Ch.

In re BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A. (No. 10)

[Ch. No. 007615 of 1991]

1996 July 16, 17, 18, 22, 23, 24, 25; Aug. 6

Sir Richard Scott V.-C.

Insolvency—Winding up—Set-off—Principal liquidation in foreign country of incorporation—Ancillary liquidation in England—Mutual set-off allowed by English law but not by foreign law—Whether English liquidators to retain funds to satisfy set-off in English liquidation—Whether jurisdiction to disapply set-off rule—Insolvency Rules 1986 (S.I. 1986 No. 1925), r. 4.90

The bank, which transacted a large part of its business in the United Kingdom and which formed part of an international group carrying on banking business through branches in 75 countries, went into liquidation in Luxembourg, the country of its incorporation. Ten days later an order was made in England that the bank be wound up by the English court under the Insolvency Act 1986. It was subsequently agreed between the bank's liquidators in Luxembourg, in England and in various other jurisdictions that 48·5 per cent. of the global realisations of the bank's assets should be distributed by the English liquidators, who had at their disposal substantial proceeds of realisations of English assets. The liquidators also agreed that the liquidation worldwide should be a joint enterprise with all creditors wherever situate receiving the same level of dividend from a central pool. The English liquidators wished to release the funds at their disposal to the Luxembourg liquidators for a distribution among creditors worldwide pari passu, with the money, once transferred to Luxembourg, being distributed according to the principles of Luxembourg insolvency law. Luxembourg insolvency law disallowed set-off for a debtor who was simultaneously owed money by the insolvent, whereas rule 4.90 of the Insolvency Rules 1986[1] provided for mutual credit and set-off, permitting a creditor/debtor or creditor who was also a debtor to set off his debt from the sum owed to him and prove any balance.

On the application of the English liquidators for directions whether, before releasing the funds to the Luxembourg liquidators, they should retain sufficient funds to satisfy debtors and creditors entitled to take advantage of any set-off available to them under rule 4.90:—

Held, that where a foreign company was in liquidation in its country of incorporation, any winding up in England would be ancillary thereto; that the functions of the ancillary liquidators were to realise the English assets, to settle a list of English creditors and to transmit the assets and the list to the principal liquidators to enable a dividend to be declared and paid; but that the ancillary nature of such an English winding up did not relieve the English court of the obligation to apply English insolvency

[1] Insolvency Rules 1986, r. 4.90: "(1) This rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor . . . (2) An account shall be taken . . . and the sums due from one party shall be set off against the sums due from the other. . . . (4) Only the balance . . . of the account is provable in the liquidation. . . ."

law to the resolution of any issue arising in the winding up in the English court; that there was no power to disapply rule 4.90 of the Insolvency Rules 1986 regarding set-off or any other substantive rule forming part of the statutory scheme under the Insolvency Act 1986 or those Rules; that, in the circumstances, it would not be appropriate to disapply rule 4.90 even if there were jurisdiction to do so; and that, accordingly, the English liquidators would be directed to retain sufficient funds to make provision for the dividend that net creditors entitled to take advantage of the English insolvency rules of set-off would receive in the English liquidation, but that no provision need be made for net debtors (post, pp. 239E–F, 246B–E, 247A–B, D–G, 249C–G, 250A–B, 251D–E).

The following cases are referred to in the judgment:

Alfred Shaw & Co. Ltd., In re; Ex parte Mackenzie (1897) 8 Q.L.J. 93

Commercial Bank of South Australia, In re (1886) 33 Ch.D. 174

English, Scottish, and Australian Chartered Bank, In re [1893] 3 Ch. 385

Federal Bank of Australia Ltd., In re (1893) 62 L.J.Ch. 561; 68 L.T. 728, C.A.

Felixstowe Dock & Railway Co. v. United States Lines Inc. [1989] Q.B. 360; [1989] 2 W.L.R. 109; [1988] 2 All E.R. 77

Fitzgerald v. Williams [1996] Q.B. 657; [1996] 2 W.L.R. 447; [1996] 2 All E.R. 171, C.A.

Hibernian Merchants Ltd., In re [1958] Ch. 76; [1957] 3 W.L.R. 486; [1957] 3 All E.R. 97

North Australian Territory Co. Ltd. v. Goldsbrough Mort and Co. Ltd. (1889) 61 L.T. 716

Queensland Mercantile Agency Co. Ltd., In re (1888) 58 L.T. 878

Sedgwick Collins and Co. v. Rossia Insurance Co. of Petrograd [1926] 1 K.B. 1, C.A.

Stein v. Blake [1996] A.C. 243; [1995] 2 W.L.R. 710; [1995] 2 All E.R. 961, H.L.(E.)

Suidair International Airways Ltd., In re [1951] Ch. 165; [1950] 2 All E.R. 920

Vocalion (Foreign) Ltd., In re [1932] 2 Ch. 196

The following additional cases were cited in argument:

Abidin Daver, The [1984] A.C. 398; [1984] 2 W.L.R. 196; [1984] 1 All E.R. 470, H.L.(E.)

Aectra Refining and Manufacturing Inc. v. Exmar N.V. [1994] 1 W.L.R. 1634, C.A.

African Farms Ltd., In re (1906) T.S. 373

Alabama, New Orleans, Texas and Pacific Junction Railway Co., In re [1891] 1 Ch. 213, C.A.

Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50; [1983] 3 W.L.R. 241; [1983] 2 All E.R. 884, H.L.(E.)

Aratra Potato Co. Ltd. v. Egyptian Navigation Co. [1981] 2 Lloyd's Rep. 119, C.A.

Australian Federal Life and General Assurance Co. Ltd., In re [1931] V.R. 317

Azoff-Don Commercial Bank, In re [1954] Ch. 315; [1954] 2 W.L.R. 654; [1954] 1 All E.R. 947

Baden v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France S.A. (Note) [1993] 1 W.L.R. 509; [1992] 4 All E.R. 161

Banco de Portugal v. Waddell (1880) 5 App.Cas. 161, H.L.(E.)

Bank of Credit and Commerce International S.A. (No. 2), In re [1992] B.C.L.C. 579

A
Bank of Credit and Commerce International S.A. (No. 3), In re [1993] B.C.L.C. 106; [1993] B.C.L.C. 1490, C.A.
Bank of Credit and Commerce International S.A. (No. 8), In re [1996] Ch. 245; [1996] 2 W.L.R. 631; [1996] 2 All E.R. 121, C.A.
Bankers Trust International Ltd. v. Todd Shipyards Corporation [1981] A.C. 221; [1980] 3 W.L.R. 400; [1980] 3 All E.R. 197, P.C.
Banque des Marchands de Moscou (Koupetschesky) v. Kindersley, In re [1951] Ch. 112; [1952] 1 All E.R. 1269, C.A.
B
Banque Indosuez S.A. v. Ferromet Resources Inc. [1993] B.C.L.C. 112
Blain, Ex parte; In re Sawers (1879) 12 Ch.D. 522, C.A.
Clark v. Oceanic Contractors Inc. [1983] 2 A.C. 130; [1983] 2 W.L.R. 94; [1983] 1 All E.R. 133, H.L.(E.)
Commercial Bank of India, In re (1868) L.R. 6 Eq. 517
Compania Merabello San Nicholas S.A., In re [1973] Ch. 75; [1972] 3 W.L.R. 471; [1972] 3 All E.R. 448
C
Continental Bank N.A. v. Aeakos Compania Naviera S.A. [1994] 1 W.L.R. 588; [1994] 2 All E.R. 540, C.A.
Gibbs (Antony) & Sons v. La Société Industrielle et Commerciale des Métaux (1890) 25 Q.B.D. 399, C.A.
Halesowen Presswork & Assemblies Ltd. v. National Westminster Bank Ltd. [1972] A.C. 785; [1972] 2 W.L.R. 455; [1972] 1 All E.R. 641, H.L.(E.)
Halifax Building Society v. Registry of Friendly Societies [1978] 1 W.L.R.
D
1544; [1978] 3 All E.R. 403
Hanak v. Green [1958] 2 Q.B. 9; [1958] 2 W.L.R. 755; [1958] 2 All E.R. 141, C.A.
Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd. [1993] Q.B. 701; [1993] 3 W.L.R. 42; [1993] 3 All E.R. 897, C.A.
I.I.T., In re (1975) 58 D.L.R. (3d) 55
International Tin Council, In re [1987] Ch. 419; [1987] 2 W.L.R. 1229; [1987]
E
1 All E.R. 890
Jabbour (F. & K.) v. Custodian of Israeli Absentee Property [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145
Jarvis Conklin Mortgage Co., In re (1895) 11 T.L.R. 373
Joachimson (N.) v. Swiss Bank Corporation [1921] 3 K.B. 110, C.A.
Klæbe, In re; Kannreuther v. Geiselbrecht (1884) 28 Ch.D. 175
Kwok v. Commissioner of Estate Duty [1988] 1 W.L.R. 1035, P.C.
F
Levasseur v. Mason and Barry Ltd. (1890) 63 L.T. 700
Libyan Arab Foreign Bank v. Bankers Trust Co. [1989] Q.B. 728; [1989] 3 W.L.R. 314; [1989] 3 All E.R. 252
M.S. Fashions Ltd. v. Bank of Credit and Commerce International S.A. [1993] Ch. 425; [1993] 3 W.L.R. 220; [1993] 3 All E.R. 969, Hoffmann L.J. and C.A.
Macfadyen (P.) & Co., In re; Ex parte Vizianagaram Co. Ltd. [1908] 1 K.B.
G
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Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corporation [1986] Ch. 482; [1986] 2 W.L.R. 453; [1986] 1 All E.R. 653
Matheson Bros. Ltd., In re (1884) 27 Ch.D. 225
Melbourn, Ex parte; In re Melbourn (1870) L.R. 6 Ch.App. 64
Mersey Steel and Iron Co. v. Naylor, Benzon & Co. (1882) 9 Q.B.D. 648, C.A.
N.F.U. Development Trust Ltd., In re [1972] 1 W.L.R. 1548; [1973] 1 All E.R.
H
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National Bank of Greece & Athens S.A. v. Metliss [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608, H.L.(E.)
National Benefit Assurance Co., In re [1927] 3 D.L.R. 289
New York Life Insurance Co. v. Public Trustee [1924] 2 Ch. 101, C.A.

New Zealand Loan and Mercantile Agency Co. Ltd. v. Morrison [1898] A.C. 349, P.C.

Oriental Inland Steam Co., In re; Ex parte Scinde Railway Co. (1874) L.R. 9 Ch.App. 557

Paramount Airways Ltd., In re [1993] Ch. 223; [1992] 3 W.L.R. 690; [1992] 3 All E.R. 1, C.A.

Real Estate Development Co., In re [1991] B.C.L.C. 210

Rolls Razor Ltd. v. Cox [1967] 1 Q.B. 552; [1967] 2 W.L.R. 241; [1967] 1 All E.R. 397, C.A.

Rossano v. Manufacturers' Life Assurance Co. [1963] 2 Q.B. 352; [1962] 3 W.L.R. 157; [1962] 2 All E.R. 214

Russian Bank for Foreign Trade, In re [1933] Ch. 745

Sefel Geophysical Ltd., In re (1988) 54 D.L.R. (4th) 117

Smith v. Buchanan (1800) 1 East 6

Sovereign Life Assurance Co. v. Dodd [1892] 2 Q.B. 573, C.A.

Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843, H.L.(E.)

Standard Insurance Co. Ltd., In re [1968] Qd.R. 118

Union Theatres Ltd., In re (1933) 35 W.A.L.R. 89

APPLICATION

The English liquidators of the Bank of Credit and Commerce International S.A. ("B.C.C.I.") applied for directions, inter alia, that prior to (a) the English liquidators transmitting to the Luxembourg liquidators the proceeds of the realisations of B.C.C.I. property (as defined in the pooling agreement) now or hereafter held by the English liquidators and/or (b) the English liquidators authorising funds available to them and now or hereafter held by or under the control of the Luxembourg liquidators and the Cayman liquidators to be distributed by way of dividend, the English liquidators be authorised and directed (1) to make a provision of U.S.$427m. in respect of the potential rights of set-off available under English law to persons having material dealings with the English branches of B.C.C.I. outstanding at 3 January 1992; (2) out of the provision referred to in paragraph (1) to pay first and subsequent dividends to persons having a deposit with, or material claim arising out of a transaction with, the English branches of B.C.C.I. who would (applying English insolvency rules of set-off) be creditors of B.C.C.I. as at 3 January 1992, at the same time and at the same rate as the Luxembourg liquidators pay first and subsequent dividends to creditors of B.C.C.I.; and (3) to retain the remainder of the provision referred to in paragraph (1) and deal with the same in accordance with the further directions of the court.

The facts are stated in the judgment.

Michael Crystal Q.C., Martin Pascoe and *Fidelis Oditah* for the English liquidators of B.C.C.I. The making of a winding up order by the English court, under the Insolvency Act 1986 and the Insolvency Rules 1986, as amended, brings into operation a statutory scheme for dealing with the assets of the company subject to the order: see *In re International Tin Council* [1987] Ch. 419, 445F–447B. As to the winding up of foreign companies as unregistered companies, see sections 221, 229 of the Act 1986 and *In re International Tin Council* [1987] Ch. 419, 446D.

