it is for those seeking to justify a departure from English principles, to show that there is some rule of Private International Law which so requires. I am also prepared to accept, as the Chancellor has suggested, that, apart from any such rule, it may also be possible to point to some countervailing benefit sufficient to justify such a departure, for example overcoming some practical difficulty, or reducing cost. But again it must be for those relying on such considerations to demonstrate them by appropriate evidence.

72. On the facts of the present case, neither of those factors is in play. It has not been shown that there is any rule of Private International Law, or any other countervailing benefit, that requires us to disregard the principles applicable under English Insolvency Law. In those circumstances, in my view, there is only one answer we can properly give.

Note 1 Because these creditors would be entitled to receive distributions from reinsurance and retrocession assets in England without hotchpot for receipts from other non-insurance assets in Australia. [Back]

Note 2 Because though these creditors will benefit from distributions from reinsurance and retrocession assets in both England and Australia they will lose the right to hotchpot under English law in respect of distributions under s.562A to insurance creditors in Australia. [Back]

Note 3 These creditors would get the benefit of distributions in Australia under s.562A but without any similar disadvantage. [Back]

Note 4 Because on remission other Australian creditors will lose the right to hotchpot available to them in the case of distributions from English Assets in a winding up in England [Back]

Note 5 These creditors would lose the benefit of hotchpot under English law and would suffer from the priority afforded to Insurance Creditors under s.562A. [Back]