A The English court, so far as it can properly do so, will assist the foreign court having the conduct of the principal liquidation of a company so as to ensure that all creditors, irrespective of nationality or location, are able to share in the proceeds of realisation of the insolvent company's assets worldwide. However, where the English court conducts an ancillary liquidation it must do so according to English law: see *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, 394; *In re Suidair* B *International Airways Ltd.* [1951] Ch. 165, 173–174; *Felixstowe Dock & Railway Co. v. United States Lines Inc.* [1989] Q.B. 360, 389C; Lord Hoffmann, "Cross Border Insolvency" (the 1996 Denning Lecture, 18 April 1996) and *In re Alfred Shaw & Co. Ltd., Ex parte Mackenzie* (1897) 8 Q.L.J. 93. [Reference was also made to *In re Commercial Bank of South Australia* (1886) 33 Ch.D. 174, 178; *North Australian Territory Co.* C *Ltd. v. Goldsbrough Mort and Co. Ltd.* (1889) 61 L.T. 716, 717; *In re Federal Bank of Australia Ltd.* (1893) 62 L.J.Ch. 561, 563 and *Sedgwick Collins and Co. v. Rossia Insurance Co. of Petrograd* [1926] 1 K.B. 1, 13.] In those cases where the English court limits the functions of its liquidator to collection of the English assets, the English court is recognising the practical limitations of the English winding up order abroad, namely, that other countries, in accordance with their own rules of private international D law, may not recognise the English winding up order or the title of the English liquidator: see *In re International Tin Council* [1987] Ch. 419, 446G–447B. Comity, that courteous and friendly reciprocal understanding and forbearance by which each nation respects the law, institutions and usages of another, does not require the English court to depart from the terms of the statutory scheme: see *In re Sefel Geophysical Ltd.* (1988) E 54 D.L.R. (4th) 117, 124, 126.

In an ancillary winding up in England, the English court will recognise and give effect to rights acquired under the English statutory scheme at the date of the winding up order. The court may allow realisations to be transmitted to the principal liquidator if the principal liquidator is in a position to provide satisfactory undertakings, or security, sanctioned by the court of the principal liquidation, to distribute the realisations in F accordance with the local statutory scheme: see *In re Standard Insurance Co. Ltd.* [1968] Qd.R. 118 and *In re Australian Federal Life and General Assurance Co. Ltd.* [1931] V.R. 317. Where the English court of the ancillary liquidation directs the ancillary liquidator to transmit the net proceeds of realisation of local assets to the principal liquidator, it does so subject to the payment of claims which, by its own law, are entitled to G priority: see *In re National Benefit Assurance Co.* [1927] 3 D.L.R. 298, 301–302; *In re Union Theatres Ltd.* (1933) 35 W.A.L.R. 89 and *In re Standard Insurance Co. Ltd.* [1968] Qd.R. 118. The court will also make provision for non-preferential fiscal claims where these would not be recognised in the liquidation abroad.

English insolvency set-off is automatic and self-executing, taking effect without the need for submission of any proof of debt: see *Stein v. Blake* H [1996] A.C. 243, 251D–E, 252B–C, 253F, 258D. It is also mandatory. Thus, it is not possible to contract out of rule 4.90 of the Insolvency Rules 1986: *Rolls Razor Ltd. v. Cox* [1967] 1 Q.B. 552, 570B; *Halesowen Presswork & Assemblies Ltd. v. National Westminster Bank Ltd.* [1972] A.C. 785 and

Stein v. Blake [1996] 1 A.C. 243, 254E–F. [Reference was also made to the Contracts (Applicable Law) Act 1990 and articles 2(e), 3, 7(2), 10(1)(d), 16 of the Rome Convention.]

Nigel Davis Q.C. for the Arab Banking Corporation ("A.B.C."), a net creditor of B.C.C.I. The starting point is that the winding up of a company under the Insolvency Act 1996 is governed by English law: *Dicey & Morris, The Conflict of Laws* (12th ed.) (1993), pp. 1131–1133. Under English law any creditor may prove in an English liquidation, whether or not the company in liquidation is foreign, whether or not the creditor is foreign, whether or not the law of the claim is foreign: see *Dicey and Morris, The Conflict of Laws,* p. 1169; *Ex parte Melbourn; In re Melbourn* (1870) 6 Ch. App. 64, 69–70; *In re Klæbe* (1884) 28 Ch.D. 175, 180; *In re Azoff-Don Commercial Bank* [1954] 1 Ch. 315, 333 and rule 4.90 of the Rules of 1986.

On its true construction rule 4.90 (the insolvency set-off rule) is mandatory and automatic and binds both liquidators and creditors: see *Stein v. Blake* [1996] A.C. 243; *In re M.S. Fashions* [1993] Ch. 425 and *In re B.C.C.I. (No. 8)* [1996] 2 W.L.R. 631, 637C. Thus a proving creditor (or liquidator) may only claim the balance of what is due. This is so even though A.B.C.'s credits arose abroad (under dealings with foreign branches of B.C.C.I.) and its debt was incurred in favour of the London branch of B.C.C.I.; the insolvency set-off rule applies in all cases. In any event, A.B.C.'s relationship with B.C.C.I. is sufficiently closely connected with England for it to be just and proper for A.B.C. to have the benefit of the more generous rules of English set-off: see *In re Paramount Airways Ltd.* [1993] Ch. 223, 239H–240A, 242C–D.

The fact that under Luxembourg law there is no provision corresponding to rule 4.90 cannot operate to displace the application of the insolvency set-off rule in the English liquidation: see *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, 394 and *In re Suidair International Airways Ltd.* [1951] Ch. 165, 173–174. That the law of a foreign principal liquidation can not govern or determine the mode of administration of an English ancillary liquidation is further illustrated by the position on questions of priorities. The general rule is that the English liquidator applies English law as to priorities: see *Ex parte Melbourn; Bankers Trust International Ltd. v. Todd Shipyards Corporation* [1981] A.C. 221, 230A–235G and *In re Vocalion (Foreign) Ltd.* [1932] 2 Ch. 196, 207. Thus the English liquidator ordinarily discharges local preferential claims before remitting assets to the principal liquidator. This approach to priorities applies equally to set-off.

Accordingly the court has no power in effect to disapply the operation of rule 4.90 by permitting remittance of the collections of the English liquidators to the Luxembourg liquidators without provision for set-off. Alternatively, even if the Court does have power so to order, then in its discretion it should not do so in this case. Such a course would otherwise be unfairly prejudicial to creditors proving in England. [Reference was made to *Felixstowe Dock & Railway Co. Inc. v. United States Line Inc.* [1989] Q.B. 360.]

Hilary Heilbron Q.C., for Mr. Ismail of the Rising Group, a net debtor, adopted the argument of A.B.C.

A *John Jarvis Q.C.* and Sandry Shandro, solicitor, for the Deposit Protection Board. The board's statutory right under section 62(3) of the Banking Act 1987 to recoup compensation payments will be overriden by the Luxembourg liquidators if no provision is made by the English liquidators. The board should not be treated like an ordinary creditor. It is given statutory rights which the English liquidators, as officers of the court, are bound to honour. The court should ensure that the scheme, B enacted as a matter of English public policy to provide protection for depositors, is enforced.

The court of the ancillary winding up will not permit funds to be transmitted to the jurisdiction of the court of the principal winding up without first making provision for the local secured, preferential and statutory creditors: see *In re National Benefit Assurance Co.* [1927] C 3 D.L.R. 289, 302; *In re Queensland Mercantile Agency Co. Ltd.* (1888) 58 L.T. 878, 879; *In re African Farms Ltd.* (1906) T.S. 373, 377, 381, 382, 384, 392 and *In re Union Theatres Ltd.*, 35 W.A.L.R. 89, 91.

In cases of concurrent ancillary and principal liquidations it is usually the case that claims are admitted according to the procedures applicable in each jurisdiction: see *In re Macfadyen & Co.* [1908] 1 K.B. 675, 676; *In re Standard Insurance Co. Ltd.* [1968] Qd.R. 118, 120–121 and *In re* D *Commercial Bank of South Australia,* 33 Ch.D. 174, 178.

Ajmalul Hossain for the B.C.C.I. campaign committee representing the interests of all ex-employees of B.C.C.I. worldwide. The employees have a right of set-off under their contracts of employment, so that they can set off outstanding loans made by B.C.C.I. for the purchase of their homes as perquisites of their employment against arrears of salary, notice pay, E relocation expenses, termination benefits etc. Alternatively, they have an equitable right of set-off which will result in a net debtor or creditor position being achieved before the date of liquidation: see *Hanack v. Green* [1958] 2 Q.B. 9 and *Aectra Refining and Manufacturing Inc. v. Exmar N.V.* [1994] 1 W.L.R. 1634, 1650A. Thus by application of the English law of contractual set-off or equitable set-off the employees end up in a net debtor or net creditor position long before the date of the liquidation.

F In any event, the English liquidators' argument on the issue of insolvency set-off is correct.

Anthony Trace and *Michael Gibbon*, for the joint liquidators of B.C.C. Gibraltar Ltd., adopted the arguments of the English liquidators on set-off.

Robin Dicker for C.M. Fashions (Leeds) Ltd., a representative net G creditor, adopted the arguments of the English liquidators.

Simon Mortimore Q.C. for the Bank of China (a net creditor), adopting the argument of the English liquidators. Under English law the statutory scheme may only be departed from where (1) there is a "compromise or arrangement between a company and its creditors" within section 425 of the Companies Act 1985; (2) there is a voluntary arrangement under Part I of the Insolvency Act 1986; and (3) there is a "compromise or H arrangement with creditors or persons claiming to be creditors" sanctioned by the court in accordance with section 167(1) of and paragraph 2 of Part 1 of Schedule 4 to the Act of 1986. [Reference was made to *In re Alabama, New Orleans, Texas and Pacific Junction Railway Co.* (1891)

1 Ch. 213, 239, 243, 244, 245, 247; *Sovereign Life Assurance Co. v. Dodd* (1892) 2 Q.B. 573, 580, 583; *In re N.F.U. Development Trust Ltd.* [1972] 1 W.L.R. 1548 and *Halifax Building Society v. Registry of Friendly Societies* [1978] 1 W.L.R. 1544.]

The indebtedness of Bank of China to B.C.C.I. arising out of the deposit surplus is closely connected with the English jurisdiction. English law governs the deposit surplus debt since the normal rules are that (a) a deposit is payable at the place where it is made and (b) loans made by a bank are subject to the law of the place where they are to be repaid. [Reference was made to *N. Joachimson v. Swiss Bank Corporation* [1921] 3 K.B. 110, 121, 127, 129, 130; *New York Life Insurance Co. v. Public Trustee* [1924] 2 Ch. 101, 111, 112, 115, 116, 120, 121; *Jabbour v. Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139, 146; *Rossano v. Manufacturers Life Insurance* [1963] 2 Q.B. 352, 378–379; *Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corporation* [1986] Ch. 482, 494; *Kwok v. Commissioner of Estate Duty* [1988] 1 W.L.R. 1035, 1041, 1042 and *Libyan Arab Foreign Bank v. Bankers Trust Co.* [1989] Q.B. 728, 746, 747.] Since 1 April 1991 the position in England is governed by the Contracts (Applicable Law) Act 1990 and the Rome Convention: see articles 1, 3, 4, 10 of the Convention.

Where rule 4.90 applies it does so automatically. It is self-executing. To the extent that it applies it extinguishes the debt: see *Stein v. Blake* [1996] A.C. 243. If the debt is not subject to English law and is not sued for in England it will not be discharged by virtue of the winding up of B.C.C.I. S.A. in England and the application of rule 4.90. [Reference was made to *Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399; *New Zealand Loan and Mercantile Agency Co. Ltd. v. Morrison* [1898] A.C. 349, 359 and *In re Russian Bank for Foreign Trade* [1933] Ch. 745, 767.]

Susan Prevezer for B.C.C.I. S.A. Isle of Man and B.C.C.I. S.A. Scotland. Creditors who dealt with Scottish or Isle of Man branches should have provision made for them out of English assets even though they had no dealings with English branches as the insolvency regimes there have similar set-off rules to rule 4.90.

Ian Geering Q.C. and *Richard Snowden* for the Luxembourg liquidators of B.C.C.I. An English winding up order is of worldwide effect and does not adopt a policy of "ring fencing" branches of an international company by local liquidators: see *In re Bank of Credit and Commerce International S.A. (No. 2)* [1992] B.C.L.C. 579 and *In re B.C.C.I. S.A. (No. 3)* [1993] B.C.L.C. 1490.

The English court, in common with the courts in many other common law jurisdictions, will generally recognise a liquidator of a foreign company appointed by the court of the place of incorporation. Such a liquidator will be recognised as having the authority to administer the assets of the company worldwide: see *In re I.I.T.* (1975) 58 D.L.R. (3d) 55 and *Baden v. Société Générale pour Favoriser le Développement du Commerce et de L'Industrie en France S.A. (Note)* [1993] 1 W.L.R. 509. In order to avoid a conflict of liquidations and laws in the case of concurrent insolvencies and to promote equal treatment of unsecured creditors worldwide, the winding up in England will usually be treated as ancillary to the winding

A up in the place of incorporation: see *In re Matheson Bros. Ltd.* (1884) 27 Ch.D. 225; *In re Commercial Bank of South Australia,* 33 Ch.D. 174, 178; *In re Federal Bank of Australia Ltd.*, 62 L.J. Ch. 561; *In re National Benefit Assurance Co.* [1927] 3 D.L.R. 289 and *In re Vocalian (Foreign) Ltd.* [1932] Ch. 192, 206–207. [Reference was also made to *Sedgwick Collins & Co. v. Rossia Insurance Co. of Petrograd* [1926] 1 K.B. 1, 16; *In re Matheson Bros. Ltd.* (1884) 27 Ch.D. 225; *In re Commercial Bank of South*
B *Australia,* 33 Ch.D. 174 and *Banque Indosuez S.A. v. Ferromet Resources Inc.* [1993] B.C.L.C. 112.] Orders in ancillary liquidations necessarily involve a significant departure from the statutory scheme of administration of the estate of an insolvent company under the Insolvency Act 1986. Directing that assets, once realised, be remitted to a foreign liquidator for distribution by him, instead of being distributed to creditors by the English
C liquidator, is itself a departure from section 143(1) of the Act of 1986 and rules 4.179 and 4.180 of the Rules of 1986.

The English court has power to make any order which it thinks fit on the hearing of a winding up petition: section 125(1) of the Act of 1986. It also has, since 1986, power to review, rescind or vary any order made by it in the exercise of its winding up jurisdiction: see rule 7.47(1). In any event the court always has an inherent power to control its own procedures
D and officers.

The court's approach to ancillary liquidations is consistent with the established principles of statutory construction. There is a presumption of construction of an English statute that unless the contrary is expressly enacted or plainly implied, it is applicable only to English subjects or to those who have submitted to the jurisdiction: see *In re Paramount Airways*
E *Ltd.* [1993] Ch. 223, 232B–233C; *Ex parte Blain* (1879) 12 Ch.D. 522, 526 and *Clark v. Oceanic Contractors Inc.* [1983] 2 A.C. 130, 145, 152.

Creditors of B.C.C.I. do not have any set-off rights under rule 4.90 which must be protected as a matter of discretion. Rule 4.90 is merely part of a code of procedure whereby insolvent estates are administered in a proper and orderly way: see *Halesowen Presswork & Assemblies Ltd. v. National Westminster Bank Ltd.* [1972] A.C. 785.

F In 1992 the English liquidators decided and the English courts determined that the insolvent estate of B.C.C.I. S.A. was to be administered in Luxembourg in accordance with Luxembourg law and there were to be no processes of proof and distribution of assets in England: see clause 3.1 and 3.11 of the pooling agreement. The pooling agreement was a compromise binding on all creditors by which they gave
G up rights to prove debts with the benefit of rule 4.90. In return creditors obtained the benefits the agreement offered such as worldwide co-operation between liquidators and were given the possibility that provisions would be made in the exercise of the court's discretion. Accordingly, from the execution of the pooling agreement in 1994, those parts of the English procedural code set out in the Insolvency Rules as to proof of debts and distributions in a domestic English liquidation, including rule 4.90, were
H disapplied and had no further effect: see *In re B.C.C.I. S.A. (No. 2)* [1992] B.C.L.C. 715, 719–720 and [1992] B.C.L.C. 715, 733–744F. The English court has a discretionary power to disapply in an ancillary English liquidation all or any parts of the statutory insolvency scheme. On the

issue of discretion, no provisions ought to be made as fairness demands that all creditors worldwide be dealt with equally under one legal system, i.e. Luxembourg law.

John Brisby Q.C. for Mr. Peter Ackermann, a creditor with no loan to set off. The court has an inherent power to disapply rule 4.90 or any other provisions of the statutory insolvency scheme. Alternatively, the court may make such order as it thinks fit under section 125(1) of the Act of 1986 and this could include disapplying rule 4.90 in an ancillary liquidation.

Whatever the effect of *Stein v. Blake* [1996] A.C. 243, the Insolvency Rules as a whole are procedural. It is only in this overall procedural context that rule 4.90 creates substantive rights. The court has power to disapply procedural rules either in whole or in part in order to avoid the administration of the ancillary English liquidation coming into conflict with the rules of the principal liquidation. It would not even be possible for the court to permit the English liquidators (or any of the liquidators in ancillary liquidations in the reported cases over the past 100 years) to transfer the funds at their disposal to the Luxembourg liquidators if this were not so. If the court has power to order transmission of funds to enable a pari passu distribution to worldwide creditors to be achieved it has power to disapply rule 4.90 and should do so.

Barbara Dohmann Q.C. and *Tom Beazley* for the English liquidation committee. There is nothing exceptional or extraordinary in the English court exercising its jurisdiction in a restricted or limited way in support of foreign proceedings, or staying its proceedings so that a matter can be determined by a more appropriate court. There is indeed a presumption against multiplication of related litigation in different jurisdictions. [Reference was made to *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, articles 21, 23, 24; *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General Insurance Co. Ltd.* [1993] Q.B. 701, 724E, 726B; *Continental Bank N.A. v. Aeakos S.A.* [1994] 1 W.L.R. 588, 593; *In re Commercial Bank of India* (1868) L.R. 6 Eq. 517; *In re Banque des Marchands de Moscou (Koupetschesky) v. Kindersley* [1951] Ch. 112, 126; see *In re Real Estate Development* [1991] B.C.L.C. 210; *In re Compania Merabello San Nicholas S.A.* [1973] Ch. 75; *In re Matheson Bros. Ltd.*, 27 Ch.D. 225, 230; *In re Commercial Bank of South Australia*, 33 Ch.D. 174, 178; *In re Queensland Mercantile Agency Co. Ltd.*, 58 L.T. 878; *In re Jarvis Conklin Mortgage Co.* (1895) 11 T.L.R. 373; *Levasseur v. Mason and Barry Ltd.* (1890) 63 L.T. 700; *In re Federal Bank of Australia Ltd.*, 62 L.J.Ch. 561; *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, 394; *Sedgwick Collins & Co. v. Rossia Insurance Co. of Petrograd* [1926] 1 K.B. 1, 13; *In re Vocalion (Foreign) Ltd.* [1932] 2 Ch.D. 196, 207; *In re Hibernian Merchants Ltd.* [1958] 1 Ch. 76 and *In re Suidair International Airways Ltd.* [1951] 1 Ch. 165.]

The English liquidation is not a full winding up taking place in accordance with the Insolvency Act 1986 but is subject to the liquidation in Luxembourg under Luxembourg law as agreed by the liquidators in 1992 and endorsed by the courts here and elsewhere. The fact that foreign

A law or procedure is different from English law or procedure does not render it inferior or unjust. Indeed it is only in exceptional cases that such comparisons are permissible at all. [Reference was made to *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.* [1984] A.C. 50; *Aratra Potato Co. Ltd. v. Egyptian Navigation Co.* [1981] 2 Lloyd's Rep. 119 and *The Abidin Daver* [1984] A.C. 398.]

B The fact that in *Stein v. Blake* [1996] A.C. 243 and *In re B.C.C.I. S.A. (No. 8)* [1996] Ch. 245, rule 4.90 was described as mandatory and automatic does not establish that the rule is of such importance that it has to be applied by the English court in an ancillary winding up. The English courts have not, however, recognised the authority of the foreign court of the place of incorporation to discharge the contractual obligations of the company where the contract was governed by English law. [Reference was

C made to *Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux,* 25 Q.B.D. 399; *Smith v. Buchanan* (1800) 1 East 6; *National Bank of Greece & Athens S.A. v. Metliss* [1958] A.C. 509; *Banco de Portugal v. Waddell* (1880) 5 App.Cas. 161; *In re Oriental Inland Steam Co.* (1874) L.R. 9 Ch.App. 557 and *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1882) 9 Q.B.D. 648.]

D The committee is greatly concerned by the prospect that at this very late stage in the liquidation it might be suggested that the European Court should decide an issue or issues. Such determination would inevitably cause considerable further delay. If the application of English insolvency set off rules might be contrary to European law [reference was made to *Fitzgerald v. Williams* [1996] Q.B. 657], that in itself militates against such application because of the delay that would be entailed in testing the

E matter. This is a legitimate consideration in circumstances where creditors have received no dividend at all after such a long time.

Cur. adv. vult.

F 6 August. SIR RICHARD SCOTT V.-C. handed down the following judgment. This hearing has been occasioned by an application made to the court by the English liquidators of Bank of Credit and Commerce International S.A. ("B.C.C.I.") for directions as to whether, before: (i) releasing funds already held in the central pool (which I will later explain) to the Luxembourg liquidators of B.C.C.I. for payment of dividends to creditors; and (ii) transmitting to the Luxembourg liquidators

G funds representing the proceeds of realisations made by the English liquidators, the English liquidators should make provision for various matters. The English liquidators also seek directions authorising them to pay out of the sums they retain certain limited dividends at the same time and at the same rate as dividends are paid by the Luxembourg liquidators. Although it is no more than an application for directions, the application has raised some important and very difficult issues of principle. It is,

H moreover, an application of very considerable practical importance to the many thousands of B.C.C.I. depositors who have been waiting for over five years for some dividend to be paid to them. The main issue for decision is whether or to what extent this court can disapply rule 4.90 of

the Insolvency Rules 1986 in order to allow the rules of Luxembourg insolvency regarding set-off to apply.

I do not think I can adequately describe the issues that I must deal with without first some rehearsal of the history of the B.C.C.I. liquidation. B.C.C.I. was incorporated in Luxembourg and formed part of a group that carried on a banking business on an international scale. B.C.C.I. was the wholly owned subsidiary of B.C.C.I. Holdings (Luxembourg) S.A. ("B.C.C.I. Holdings"). Some 77 per cent. of the shares in B.C.C.I. Holdings were owned by the ruler of the emirate of Abu Dhabi, the Crown Prince of the emirate and other Abu Dhabi government entities. Another wholly-owned subsidiary of B.C.C.I. Holdings was Bank of Credit and Commerce International (Overseas) Ltd. ("B.C.C.I. Overseas"). B.C.C.I. Overseas was incorporated in the Cayman Islands. B.C.C.I. and B.C.C.I. Overseas carried on the group's banking business in many parts of the world. In most countries the business was carried on through branches. In some countries, however, business was carried on through the medium of subsidiary companies. For example, B.C.C. Gibraltar Ltd. was incorporated in Gibraltar as a wholly owned subsidiary of B.C.C.I. for the purpose of carrying on the business in Gibraltar.

In 1972 the centre of operations of the B.C.C.I. group was based in Abu Dhabi. Shortly thereafter it was moved to London. But in 1987 the group's central treasury operations were moved from London back to Abu Dhabi and in the summer of 1990 the central management of the group was also moved from London to Abu Dhabi. By June 1991 the B.C.C.I. group operated in some 69 countries. B.C.C.I. had some 47 branches, including 24 in the United Kingdom, covering 13 countries. B.C.C.I. Overseas had 63 branches covering 28 countries. Other subsidiaries or affiliates of B.C.C.I. Holdings had some 260 branches covering 30 countries.

The group collapsed in the summer of 1991. Provisional liquidators of B.C.C.I. were appointed in England on 5 July 1991 on the application of the Bank of England. Similar action was taken by other regulators around the world with the intention and effect of closing down the operations of the B.C.C.I. group. In Luxembourg a commissaire de surveillance was appointed on 8 July 1991. In the Cayman Islands a receiver was appointed over B.C.C.I. Overseas and associated companies on 5 July 1991, and on 22 July 1991 the Grand Court of the Cayman Islands appointed provisional liquidators of B.C.C.I. Overseas and of International Credit and Investment Company (Overseas) Ltd. ("I.C.I.C. Overseas"). Both the Court of Session in Scotland and the High Court of the Isle of Man appointed provisional liquidators of B.C.C.I. in their respective jurisdictions.

A petition to wind up B.C.C.I. founded on allegations contained in a draft report that had been prepared by Price Waterhouse under section 41 of the Banking Act 1987 was presented by the Bank of England on 5 July 1991. When the petition came before the court on 30 July 1991 it was adjourned for four months to enable a possible restructuring support operation to be examined. In the course of his judgment Sir Nicolas Browne-Wilkinson V.-C. referred to the nature of the problems that would have to be faced if a winding up order were to be made. He said:

"This case raises, and will continue to raise, enormous problems. B.C.C.I. is a Luxembourg bank; it is not an English bank. As

A I understand it, if a winding up goes forward the assets of B.C.C.I. worldwide will be applicable for the creditors of B.C.C.I. worldwide. The attempt to put a ring fence around the assets of the creditors to be found in any one jurisdiction is, at least under English law as I understand it, not correct and destined to failure. I believe the position will prove to be the same in most other countries and jurisdictions."

B

In dealing with an application made on 27 August 1991 on behalf of a group of creditors, Sir Nicolas Browne-Wilkinson V.-C. said:

"The second delicate aspect is the relationship between this court and the court of Luxembourg. B.C.C.I. is incorporated in Luxembourg, which prima facie is the court where the prime winding up proceedings, if it ever gets that far, will have to be conducted as being the law of the country of incorporation. Some suggestions have been made that in some way it is inappropriate that that should be the primary administration were a winding up order to be made. That is not a view with which I can concur in any way. There is nothing to indicate that the court of Luxembourg would be in some way regarded as inappropriate, if otherwise under the general law that is the right court to administer the matter."

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On 2 December 1991, when the adjourned petition came back before the court, Sir Donald Nicholls V.-C. (who had replaced Sir Nicolas Browne-Wilkinson V.-C. as Vice-Chancellor) referred to "the truly gargantuan task of preserving and realising assets of B.C.C.I. worldwide" and went on:

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"One has only to read the provisional liquidators' report to the court dated 29 November to see what a mammoth and difficult task this is. The B.C.C.I. group operated through branches or representative offices in 75 countries, each has its own legal system and some have exchange control restrictions. Further, the affairs of B.C.C.I. and Overseas are inextricably intermingled. Plainly, worldwide co-operation is essential if the assets in the different jurisdictions are to be realised to the best advantage of the creditors. Otherwise and all too obviously there is likely to be long drawn out litigation in many jurisdictions between the different parts of the B.C.C.I. group."

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He adjourned the petition to 14 January 1992.

On 3 January 1992 B.C.C.I. went into liquidation in Luxembourg, the country of its incorporation. Three liquidators were appointed. The winding up order was made by Judge Welter. In a judgment submitted to the law courts in Luxembourg on 6 December 1991 and certified on 23 January 1992 she commented that "the company . . . transacted only some 10 per cent. of its worldwide business in Luxembourg, the preponderant volume being located in the United Kingdom," that "the method of winding up adopted by the court . . . should . . . take account of the non-conflicting provisions of English law" and that "the court's

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main concern is to ensure that the rights of creditors are respected and an equal footing is maintained between them." She went on:

> "Observance of the principle of equality of creditors means that it must be expressly stated that as from the date of the said judgment, no further payment (legal, judicial or contractual) can be made for the benefit of those who are both debtors and creditors of B.C.C.I. Consequently, these creditors must pay to the liquidators the sums originally due to the credit establishment and, with regard to their debts, accept the law of the dividend should the possibility of an offset provide them, where applicable, with payment in full. The only exception to the rule banning any offset, repeatedly confirmed in the case of bankruptcy, winding up or controlled management (cf. in particular, Appeal Court, 2 March 1923, 11, 134; Luxembourg Court, 30 July 1927, 11, 554; Commercial Court of Antwerp, 2 March 1937, Pand. period. 1938, No. 226; Luxembourg Court, 23 December 1983: *Banco Ambrosiano Holding v. Banco di Napoli International* No. 1227/83 on the Roll) is where the sum owed and the debt have a common origin or relate to the same contract (cf. Luxembourg Court, 1 April 1977, 23, 556). The reference to articles 537 to 552 inclusive of the Commercial Code has the effect of regulating the rights of joint debtors, sureties, creditors under pledge and privileged creditors under moveables and mortgage and privileged creditors under immoveables, by analogy with bankruptcy."

It will be appreciated that the Luxembourg set-off rule, as stated by Judge Welter, produces a very different effect from that produced in English liquidations by rule 4.90 of the Insolvency Rules 1986. Under rule 4.90 an automatic, self-executing offset between debts owed by and debts owed to the insolvent company to and by a third party creditor/debtor takes effect. Only the net balance will remain to be proved for by the third party or, as the case may be, sued for by the company. One way of looking at the effect of rule 4.90 is that the company's asset, namely, the debt owed by the third party, becomes available to the third party as a security to set against the debt owed by the company. It follows from rule 4.90 that a creditor of the company who also owes money to the company does not have to be content simply with an eventual dividend paid on the debt owed by the company. Up to the extent of the debt that he or she owes to the company, the creditor will receive in respect of the debt owed by the company 100p in the pound. This state of affairs, an inevitable and intended consequence of rule 4.90, does not treat the creditor who owes money to the company on an equal footing with creditors who do not owe money to the company. The latter recover only a dividend. The former are credited with 100p in the pound up to the extent of their debt to the company.

Be that as it may, the order of the Luxembourg court of 3 January 1992: (i) confirmed the "dissolution and winding up" of B.C.C.I.; (ii) appointed Judge Welter as investigating judge; (iii) appointed three individuals as liquidators; and (iv) declared that "as from [the date of the judgment] no further offset may be made except in the case of linked debts arising under the same contract." The order contained, of course,

A many other provisions as well. The Luxembourg winding up order on 3 January 1992 was followed by a winding up order made in this jurisdiction on 14 January 1992. The order was that B.C.C.I. "be wound up by this court under the provisions of the Insolvency Act 1986 . . ."

One of the parties heard by the court when the English winding up order was made was the Deposit Protection Board. The board administers the Deposit Protection Scheme, a statutory scheme that was established B by section 58 of the Banking Act 1987 to provide compensation to sterling depositors in the event of insolvency of an institution authorised to take deposits under the Act. B.C.C.I. was such an institution. The level of compensation payable is an amount equal to 75 per cent. of a "protected deposit" subject to a maximum payment to any one depositor of £15,000: see section 60(1). Section 58(1) requires the board to make the C compensation payments "as soon as practicable." Under section 62 of the Act, where the board has made or is under a liability to make a compensation payment to a depositor, the insolvent institution becomes liable to the board for an amount equal to the compensation payment made, or to be made, by the board. And the liquidator of the institution comes under a statutory duty to pay to the board, until the board has been fully repaid, dividends that would otherwise have been paid to the D depositor. The collapse of B.C.C.I. led to considerable pressure on the board, both from the Government and the media, to make compensation payments to depositors as soon as possible. Claim forms were sent to depositors as early as 22 July 1991 and by the time the winding up order was made on 14 January 1992 it had become clear that a sum of many millions of pounds would have to be paid by the board as compensation E under the scheme.

On the same day as the English winding up order was made, a winding up order in respect of B.C.C.I. was made by the Court of Session in Scotland; and on 15 January 1992 the High Court in the Isle of Man, too, made a winding up order. Both in Scotland and in the Isle of Man, B.C.C.I. had carried on its banking business through branches. And, also on 14 January 1992, the Grand Court of the Cayman Islands ordered F B.C.C.I. Overseas and associated B.C.C.I. companies to be wound up.

In the meantime, liquidation proceedings were in progress in the United States. The United States, I understand, unlike England, Luxembourg and, I think, the majority of European states, operates a "ring fence" liquidation system under which assets in its jurisdiction are applied first in or towards the discharge of debts owing to domestic G creditors. In addition, proceedings were instituted in the United States against companies in the B.C.C.I. group, including B.C.C.I., for infringements of federal regulatory requirements as well as for breaches of anti-racketeering statutes. Discussions were in progress between the United States authorities and the B.C.C.I. and B.C.C.I. Overseas liquidators outside the United States regarding the resolution of the U.S. proceedings. It was, naturally, the wish of the Luxembourg, English and Cayman H Islands liquidators to obtain the release from the United States of as large a sum as possible in respect of B.C.C.I.'s United States assets.

Also in progress were discussions between the Luxembourg, English and Cayman Island liquidators regarding difficulties in deciding which

B.C.C.I. assets belonged to which B.C.C.I. company and which B.C.C.I. creditors and which B.C.C.I. debtors were the creditors or debtors of which B.C.C.I. company. The manner in which many of the B.C.C.I. books had been kept left the answers uncertain. The possibility of lengthy and expensive litigation in order to reach some resolution of these difficulties loomed. In addition, very important negotiations with the Abu Dhabi majority shareholders had been commenced. The prospect that a very substantial sum might be forthcoming from the majority shareholders was a real possibility. But, of course, agreement between the respective B.C.C.I. liquidators as to the basis on which any such sum would be paid and received, and as to the manner in which the sum once received would be applied, was essential.

The discussions and negotiations to which I have referred led in due course to a number of agreements being concluded. A so-called "contribution agreement" was entered into with the Abu Dhabi majority shareholders. Under this agreement, the majority shareholders agreed to provide a sum in excess of about U.S.$1·5 billion upon terms which included their release from any further action being brought or claim made against them by any of the B.C.C.I. liquidators. Claims which had been made by the liquidators against Sheik Mahfouz were settled for sums of U.S.$245m. and $183m. And negotiations with the United States authorities led to an agreement for the release from the United States of $240m. These funds have been referred to collectively as "global realisations."

By an agreement dated 15 January 1993 (although not signed until May 1994) made between the respective liquidators in Luxembourg, England and the Cayman Islands, agreement was reached as to how the global realisations should be allocated between them. The agreement (known as the "costs and recoveries agreement") recited that arrangements had been agreed "for dealing with certain projects which . . . are agreed by the liquidators to be treated as global projects" and that the liquidators wished "to set out their agreement for the sharing of the costs of and the recoveries from such projects." Paragraph 3.2 of the agreement provided: "All recoveries resulting from a global project shall be distributed to the liquidators in the relevant percentages forthwith after receipt thereof." Paragraph 5.1 of the agreement provided: "This agreement may only be terminated with respect to any global project upon the agreement of all the liquidators and, in that event, on such terms as they mutually agree."

The "relevant percentages" as set out in the agreement, were "English liquidators—50 per cent.; Luxembourg liquidators—10 per cent.; Overseas liquidators—35 per cent.; Holdings liquidators—5 per cent." Under a later agreement, whereby the I.C.I.C. companies brought assets into the global realisations pool, the relevant percentages were altered so as to enable a 2·5 per cent. share to be allocated to the I.C.I.C. companies. The English liquidators' percentage became 48·5 per cent. The present position, therefore, is that the English liquidators are entitled to call for the distribution to themselves for the purposes of the English liquidation of 48·5 per cent. of the global realisations.

The costs and recoveries agreement in its original form was approved by the Luxembourg court on 25 January 1994. The costs and recoveries

A agreement amended to take account of the I.C.I.C. companies 2·5 per cent. share was approved by the Luxembourg court on 31 January 1995. The costs and recoveries agreement dealt with global realisations. In addition, however, the English liquidators have at their disposal the proceeds of realisations of English assets. These English realisations amount at present to some $655m.

B The most important agreement of all for present purposes is the pooling agreement. It was, for reasons I have already indicated, well understood by each set of liquidators that co-operation between them was essential if the winding up was not to be lost in a morass of legal argument. Their objective was to create a structure under which all B.C.C.I. assets would be pooled, the tracing and recovery of assets would be a joint enterprise and creditors in each liquidation would receive the C same level of dividend from a central pool. In the course of the discussions which led to the pooling agreement it was recognised that the difference between the respective set-off laws of England and Luxembourg presented a problem. On the one hand, Luxembourg, the country in which B.C.C.I. was incorporated, was the country in which the principal liquidation would be taking place. On the other hand, persons who were both creditors and debtors of B.C.C.I. would, if obliged to prove in D Luxembourg, be deprived of the advantage in an English winding up of the debts they owed being set off against the debts owing to them.

It is necessary for me to refer to a number of the provisions of the pooling agreement. The pooling agreement was dated 10 November 1994. The parties were B.C.C.I., B.C.C.I.'s Luxembourg liquidators, B.C.C.I.'s English liquidators, B.C.C.I. Overseas and B.C.C.I. Overseas' Cayman E Islands liquidators. The recitals to the pooling agreement included the following:

> "(iv) one of the purposes of this agreement is to provide for the property of [B.C.C.I.] and Overseas to be pooled and shared between them in the manner hereinafter set out; . . . (v) it is expedient that so far as possible the affairs of all branches of [B.C.C.I.] and Overseas F should be wound up or otherwise dealt with as part of a worldwide winding up of each company . . .".

The agreement was expressed to be conditional on approval being obtained from the Luxembourg court, the English court and the Cayman Islands court.

Clause 3 of the pooling agreement, headed "Distribution of pool G property to pool creditors," included the following sub-clauses:

> "3.1 Subject to clause 3.11 below, the liabilities of [B.C.C.I.] in respect of which a creditor of [B.C.C.I.] is entitled to rank for a dividend in the liquidation of [B.C.C.I.], and the amount for which he is entitled to rank for such dividend, shall be established by the Luxembourg liquidators in the Luxembourg liquidation in accordance with the laws of the Grand Duchy of Luxembourg (including its H conflict of law rules) for the time being applicable. . . .
>
> "3.11 The individual entitlement of each pool creditor in respect of each distribution made in accordance with this agreement shall be subject: (a) in the case of each creditor with an admitted [B.C.C.I.]

claim to the laws of the Grand Duchy of Luxembourg, to the provisions of the Luxembourg judgment and to such further orders and directions as may be made by the Luxembourg court. . . .

"3.18 Subject to clause 3.21 below, no distribution to creditors of [B.C.C.I.] or of Overseas or of any participating subsidiary or of Holdings shall be made out of the pool realisation accounts except a distribution made in accordance with this Part or with Part VII of this agreement. . . .

"3.21 The Luxembourg liquidators and the Cayman liquidators may make arrangements: (a) with the English liquidators in relation to matters set out in clause 5.6 below; . . ."

No such arrangements as are referred to in clause 3.21(a) have, in the event, been made. Part VII of the pooling agreement (referred to in clause 3.18) dealt with preferential payments. It follows from the provisions of clause 3 that once realisations of B.C.C.I. assets reach the pool realisation accounts, the distribution of the money will, so far as unsecured creditors of B.C.C.I. are concerned, be the responsibility of the Luxembourg liquidators acting in accordance with Luxembourg law and under the supervision of the Luxembourg court.

I now come to clause 5 of the pooling agreement, headed "The English liquidation." Clause 5 included the following relevant sub-clauses:

"5.1 Subject to clause 5.3 below, [B.C.C.I.], the Luxembourg liquidators, Overseas and the Cayman liquidators shall co-operate with the English liquidators by the exchange of information, in the joint conduct of litigation, and by other means, as from time to time may seem expedient, with a view to the realisation by the English liquidators of [B.C.C.I.] property situated within the jurisdiction of the English court.

"5.2 Subject to clause 5.3 below, the English liquidators shall co-operate with [B.C.C.I.], the Luxembourg liquidators, Overseas and the Cayman liquidators by the exchange of information, in the joint conduct of litigation, and by other means, as from time to time may seem expedient, with a view to the realisation by the Luxembourg liquidators and/or the Cayman liquidators of Overseas property wherever situated and of [B.C.C.I.] property situated outside the jurisdiction of the English court.

"5.3 Subject to any prohibitions or conditions imposed by the law of England and Wales and subject to clause 5.4 below, the English liquidators shall make the books and records of the branches of [B.C.C.I.] in England and Wales available for inspection and review by the Luxembourg liquidators or by such person or persons as the Luxembourg liquidators may appoint as their agent or agents for such purpose and shall respond to any queries raised by the Luxembourg liquidators or by such person or persons as aforesaid (and upon request provide to the Luxembourg liquidators or to such person or persons as aforesaid such information or copies of documents or other data as they may reasonably require) which relate to the affairs of such branches of [B.C.C.I.].

"5.4 Notwithstanding the provisions of clauses 5.1, 5.2 and 5.3 above: (a) nothing in such clauses shall require the Luxembourg liquidators or the Cayman liquidators to take any step which is contrary to an express direction of the Luxembourg court or the Cayman court respectively; and (b) nothing in such clauses shall require the English liquidators to take any step which is contrary to an express direction of the English court.

"5.5 It is the joint intention of the Luxembourg liquidators, the Cayman liquidators and the English liquidators that, subject to such provision or arrangements being made in relation to the matters set out in clause 5.6 below, and subject generally to such terms and conditions, as to the English court may seem fit, the English liquidators should transmit to the Luxembourg liquidators to be dealt with by the Luxembourg liquidators in accordance with the provisions of this agreement all proceeds of the realisation of [B.C.C.I.] property which are now or may hereafter be or come within the jurisdiction of the English court.

"5.6 The matters referred to in clause 5.5 above are: (i) the payment of, or provision for, the English costs; (ii) the payment in full of all English preferential claims; (iii) the recognition of all valid claims (whether based upon the existence of security or rules of law and equity or otherwise) having regard to which assets in the hands of the English liquidators are not assets available for distribution to creditors in the English liquidation but the property of the claimant; (iv) provision or arrangements for the benefit of debtors of [B.C.C.I.] liable to be sued in a court in England and Wales which enables them to take advantage of any set-off or cross-claim which would have been available to them if they had been sued by the English liquidators in the course of the English liquidation; (v) provision or arrangements in relation to any claim (not being an English preferential claim) which would be admissible in the English liquidation but would not be admissible (or would be admissible on different terms as to dividend) in the Luxembourg liquidation; and (vi) provision or arrangements in relation to the claims and rights of persons who are entitled to compensation payments under Part II of the Banking Act 1987 (or who would be so entitled to such payments but for section 61 of that Act), and in relation to the consequent claims and rights of the Deposit Protection Board thereunder, in order to protect such claims and rights.

"5.7 With a view to achieving the objective described in clause 5.5 above, the English liquidators will use their best endeavours to obtain from the English court such further or other orders and directions (whether by way of variation of or addition to the English order or otherwise) as may be necessary or desirable to enable the said objective to be achieved."

The "English order" referred to in clause 5.7 is the order of this court approving the pooling agreement; in the event, Sir Donald Nicholls V.-C.'s order of 12 June 1992 was the English order.

The reference in clause 5.5 to "all proceeds of the realisation of [B.C.C.I.] property which are now or may hereafter be or come within the jurisdiction of the English court" is apt, in my opinion, in its ordinary meaning, to include the English liquidators 48·5 per cent. of the global realisations if and to the extent that the English liquidators should call for the share to be transmitted to them in England. Under the costs and recoveries agreement the English liquidators appear to me to have the right to so call.

The obligation of the English liquidators under clause 5.5 to transmit realisations of B.C.C.I. assets to the Luxembourg liquidators is expressed to be subject to "arrangements being made in relation to the matters set out in clause 5.6." These "matters" include provision or arrangements which would enable B.C.C.I. debtors "liable to be sued in a court in England and Wales" to retain the benefit of rule 4.90 set-off (see sub-paragraph (iv)). Sub-paragraph (iv) appears to be authorising the English liquidators to make provision for a class of creditor/debtors limited to those "liable to be sued in a court in England and Wales." If the sub-paragraph were to be applied so as to provide English creditor/debtors of B.C.C.I. with an advantage not available to B.C.C.I.'s other creditor/debtors, a question might arise under article 6 of the E.C. Treaty (O.J. 1992 C.224, p. 9) as to the legality of the provision. I will return to this point later.

No such difficulty arises in connection with sub-paragraph (v) of clause 5.6. The claims to which sub-paragraph (v) applies would include, in my opinion, claims of creditors proving for the net balance due to them after rule 4.90 set-off had been applied. Claims thus calculated would not be admitted in the Luxembourg liquidation. Sub-paragraph (vi) of clause 5.6 contemplated in terms that provision for the claims of the Deposit Protection Board might need to be made by the English liquidators. Clause 6 of the pooling argument contained provision for liquidators of foreign branches or foreign subsidiaries of B.C.C.I. or B.C.C.I. Overseas to enter into branch participation agreements whereby they would, in effect, join the pooling agreement.

The terms of the pooling agreement and the contribution agreement having been settled between the respective sets of liquidators, the process of obtaining the approval of the respective courts to these agreements was set in train. The English liquidators' application for approval was dealt with by Sir Donald Nicholls V.-C. at a four-day hearing from 8 to 12 June 1992. A number of creditors or group of creditors appeared and objected. However, Sir Donald Nicholls V.-C. approved both agreements. The contents of his order dated 12 June 1992 approving the pooling agreement are of relevance. It was recited, inter alia:

> "(iv) that it is expedient that the determination of the claims of the creditors of B.C.C.I. (other than the claims of creditors whose claims are given preferential status on a liquidation of B.C.C.I. in a jurisdiction other than the Grand Duchy of Luxembourg and the distribution of assets of B.C.C.I. to such creditors (other than as aforesaid) should be carried out in accordance with one liquidation; and (v) that it is expedient that the liquidation in accordance with which such determination and distribution should be carried out

A should be the liquidation of B.C.C.I. by the Luxembourg court in Luxembourg."

It was then ordered, so far as relevant, that:

"Subject to: (i) the provisions of the pooling agreement . . . being satisfied . . . and (ii) the terms and conditions set out in the schedule B to this order and to provisions being made for the matters referred to in the said schedule in accordance with the said terms and conditions, the English liquidators be at liberty to transmit to the Luxembourg liquidators in Luxembourg for the purposes of the liquidation of B.C.C.I. by the Luxembourg court all proceeds of the realisation of property of B.C.C.I. which are now or may hereafter be or come within the jurisdiction of this honourable court (such proceeds being C hereafter referred to as English proceeds)."

The schedule to the order authorised the English liquidators to retain sufficient funds out of the English proceeds to cover costs, charges and expenses of the English liquidation, to cover any preferential claims and to cover any proprietary claims that ought to be made and, also, D authorised them:

"to make such arrangements with the Luxembourg liquidators as they think fit to facilitate: (a) the ascertainment of the claims of the creditors (other than preferential English claims) which are capable of being admitted in the liquidation of B.C.C.I. in Luxembourg; (b) the qualification of such claims; and (c) distributions to which E creditors in respect of such claims may be entitled. . . ."

In his judgment, given on 12 July 1992, Sir Donald Nicholls V.-C. said about the pooling agreement:

". . . I am in no doubt that the agreements are so plainly for the benefit of the creditors that I should approve them without further F ado. I am satisfied that the affairs of B.C.C.I. and B.C.C.I. Overseas are so hopelessly intertwined that a pooling of their assets, with a distribution enabling the like dividend to be paid to both companies' creditors, is the only sensible way to proceed. It would make no sense to spend vast sums of money and much time in trying to disentangle and unravel."

G One of the features of the contribution agreement, as it then stood, was that it contained a provision barring from participation in the funds being provided by the Abu Dhabi majority shareholders, any creditors who declined to release the majority shareholders from damages claims. To that extent, therefore, the contribution agreement effected a variation in the pari passu scheme established in this jurisdiction by the Insolvency H Act 1986 and its statutory predecessors. It was contended by a group of creditors who objected to the contribution agreement that, inter alia, the court had no power, save by a formal scheme of arrangement under section 425 of the Companies Act 1985, to authorise a distribution of

assets in a winding up otherwise than in accordance with the statutory pari passu scheme. Sir Donald Nicholls V.-C. said, simply:

> "I do not agree. The liquidators' powers under, paragraphs 2 and 3 of Schedule 4 to the Insolvency Act 1986, exercisable with the approval of the court, are wide and they are wide enough to cover this case."

The objectors took this ultra vires point (with other points) to the Court of Appeal. The appeal was dismissed on 17 July 1992. As to the ultra vires point, Dillon L.J. said:

> "As I see it, in a liquidation there can be a departure from the pari passu rule by a scheme of arrangement under section 425; but, equally, there can be a departure from the pari passu rule if it is merely ancillary to an exercise of any of the powers which are exercisable with the sanction of the court under Part I of Schedule 4 to the Insolvency Act 1986."

The contribution agreement represented a compromise of claims and cross-claims between the B.C.C.I. companies and the majority shareholders. Since, the liquidators had power to enter into a compromise agreement with the majority shareholders, they had power to agree, as a term of the compromise, to a variation of the strict pari passu rule.

The contribution agreement and the pooling agreement were approved also in the Grand Court of the Cayman Islands on 19 June 1992. On the same day the Cayman court adopted insolvency rules identical to those contained in the Insolvency Rules 1986. In Luxembourg, however, the application for approval of the two agreements ran into difficulties. Both the agreements, as originally agreed, had contained a clause nominating English law as the proper law and England as the venue for the arbitration of any disputes. These provisions were objected to by Judge Welter in the Luxembourg hearings. She approved the agreements on 22 October 1992 subject to a requirement that the provisions regarding English law and regarding the venue of any arbitration should be deleted. The majority shareholders and the English and Cayman Island courts agreed to the deletions.

In Luxembourg, however, an appeal was lodged against the approval of the agreements, although the appeal against the pooling agreement approval was later withdrawn. On 27 October 1993 the Luxembourg appeal against the approval of the contribution agreement was allowed. It succeeded on the same point that had been argued unsuccessfully in this country, namely, that the court had no power to permit a departure from a strict pari passu distribution among the unsecured creditors.

The refusal by the Luxembourg Appeal Court to accept the contribution agreement led to renewed negotiations between the majority shareholders and the respective sets of liquidators. In due course a revised contribution agreement with an increase to $1·8 billion of the sum to be provided by the majority shareholders and the removal of the provision that might have led to a variation in the pari passu distribution rule was agreed. The revised contribution agreement (and the agreement under which the I.C.I.C. companies joined the pooling agreement and were

A allocated 2·5 per cent. of the global realisations), was approved by me on 19 December 1994, by the Grand Court in the Cayman Islands on 13 January 1995 and by the Luxembourg court on 31 January 1995. Again, however, the approval given by the Luxembourg court was appealed. But this time the appeal was withdrawn. The revised contribution agreement was formally completed on 14 May 1996.

B The agreements to which I have referred all being in place and the B.C.C.I. realisations now totalling well over $2 billion, the liquidators are anxious to declare and pay a first dividend as soon as possible. It is contemplated by the pooling agreement that the B.C.C.I. dividend will be declared and paid by the Luxembourg liquidators. The Luxembourg liquidators (and the Cayman Islands liquidators) have in mind a first dividend of 20 per cent., to be followed later by another 20 per cent.

C dividend. For this to be possible funds must be released to the Luxembourg liquidators by the English liquidators. First, however, there must be a decision as to the amount of the funds that need to be retained by the English liquidators under their control. That decision will determine what, if any, part of the English realisations can be transmitted to Luxembourg and what part of their 48·5 per cent. share of the global realisations they

D can release to the Luxembourg liquidators.

The English liquidators' report to the court dated 20 February 1996 raised eight separate matters in respect of which funds might need to be retained and in respect of which directions from the court were thought to be needed. They were (i) set-off; (2) currency conversion; (3) claims admission procedures; (4) claims under examination; (5) claim valuation date; (6) the B.C.C.I. Scottish branch's letter of request; (7) the B.C.C.I.

E Isle of Man branch's letter of request and; (8) preferential claims. To these matters should now be added (9) the claims of the Deposit Protection Board. Some of these matters present no present problem. The Luxembourg liquidators have indicated that they propose to admit all claims in United States dollars at 3 January 1992 exchange rates and to pay all dividends in U.S. dollars. No provision need now be made in

F respect of currency conversion difficulties.

The "claim valuation date" problem arises from the circumstance that the Luxembourg liquidation commenced on 3 January 1992 but the English liquidation did not commence until 14 January 1992. Interest bearing claims would, therefore, accrue some 10 days' additional interest if proved in a English liquidation than would be able to be claimed in a

G Luxembourg liquidation. In their report of 20 February 1996, the English liquidators have expressed the view that "it would not be unfair for any creditor to receive a dividend based on claims calculated as at 3 January 1992" and that they "do not consider it appropriate for any provision to be made for the different claim valuation date that would apply were the liquidation of B.C.C.I. a purely English liquidation." I agree.

H As to preferential claims, it is now common ground that the English liquidators should pay the preferential claims of all employees who were working for English branches of B.C.C.I. The provision to be made by the English liquidators will be calculated accordingly. No directions from the court are needed.

The other matters are all live. They raise a question as to the nature of a so-called "ancillary" liquidation and as to the extent to which the court has power in a winding up to direct that particular parts of the statutory winding up scheme and particular winding up rules shall not apply. It may be convenient if I describe briefly the problems that arise in respect of each of the still live matters.

(1) *Set-off*

It was made clear by the terms of the order 3 January 1992 of the Luxembourg court and the judgment given by Judge Welter that the Luxembourg liquidators would be required to restrict set-off to the very limited set-off recognised by Luxembourg law. Leaving aside that very limited set-off, the Luxembourg liquidators are required to collect all outstanding loans in full and to admit deposits in full for dividend purposes even where the loans and deposits were made to and made by the same person. A creditor/debtor will, therefore, be required to repay in full his or her liabilities to B.C.C.I. before receiving any dividend. If a loan is outstanding at the time a dividend is declared, the liquidators may apply the dividend in or towards discharge of the loan and sue for the balance, if any, of the loan. Alternatively, they may refuse to admit the proof submitted by the creditor/debtor and take action to recover the full amount of the loan. The Luxembourg liquidators have made clear that, as the rules on set-off in Luxembourg are regarded as a matter of public policy, they would not be able to sanction any arrangement which required them formally to recognise and apply rights of set-off wider than those which exist under local rules.

Under rule 4.90 of the Insolvency Rules 1986, by contrast, all mutual credits and debits are set off so that only the net balance is provable in, or payable to, the liquidation. An account must be struck as at the commencement of the liquidation between the company and the creditor/debtor whereby all credits and debits are set off regardless of the jurisdiction in which any credit or debit arose. In *Stein v. Blake* [1996] A.C. 243, 251, 255 Lord Hoffmann (with whose speech the other members of the House agreed) said: "Bankruptcy set-off . . . affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security" and that bankruptcy set-off "is mandatory and self-executing and results, as of the bankruptcy date, in only a net balance being owing."

Every English winding up has a theoretical international application. The set-off brought about by rule 4.90 applies, under English law, to every creditor and every debtor whether or not the proper law of the debt is English law. The rule 4.90 account, struck at the commencement of the winding up, will have the result that the creditor/debtor will be left either as a net creditor to prove for the balance or, as the case may be, as a net debtor to be sued for the balance, or, if the credits and debits were of exactly equal amounts, with no sum either owing or owed.

In their report to the court of 20 February 1996 the English liquidators gave details of the practical implication of the differences in set-off law between England and Luxembourg. Out of a total of some 36,000 proof of debt forms received by them, round about 6,000 were affected by rule

A 4.90 set-off. These were broken down as follows: (1) net creditors—credit accounts with balances totalling in aggregate about $300m., involving about 1,100 separate net creditors and where amounts outstanding on loan accounts totalling $150m. would be set off under rule 4.90, have been identified; (2) net debtors—loan accounts with a total of about $765m. outstanding, involving about 1,600 separate net debtors and where balances on credit accounts totalling $121m. would be set off under rule B 4.90 have been identified. There may be additional net creditors and net debtors who have not yet been identified.

If the net creditors were proving in England, they would, treating them as a block, receive dividends on the net balance of $150m. Assuming a dividend of 40 per cent., the dividend paid would be $60m. In Luxembourg, by contrast, no dividend at all would be paid. The 40 per cent. dividend C payable on the $300m. would be $120m. But the $120m. would be set against the $150m. outstanding on loan accounts. So nothing would be paid to the net creditors and $30m. would still be owed by them. As to the net debtors, in England there is no credit balance in respect of which they can prove but they remain liable for the net debt of $644m. (i.e. $765m. minus $121m.). In Luxembourg they could prove for the $121m. The 40 per cent. dividend would be $48·4m. The $48·4m. would be set D against the 765m., leaving the debtors still liable to pay $716·6m. The respective disadvantages to the net creditors and net debtors of depriving them of the benefit of rule 4.90 and applying to them the Luxembourg winding up rules is clear.

(2) *Claims admission procedures*

E The English liquidators have examined the 36,000-odd proofs that have been submitted to them by those creditors who had material dealings with the English branches of B.C.C.I. Having done so, they have forwarded to the Luxembourg liquidators the proofs that have appeared to them (the English liquidators) to be in order. The Luxembourg liquidators have reviewed the claims but have indicated that for a variety F of procedural reasons, they are at present unable to accept some 4,000 claims totalling $300m.-odd. The reasons relate to such matters as proof of identity, signature verification and minor discrepancies between bank records and proof forms. To the extent that these claims may eventually be rejected by the Luxembourg liquidators but would have been accepted by the English liquidators, the claimants will have been disadvantaged by the application of Luxembourg winding up procedure rather than English G winding up procedure.

(3) *Claims under examination*

There are about 2,800 claims to an aggregate value of $694m. that the English liquidators are currently examining. A significant number of these will turn out to be acceptable to the English liquidators and will be H forwarded to Luxembourg. No doubt the Luxembourg liquidators' review will reveal the same sort of procedural problems in regard to some of those forwarded as arose in regard to the 4,000-odd claims mentioned in (2) above.

(4) *The Scottish liquidation and Isle of Man liquidation*

The Scottish liquidators of B.C.C.I. have been collecting the assets of the Scottish branch. They have been contemplating entering into a branch participation agreement in a form to be agreed with the Luxembourg liquidators (see clause 6 of the pooling agreement). They wish to be able to make similar provisions to those which the English liquidators are, under clause 5 of the pooling agreement, able to make. But it is not clear whether or not the Luxembourg liquidators will be willing to allow the same latitude to the Scottish liquidators under a branch participation agreement as has been allowed to the English liquidators under the pooling agreement.

In these circumstances, the Court of Session in Scotland has issued a letter of request dated 31 January 1996 to this court under section 426 of the Insolvency Act 1986. The letter of request asks this court to consider whether the English liquidators should be directed to make the same provision for persons who dealt with the Scottish branches of B.C.C.I. as are directed to be made for those who dealt with the English branches. The same point arises in connection with the Isle of Man liquidation. The High Court in the Isle of Man has issued a letter of request dated 2 February 1996 seeking the same assistance as is sought by the letter of request from the Court of Session.

(5) *The Deposit Protection Board*

Under the Banking Act 1987 the English liquidators are placed under a statutory duty to divert to the board dividends that would otherwise be payable to creditors to whom the board has made compensation payments. In calculating the amount of the compensation payments, the board sought and received the assistance of the English liquidators as to the amount of the indebtedness of B.C.C.I. to the respective creditors. In calculating the respective amounts, the English liquidators applied rule 4.90 where applicable. They had no choice but to do so. It may be, therefore, that the board must look to the English liquidators rather than to the Luxembourg liquidators for the diverted dividends that are due to them.

Ancillary liquidations

There is no doubt but that both Sir Nicolas Browne-Wilkinson V.-C. and Sir Donald Nicholls V.-C., my two distinguished predecessors, contemplated and intended that the winding up of B.C.C.I. in this country would be an "ancillary" liquidation with the Luxembourg liquidation constituting the principal liquidation. I have already cited a number of passages from their respective judgments and need not, I think, add to that citation. The intention that the English liquidation should be ancillary to that in Luxembourg is made manifest by the terms of the order of 12 July 1992 made by Sir Donald Nicholls V.-C. in approving the contribution agreement and the pooling agreement. The relevant terms of that order, too, I have already cited. It is equally clear from the terms of the Luxembourg winding up order of 3 January 1992 and the several judgments of the Luxembourg courts that the Luxembourg courts regard the Luxembourg winding up as the principal winding up.

A This common ground leaves it, however, wholly unclear whether there are any, and if so what, limits to the extent to which English liquidators in a so-called "ancillary" liquidation can decline to apply provisions of English insolvency law and procedure in deference to the insolvency law and procedure of the country in which the principal winding up is taking place. Mr. Crystal, on behalf of the English liquidators, has placed before me all the relevant authorities in order to demonstrate the state of B uncertainty in which the law appears to stand. Counsel for various net creditors have submitted that English liquidators have no power to disapply provisions of the statutory insolvency scheme established under the Insolvency Act 1986 and its predecessors. If there is such power, it should not, they submit, as a matter of discretion be exercised so as to deprive creditors entitled to prove in England of benefits to which they C would be entitled under the English insolvency scheme. Counsel for the Luxembourg liquidators, Mr. Geering, and counsel for creditors who have no loans to offset have submitted that the English court does have a discretionary power to disapply in an English liquidation all or any parts of the statutory insolvency scheme and that, in the present case, all ordinary creditors, whether or not they have loans which under rule 4.90 would be offset in England, should be required to prove in Luxembourg D under Luxembourg rules and procedure.

The first question, therefore, is whether this court does have the discretionary power contended for. Just as companies are creatures of statute, so, too, the law and procedure governing the dissolution of companies is statutory. Many of the rules of winding up have been borrowed from bankruptcy law and practice—rule 4.90 is an example— E but, none the less, the power of the courts to wind up companies is a statutory power. Mr. Brisby, counsel for a representative creditor with no loan to offset, i.e. a creditor in whose interest it would be that rule 4.90 did not apply so as to allow creditor/debtors the benefit of rule 4.90 set-off, submitted that the court had an inherent power to disapply rule 4.90 or any other provisions of the statutory insolvency scheme. I do not accept that there is any such inherent power. The courts have, in my F judgment, no more inherent power to disapply the statutory insolvency scheme than to disapply the provisions of any other statute.

Alternatively, Mr. Brisby suggested that section 125(1) of the Act of 1986 could provide the requisite power. Section 125(1) provides:

> "On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an G interim order, or any other order that it thinks fit; . . ."

The words invoked by Mr. Brisby were "any other order that it thinks fit." These words cannot, in my opinion, bear the weight sought to be placed on them. They must, surely, be read subject to the ejusdem generis rule and, so read, cannot authorise the coupling-up of a winding up order with a direction disapplying some part of the statutory winding up scheme.

H Mr. Geering referred me to a textbook, *Smart, Cross-Border Insolvency* (1991). The author states, at p. 244:

> "if an ancillary winding up is ordered, the powers of the English liquidator may be restricted to collecting the English assets and

A a correct inference, the source of the court's power to authorise this to be done remains unrevealed.

In re Queensland Mercantile Agency Co. Ltd. (1888) 58 L.T. 878 was another case dealt with by North J. It involved a Queensland company which was the subject of winding up orders made both in Queensland and in England. The winding up order in England had, according to the report of the facts, directed that the winding up be ancillary to the winding up in B Queensland. The issue in the case was whether an action brought against the company in Scotland should be stayed. North J. said, at p. 879:

> "The liquidation of the company is going on here. It is true that there is a liquidation of the company also going on in Queensland, where the head office of the company was situated. To a certain extent, I treat the winding up here as ancillary to the winding up there, but C not to such an extent as to make this court an agent for the courts in Queensland . . ."

This dictum is tantalisingly silent as to the effect of the English winding up being treated as ancillary to that in Queensland.

In *North Australian Territory Co. Ltd. v. Goldsbrough Mort and Co. Ltd.* (1889) 61 L.T. 716 it was the English winding up which was the D principal winding up. An English company entered into voluntary liquidation in England but a compulsory winding up order was made against it in Australia. In describing the situation Kay J. said, at p. 717:

> "But they are not an Australian company; they are an English company. In Australia an order has been made for a compulsory winding up. According to our law such an order might possibly be E made, or something of that kind might be done, but in the case of an Australian company it would be confined to the property existing in this country, and would only be by way of assisting a winding up which either was going on or was contemplated in Australia. It would only be to protect the property in this country, and the creditors in this country. That would be the only purpose of such an order. . . . F The Australian courts have no jurisdiction to wind up an English company in this country. The winding up in this country must go according to the law of this country, and according to the law of the corporation, which is a corporation in this country. Therefore any order made by the Australian courts for winding up in Australia would merely be ancillary, just as in the converse case an order made in this country for winding up an Australian company could only be G ancillary to any winding up taking place in Australia."

This exposition seems to me to provide a valuable insight into what was meant by an "ancillary" winding up. The effective jurisdiction of the court is, for winding up purposes, necessarily territorial. English liquidators can get in assets of the company that are within the jurisdiction of the court. But they can only get in assets of the company that are outside the H territorial jurisdiction of the court if or to the extent that their title to control the company is recognised by the courts of the country in which the assets are situated. The English statutory insolvency scheme purports to have worldwide, not merely territorial, effect. Every creditor of the

Joint Stock Companies Arrangement Act 1870 (33 & 34 Vict. c. 104) arose. Vaughan Williams J. said, at p. 394:

> "in construing the statute, one must bear in mind the principles upon which liquidations are conducted, in different countries and in different courts, of one concern. One knows that where there is a liquidation of one concern the general principle is—ascertain what is the domicil of the company in liquidation; let the court of the country of domicil act as the principal court to govern the liquidation; and let the other courts act as ancillary, as far as they can, to the principal liquidation. But although that is so, it has always been held that the desire to assist in the main liquidation—the desire to act as ancillary to the court where the main liquidation is going on—will not ever make the court give up the forensic rules which govern the conduct of its own liquidation."

This passage seems to me valuable for two reasons. First, it adds to the growing number of cases in which the propriety of an English winding up assuming an ancillary role is accepted. But, second, it expresses a potentially important limitation to the extent to which an English winding up can assume a subordinate role, namely, the court will not ever give up "the forensic rules which govern the conduct of its own liquidation."

In *Sedgwick Collins and Co. v. Rossia Insurance Co. of Petrograd* [1926] 1 K.B. 1, 13 Scrutton L.J. remarked that "winding up orders here have hitherto been treated only as ancillary to the main liquidation and carefully limited in effect," and in *In re Vocalion (Foreign) Ltd.* [1932] 2 Ch. 196, 207 Maugham J. said:

> "The view of this court is that the principal winding up should be in the principal domicil of the corporation, and that any other winding up order should be ancillary to the principal winding up: . . . The effect of one winding up being ancillary to the principal winding up has not, I think, been much considered in our courts. This court no doubt holds that in the winding up here all creditors, whether British or foreign, who can prove their debts have equal rights; but it would seem that foreign courts do not always take the same view . . ."

In *In re Commercial Bank of South Australia*, 33 Ch.D. 174, 178–179 North J. had said that the English liquidator in an ancillary winding up ought not to take any step other than to get in the English assets and settle a list of English creditors without obtaining the special directions of the court. In *In re Hibernian Merchants Ltd.* [1958] Ch. 76, 78 Roxburgh J. expressed the view that Vaughan Williams J. had gone "too far" in his remarks in *In re Federal Bank of Australia Ltd.*, 62 L.J.Ch. 561, 563 about limiting the authority of the liquidator. Roxburgh J. went on to say, at pp. 79–80:

> "I think that something in the nature of what North J. did in *In re Commercial Bank of South Australia Ltd.*, 33 Ch.D. 174, the case to which Vaughan Williams J. referred, could be done, if desirable . . . I do not think that there is necessarily anything ultra vires in such an order,"—i.e., an order incorporating North J.'s direction referred to above—"provided that it is always construed not as in any

way limiting the effect of the winding up order but as reserving specially to the court certain matters in respect of which a liquidator is always at liberty to apply to the court under the general law if he desires to do so. If the order be so construed it cannot, in my judgment, offend the statute; . . ."

The doubts expressed by Roxburgh J. were implicit in remarks made by Wynn-Parry J. in *In re Suidair International Airways Ltd.* [1951] Ch. 165. The case concerned a South African company against which a winding up order was made in South Africa. A creditor of the company had obtained a judgment against the company in England and had commenced execution processes. A winding up order was then made against the company in England. The question for decision was whether an order should be made under section 325 of the Companies Act 1948 allowing the creditor to retain the benefit of the execution processes. The execution would have been void under South African insolvency law. Wynn-Parry J. cited the passage from the judgment of Vaughan Williams J. in *In re English, Scottish, and Australian Chartered Bank* [1893] 3 Ch. 385, 391 that I have cited above and then continued, at pp. 173–174:

"It appears to me that that must be the common sense of the matter, and that that passage enunciates a principle which, so far as I know, has never been doubted. Then it is said that all that that passage refers to is questions of procedure; that section 325 concerns a question of substantive law; and that therefore the passage, when properly regarded, is not any obstacle to the adoption by the court of the argument put forward on behalf of the liquidator. To that I would make two answers: first, I do not read Vaughan Williams J. as confining himself to what, on a narrow view, may be said to be matters of procedure. I think that he intended his observations and the statement of the principle to apply to the decision of all questions arising in the ancillary liquidation. Secondly, even if that passage could be read otherwise, I should be prepared for myself to say that I can see no sound reason for distinguishing between matters of procedure viewed in that narrow sense and matters of substantive right. It appears to me that the simple principle is that this court sits to administer the assets of the South Africa company which are within its jurisdiction, and for that purpose administers, and administers only, the relevant English law; that is, primarily, the law as stated in the Companies Act 1948 looked at in the light, where necessary, of the authorities. If that principle be adhered to, no confusion will result. If it is departed from, then for myself I cannot see how any other result would follow than the utmost possible confusion. Who could lay down as a clear and exhaustive proposition where the court was to draw the line in any particular case between administering the English law and the law of the main liquidation?"

Felixstowe Dock & Railway Co. v. United States Lines Inc. [1989] Q.B. 360 concerned a company incorporated in the United States. A United States court had made an order under chapter 11 of the United States Federal Bankruptcy Code staying all claims against the company within and outside the United States. Hirst J. had to decide whether to give effect

A in England to this order so as to restrain the plaintiffs, trade creditors of the company, from continuing to prosecute proceedings in this country to recover payment for the services which they had provided. He referred, inter alia, to *In re English, Scottish, and Australian Chartered Bank* [1893] 3 Ch. 385, *In re Vocalion (Foreign) Ltd.* [1932] 2 Ch. 196 and *In re Suidair International Airways Ltd.* [1951] Ch. 165 and accepted, at p. 379, a submission that

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> "the English practice is to regard the courts of the country of incorporation as the principal forum for controlling the winding up of a company, but that in so far as that company has assets here, the usual practice is to carry out an ancillary winding up in England in accordance with our own rules, while working in harmony with the foreign courts" and that "Applying this principle ... the English
> C courts would not and should not favour an order which removed the English assets entirely outside their control."

Finally, I should refer to a Queensland case, *In re Alfred Shaw & Co. Ltd., Ex parte Mackenzie* (1897) 8 Q.L.J. 93. The case concerned a Victorian company in voluntary liquidation in Victoria and against which winding up orders had been made in Queensland and in England. The
D company had carried on business in Queensland and in England but not, it seems, in Victoria. The Queensland liquidator applied to the court for leave to transmit assets to England in order to enable the English liquidator to pay a dividend to, inter alios, the creditors who had proved in Queensland. Griffith C.J. made the point, at p. 95:

> E "The proceedings upon a winding up order in such a case, however, can only operate as an administration of the local assets of the company, which cannot be dissolved except under the law of the country of its domicile."

He said that "the title of the liquidators of the domicile should be recognised, subject to local law," but that "the formal title of the local liquidator is better than that of the foreign one." After confirming that all
F creditors were entitled to share in the assets of the company pari passu, with no priority being given to local creditors, he said, at p. 96:

> "I hold, further, in accordance with the dictum of North J. already cited, that in such a case the country of the domicile is to be treated as the locality of the principal administration, and that the administration by the courts of other countries in which the affairs of
> G the company are administered, ought to be regarded as ancillary to that administration. It is indeed manifest that to a certain extent the administration is merely ancillary. For, as already pointed out, the court of a country which is not the country of the domicile of the company can only administer the assets which it finds within its jurisdiction. ... Applying these principles, I hold that in the present
> H case the principal, and, indeed, the only real winding up, must take place in Victoria, and that the proceedings in Queensland (as those in England) are merely ancillary. If then a winding up order had been made by the Supreme Court of Victoria, and the liquidator appointed by that court had applied to this court, with the sanction of that

court, for an order to transmit the proceeds raised by the realisation of Queensland assets to him, I should have had no difficulty in dealing with the application. No winding up order has, however, been made in Victoria, and the Victorian liquidators are not parties to this application. Moreover, the application is not for the transmission of funds realised from an ancillary administration in England to a principal administrator, but for their transmission to another ancillary administrator in England. Ought I, then under these circumstances, to accede to the application?"

In the event, Griffith C.J. adjourned the application to enable the Victorian liquidators to be joined.

This line of authority establishes, in my opinion, at least the following propositions. (1) Where a foreign company is in liquidation in its country of incorporation, a winding up order made in England will normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation. (2) The winding up in England will be ancillary in the sense that it will not be within the power of the English liquidators to get in and realise all the assets of the company worldwide. They will necessarily have to concentrate on getting in and realising the English assets. (3) Since in order to achieve a pari passu distribution between all the company's creditors it will be necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool, the winding up in England will be ancillary in the sense, also, that it will be the liquidators in the principal liquidation who will be best placed to declare the dividend and to distribute the assets in the pool accordingly. (4) None the less, the ancillary character of an English winding up does not relieve an English court of the obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up which is brought before the court. It may be, of course, that English conflicts of law rules will lead to the application of some foreign law principle in order to resolve a particular issue.

Rule 4.90 of the Insolvency Rules 1986 is a substantive rule of English law. *Stein v. Blake* [1996] A.C. 243 establishes that that is so. Mr. Geering, supported by Mr. Brisby, submitted that the Insolvency Rules, as a whole, were procedural and that it was only in that procedural context that rule 4.90 created substantive rights. The court had, they submitted, power to disapply these procedural rules, either in whole or in part, in deference to the rules of the principal liquidation. They submitted that, if that were not so, the court could not make any order varying any of the procedures prescribed by the Act and Rules of 1986.

They pointed, by way of example, to the transmission of assets to the principal liquidators in order for those liquidators to declare and pay dividends to creditors. Unless the court has power to direct English liquidators in an ancillary liquidation to transmit assets to the principal liquidators, an ancillary liquidation is meaningless. If the court does have power to give that direction, it follows that it does have power to disapply the part of the statutory insolvency scheme established by the Act and Rules of 1986 that relates to payment of dividends. The position, they

submitted, is all or nothing. Either the court has power to disapply any part of the statutory insolvency scheme that, in its discretion, it thinks fit to disapply or it has no power to disapply any part of the statutory scheme. The latter conclusion cannot stand in the face of the many authorities that, over the past 100 years or more, have endorsed the propriety of an English winding up being merely an ancillary winding up. Ergo, the former conclusion must be the right one and the English liquidators do have a discretionary power to disapply rule 4.90. I find the logic of these submissions compelling but I am not persuaded that they are right.

I have already observed that the source of the discretionary power to disapply at discretion parts of the statutory insolvency scheme can be found neither in statute nor in any inherent common law power of the courts. There is, however, another way in which powers can become vested in the courts, namely, by accretion of judicial decisions. In the early decisions in which the English liquidations were described as "ancillary," no attempt was made to spell out the effect of placing that description on the winding up in question or to analyse the source of the dispensing power that the court was exercising. Without, apparently, any such analysis, the situation seems simply to have come to be accepted that in an appropriate case, of which the paradigm would be a company in liquidation in its country of incorporation but against which a winding up order had been made in this country, the court could direct that the winding up in this country be treated as "ancillary." The implication of this direction was that at some stage in the liquidation the court would authorise the English liquidators to transmit the assets they had got in to the principal liquidators. Mr. Geering and Mr. Brisby emphasised that, without that implication, the description of the liquidation as ancillary becomes fairly meaningless. I agree and consequently accept that the implication to which I have referred should be read into the numerous judicial dicta in which the concept of an ancillary liquidator has been endorsed. In Sir Donald Nicholls V.-C.'s order of 12 June 1992 in this liquidation, the direction to be implied in the earlier cases was spelled out in express terms. And his order was approved by the Court of Appeal.

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 now 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.

My conclusion on this issue of jurisdiction is reinforced by a consideration of the practical consequences that would follow in the present case if the court did have power to disapply rule 4.90 and purported to exercise that power. It may be said, however, that this is a point that goes more to the question whether, assuming the power exists, it should be exercised. To that issue of discretion I now turn.

Discretion

(i) *Rule 4.90*

If rule 4.90 is to be disapplied in the winding up of B.C.C.I. it must, in my opinion, be disapplied across the board. It could not be disapplied for one class of creditor/debtors but not for another class. Let me consider in turn the various classes of creditor/debtors.

(a) Creditor/debtors whose choses in action have English law as their proper law and who, on an application of rule 4.90, would become net debtors. In relation to this class, the disapplication of rule 4.90, even if it were jurisdictionally possible (which in my view it is not), would be wholly impracticable. This is a class of creditor/debtors who will not be submitting any proof in the bankruptcy. They are net debtors. If they are sued in England on the gross amount of their debt, they will be liable only for the net debt. If they are sued abroad and English law is applied to determine the quantum of the indebtedness, the same result will obtain. In respect of a number of these debtors their net debts, with or without court action, will by now already have been paid. The choses in action will have been extinguished. In relation to those whose net debts have not been paid, the only extant chose in action will be the net debt. *Stein v. Blake* [1996] A.C. 243 provides clear authority that that is so. To this class of creditor/debtors there can be no question of disapplying rule 4.90.

(b) Creditor/debtors whose choses in action do not have English law as their proper law but who, on an application of rule 4.90, would be net debtors. If these net debtors were to be sued in England they, too, would be liable only for the net debt. It may be that if they were sued abroad, and certainly if they were sued in Luxembourg, they would be liable for the gross amount of their debts. They would have a right to prove in the Luxembourg liquidation for the full amount of their deposits. So far as the English liquidation is concerned, however, a discriminatory disapplication of rule 4.90, so as to disapply the rule to this class of net debtors but not to domestic net debtors, would, in my opinion, be unthinkable. It would offend a fundamental principle of English winding up procedure and, arguably, would constitute a breach of article 6 of the E.C. Treaty: cf. *Fitzgerald v. Williams* [1996] Q.B. 657. If, as seems to me clear, rule 4.90 cannot be disapplied in respect of domestic net debtors, it cannot, in my judgment, be disapplied in respect of any net debtors.

(c) Creditor/debtors whose choses in action have English law as their proper law but who, on an application of rule 4.90, would be net creditors. Members of this class could not be sued in England on the debts they owed B.C.C.I. Those debts would have been extinguished by rule 4.90. If

A sued in any foreign country which recognised the proper law of the debt as governing the extinguishing of the debt, the same result would be reached. Members of this class will, since the date of the winding up order, 14 January 1992, have been proceeding on the footing that their debts have been extinguished and that they must prove for the net credit. Many members in this class have received sums from the Deposit Protection Board calculated on that footing. It is, in my opinion, simply
B not practicable, even if it were jurisdictionally possible, to revive these extinguished debts. Moreover, if rule 4.90 cannot be disapplied so as to revive the full amount of the debts of the net debtors, it cannot be disapplied so as to revive the debts of the net creditors. Otherwise persons with debts greater than the amount of their deposits might find themselves in a more favourable financial position than if they had owed debts less
C than the amount of their deposits. Rule 4.90 cannot be disapplied to this class of creditor/debtors.

(d) Creditor/debtors whose choses in action do not have English law as their proper law but who, on an application of rule 4.90, would be net creditors. For the reasons given under (b) above, rule 4.90 cannot be disapplied in respect of this class but allowed to apply to and benefit the domestic net creditors.

D For the reasons given above, I have no hesitation, assuming I have jurisdiction to disapply rule 4.90, in declining to do so. Mr. Geering submitted that by Sir Donald Nicholls V.-C.'s order of 12 June 1992 the decision that rule 4.90 should be disapplied had already been taken. He so submitted on the footing that the order had approved the pooling agreement and that the pooling agreement contemplated that Luxembourg
E law and procedure on set-off would be applied. He accepted that it was implicit in his submission that the order of 12 June 1992 had had retrospective effect, reviving the debts extinguished by rule 4.90 and thereby altering rights that had previously accrued. This implication makes his submission one that it is impossible to accept. First, the pooling agreement in clause 5.6(iv) and (v) reserves the position as to set off. Second, it is inconceivable that Sir Donald Nicholls V.-C. would have
F made an order intending it to have retrospective effect and to alter accrued rights or that the Court of Appeal would have regarded the order as having that effect without any express mention of such a thing in the judgments. Accordingly, in my opinion, rule 4.90 applies in the English winding up and must be given effect to. The question of what, if any, retentions should be made by the English liquidators to protect the
G positions of net creditor or net debtors must be answered on that footing.

(ii) *Claims and admissions*

If a proof is submitted to English liquidators, their duty under the statutory insolvency scheme is to consider it, to admit it or reject it and, if it is admitted, to pay a dividend on it accordingly: see rules 4.73 to 4.94 and rules 4.179 to 4.186 of the Rules of 1986. If it is right (and I do not
H think it is) that in an English "ancillary" liquidation the court can direct the English liquidators to leave to the principal liquidators the decision as to whether or not a dividend should be paid to a creditor whose proof has been, or is fit to be, admitted by the English liquidators, the question is

whether or to what extent that power should be exercised in the present case.

It is implicit in the concept of an ancillary liquidation that the English liquidators, having realised assets and settled a list of creditors, will transmit the assets and the list to the principal liquidators to enable a dividend to be declared and paid. The principal liquidators, following as they must the procedural rules required by the law and practice in their own country, are likely to subject the list of creditors to a process of review. In the present case there is no reason, in my opinion, why any point should be taken about the procedural requirements for verification of the claims or for identification of the claimants that are necessary under Luxembourg law and practice. If, however, it transpires (it has not yet so transpired) that the Luxembourg liquidators or the Luxembourg court reject for some substantive reason a proof that was originally submitted to the English liquidators and that either has been or would be admitted by the English liquidators, a problem will arise. Assuming that the court has the requisite power to authorise the English liquidators to decline to pay a dividend to such a creditor, I do not see any sufficient reason why the court should exercise such power. Provision ought, in my opinion, to be made.

Provision

The pooling agreement

Clause 5.6 of the pooling agreement enables the English liquidators, as a matter of contract between themselves and the Luxembourg liquidators, to make provision for debtors of B.C.C.I. liable to be sued in an English court and who could, if sued by the English liquidators, have relied on rule 4.90 set-off. Rule 5.6(v) is of more general application. I have already expressed the view that it would be wrong to discriminate between those whose debts to or deposits with B.C.C.I. were subject to English law and those whose debt or deposits were subject to some foreign law. For the same reasons it would, in my opinion, be wrong to discriminate between debtors "liable to be sued in a court in England and Wales" and debtors not so liable. In my judgment provision made for the former (under sub-paragraph (iv)) can and should equally be made for the latter (under sub-paragraph (v)).

Mr. Geering submitted also that any provision to be made should be made only out of the English realisations and should not extend to any part of the English liquidators 48·5 per cent. in the global realisations. He told me that the Luxembourg liquidators had been proceeding on the footing that English realisations alone would be used for such provision as this court might think it right to direct the English liquidators to make. He told me also that the Luxembourg liquidators would not be able to sign any authority for withdrawals to be made from the global realisations without the authority of the Luxembourg court. This point applies to the Abu Dhabi funds which are, I understand, in a bank account requiring for withdrawals the signatures of all 13 liquidators. On the other hand the Sheik Mahfouz funds are in a bank account withdrawals from which could, I understand, be made by the English liquidators alone up to the amount of their 48·5 per cent. share. In any event, I cannot believe that

Mr. Geering's warning to me was necessary. The costs and recoveries agreement, dated 15 January 1993 but which came into effect in May 1994, gives the English liquidators the right to call for the distribution to them of their 48·5 per cent. share in the Abu Dhabi funds for the purposes of the winding up. The agreement was approved by the Luxembourg court. Mr. Geering told me that it was regarded as having been superseded by the pooling agreement. But I observe, first, that the costs and recoveries agreement contained specific provision for its termination and according to its own terms is still on foot, and, second, that, when the I.C.I.C. companies joined the pooling agreement, the costs and recoveries agreement, far from being treated as superseded, was amended so as to reflect the 2·5 per cent. share that was attributed to the I.C.I.C. companies and, on 31 January 1995, approved as amended by the Luxembourg court. The suggestion that the costs and recoveries agreement is no longer effective does not impress me in the least. Nor do I see any reason to believe that the Luxembourg courts might take that view.

I propose, therefore, to consider what, if any, provisions should be made by the English liquidators on the footing, first, that the making of any such provisions is consistent with and authorised by the pooling agreement, and, secondly, that if in order to make such provisions the English liquidators need to draw on their share of the Abu Dhabi funds or the Sheik Mahfouz funds, they are entitled under the costs and recoveries agreement to do so.

1. *Net creditors and net debtors*

I have come to the clear conclusion that provision should be made by the English liquidators for the dividend that net creditors would receive in any English winding up but that no provision need be made for net debtors.

As to net debtors, the position is that, under English law, their debts are extinguished by rule 4.90 save for the net debt. There is no credit for which they can prove. The English liquidators have no liability to any of them. It is possible that they may be sued in some foreign jurisdiction. What the result of that might be, I cannot tell. I imagine the result would depend on whether English law was the proper law of the debt and whether the foreign court recognised the effect of rule 4.90 on the debt. But, even if the foreign court imposed a liability on the debtor in excess of the net debt that would have been produced by the application of rule 4.90, the net debtor would have no recourse against the English liquidators. The result would be a matter between the Luxembourg liquidators (the assumed plaintiffs), the debtor and the foreign court. No provision need be made here.

As to net creditors, no provision need be made for the debt to B.C.C.I. that, by the operation of rule 4.90, would have been extinguished. In that respect, the net creditors' position would be no different from that of a net debtor. Provision should, however, be made for the dividend that the net creditor would be entitled to receive under English insolvency rules. The amount of the requisite provision has caused me some anxiety. It would be preferable if the provision could be confined to the difference between the dividend payable in England and the dividend payable in

Luxembourg. An example will explain what I have in mind. A creditor has a deposit of £1,000 and an outstanding loan of £200. He is a net creditor for £800 and, in England, would receive £320 if a 40 per cent. dividend were declared. In Luxembourg, the creditor would be entitled to a dividend of £400 but the £400 would be applied in discharging the £200 loan. So the creditor would receive only £200. Prima facie, therefore, provision should be made in the sum of £120, the difference between £320 and £200. If that is done, however, it is possible that the Luxembourg liquidators will take the view that as to £120 the creditor will be receiving his dividend in England and that he should receive in Luxembourg only £80, i.e. £200 minus £120. I sought clarification from Mr. Geering as to whether or not the Luxembourg liquidators would seek to set off against any Luxembourg dividend the provision made for the creditor in England. He was not able to provide any clarification. It may be that the point would be one for the Luxembourg court.

In these circumstances, it seems to me that the English liquidators will have to make provision for the full amount of the dividend payable to such a creditor, i.e. £320. The creditor would, of course, as a condition of being paid the sum by the English liquidators, have to confirm that he had not received and would withdraw any claim to a dividend from the Luxembourg liquidators.

2. *Claims and admission procedures*

Clause 5.6(v) of the pooling agreement contemplates that the English liquidators may make provision for claims "which would be admissible in the English liquidation but would not be admissible . . . in the Luxembourg liquidation." If claims that have met the standard of proof requisite for admission in the English liquidation, a fortiori claims have already been admitted in the English liquidation, are rejected by the Luxembourg liquidators, dividends on those claims ought, in my view, to be paid by the English liquidators.

Mr. Geering has submitted that a conclusion on those lines would, in effect, be reversing the decision already reached by Sir Donald Nicholls V.-C. that the English liquidation should be ancillary to the Luxembourg liquidation. I do not agree. First, there has never been any clarity as to what was contemplated by the direction that the English liquidation should be ancillary. Second, the pooling agreement expressly contemplates that the English liquidators may make provision for claims not admissible in the Luxembourg liquidation. Third, the English liquidators have, in my opinion, a statutory obligation which the court ought not to waive, even if it has power to do so, to pay or make provision for payment of claims that are admitted (or fit to be admitted). It is one thing to hold, as I do, that the court has power to authorise the English liquidators to transmit assets and a list of creditors to the foreign liquidators so that the foreign liquidators can declare and pay the dividend. It is quite another to hold that the court can authorise the transmission of assets to the foreign liquidators in circumstances which will lead to a creditor whose claim would be, or has been, admitted in England, receiving nothing either from the foreign liquidators (because

A they have rejected the proof) or from the English liquidators (because they have no assets left with which to pay the dividend).

In this respect, as generally, the English liquidators cannot, in my opinion, justify limiting the provisions they make to provisions in respect of claimants whose accounts were conducted at English branches of B.C.C.I. All creditors should be treated alike. On the other hand, the English liquidators need not make provision for creditors of B.C.C.I. who B have not submitted proofs to them. The provision to be made under this heading should be confined to creditors who have submitted proofs to the English liquidators. In deciding the quantum of provision that should be made, the English liquidators will have to endeavour to ascertain from the Luxembourg liquidators the extent to which the difficulties that the claimants, all of whose claims have, I understand, been accepted in C England, are experiencing in having their claims accepted in Luxembourg are likely to lead to a final rejection of the claims. With the assistance of the Luxembourg liquidators I would expect that a reasonably accurate assessment of the provisions that are needed under this heading can be made. The principle on which provision should be made is, however, as I have stated it.

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3. *The Deposit Protection Board*

The English liquidators have a statutory obligation to make dividend payments to the board in respect of any compensation payments made by the board to B.C.C.I. depositors: see section 62 of the Banking Act 1987. In my judgment, this is not an obligation the performance of which can E be delegated by the English liquidators to the Luxembourg liquidators. If, or to the extent that, the Luxembourg liquidators were to pay dividends to the board, those payments would, pro tanto, discharge the English liquidators' obligation. But neither the board nor the English liquidators should, in my view, be placed in a position in which the decision as to whether a dividend in respect of a particular compensation payment should be paid to the board or as to the amount to be paid to the board F is taken by the Luxembourg liquidators or the Luxembourg court. In any event, the state of the evidence has left it unclear whether the status of the board as entitled to receive dividends that would otherwise have been paid to the compensated depositor is recognised by the Luxembourg courts.

There is, however, a further consideration. A number of the depositors who have been compensated by the board are depositors who had loans G outstanding and owing to B.C.C.I. In respect of all of these, rule 4.90 applied so as to produce the net credit in respect of which the amount of compensation paid by the board was calculated. This net credit would not be recognised in Luxembourg as the sum in respect of which a proof could be submitted and on which a dividend would be paid. It is, accordingly, not clear that the amount of the compensation paid by the board to these net creditors would be regarded in Luxembourg as an H amount on which a dividend to the board could properly be paid.

For all these reasons the board is entitled, in my opinion, to look to the English liquidators for payment of the dividend to which under section 62 of the Banking Act 1987 they will become entitled. The English

liquidators must retain sufficient funds under their control for that purpose.

4. *The Scottish and Isle of Man Branches of B.C.C.I.*

The insolvency regimes in Scotland and in the Isle of Man have similar set-off rules as in rule 4.90. The net creditors who have proved in those jurisdictions would suffer the same disadvantages if they had to prove in Luxembourg as would be suffered by the English net creditors.

The position in these two jurisdictions is as follows. In Scotland, assets of about $5m. have been collected; claims of about $127m. have been submitted. In the Isle of Man assets of about $20m. have been collected; claims of about $100m. have been submitted. If these claims totalling $227m. were transmitted to the English winding up, the English liquidators estimate that an additional set-off provision of $14m. and an additional provision in respect of rejected claims of £6m. may be necessary. The court has been invited by each of the two letters of request to direct the English liquidators to make similar provision for the Scottish and Isle of Man claimants as is proposed to be made for claimants who have proved in the English liquidation. Subsection (4) of section 426 of the Insolvency Act 1986 requires me to assist the Manx and Scottish courts in response to their respective requests. I have a discretion as to the nature of the assistance to be provided.

In my view, it would in principle be right for net creditors in the two jurisdictions to be treated in the same way as net creditors who have proved in this jurisdiction. Similarly, I think creditors whose claims have been accepted by the Scottish or Isle of Man liquidators (as the case may be) should have the same provision made against the eventuality that their claims are rejected in Luxembourg as is to be made for creditors who have proved in England and whose claims have been accepted by the English liquidators. This is particularly appropriate in the case of the Isle of Man creditors having regard to the extent to which the Isle of Man branch was supervised by B.C.C.I. managers in London (see the affidavit of Mr. Vanderpump sworn on 15 July 1996).

I am of opinion, however, that, if the English liquidators are to make provision for the Scottish and Isle of Man claimants, the assets collected in Scotland and the Isle of Man ought to be transmitted to the English liquidators. It is not clear whether or to what extent the claims that have been made in Scotland and the Isle of Man have been transmitted to Luxembourg. I assume from the content of Mr. Vanderpump's affidavit and that sworn by Mr. Powdrill in Scotland that the claims have not yet been transmitted to Luxembourg. If that is right, they should be so transmitted as soon as possible so that those that do not raise any difficulty can be accepted in Luxembourg and the provision to be made by the English liquidators can be limited accordingly.

General

I have, I believe and hope, dealt with all the points of principle that need a decision in order for the necessary provisions to be quantified and, subject to those provisions, for the rest of the funds controlled by the

English liquidators to be released or transferred, as the case may be, to the Luxembourg liquidators. If, there are points that I have overlooked, they can be mentioned when I hand down this judgment.

Funds to be released to Luxembourg liquidators subject to provisions for net creditors in English liquidation entitled to rule 4.90 set-off.

Solicitors: Lovell White Durrant; Norton Rose; Sheridans; Clifford Chance; Sprecher Grier; Stephenson Harwood; Wilde Sapte; Clifford Chance; Lovell White Durrant, for Cains, Isle of Man, and for Shepherd & Wedderburn, W.S., Edinburgh; Hammond Suddards; Memery Crystal.

S. W.

BUILDING SOCIETIES COMMISSION v. HALIFAX BUILDING SOCIETY AND ANOTHER

[Ch. 1995 B. No. 1516]

1995 March 20, 21; 28 Chadwick J.

Building Society—Transfer of business—Transfer to specially formed company—Allocation of fixed number of free shares to members regardless of duration of membership—Whether allocation to members of less than two years' standing lawful—Whether made to "other subscribers"—Building Societies Act 1986 (c. 53), s. 100(8)

In November 1994 the defendant building societies, H. and L., proposed that L.'s undertaking and engagements be transferred to H., that the merged business be transferred, under Part X of the Building Societies Act 1986,[1] to a specially formed public limited company and that the rights conferred on their shareholding and borrowing members, employees and pensioners would include a right to a fixed allocation of free shares. Shareholding members were those holding shares on 25 November to the value of £100 or more who continued to hold them until completion of the transfer and were eligible to vote on the shareholders' resolution to approve the transfer. Borrowing members were those whose mortgage debt was then £100 or more who remained borrowing members until completion of the transfer and were eligible to vote on a similar borrowing members'

[1] Building Societies Act 1986, s. 100(8): see post, p. 259D–E.