Re Bank of Credit and Commerce International SA (No 2)

CHANCERY DIVISION (COMPANIES COURT)
SIR NICOLAS BROWNE-WILKINSON V-C
27 AUGUST 1991

Provisional liquidator – Depositors in bank seeking appointment of an additional provisional liquidator of bank – Bank incorporated in Luxembourg with assets and creditors worldwide – Depositors seeking adjournment of the application – Whether application should be adjourned or dismissed – Role of provisional liquidators.

Partners in Messrs Touche Ross were appointed as provisional liquidators of the Bank of Credit and Commerce International SA (BCCI), a Luxembourg company. Three separate groups of depositors in BCCI sought the appointment of an additional provisional liquidator, from a firm other than Touche Ross. The majority shareholders of BCCI who were discussing a possible rescue operation indicated that they regarded the appointment of an additional provisional liquidator as unhelpful and unlikely to assist the negotiations with the commissaire appointed by the Luxembourg court, who was also a partner in Touche Ross. Accordingly the three groups of depositors applied for an adjournment of their applications, which was opposed by the provisional liquidators and the Bank of England.

Held – An adjournment would be refused and the applications dismissed. The case was not an ordinary one where an adjournment might be contemplated but one of the greatest delicacy, difficulty and complication. Three particular aspects of the case were delicate. First, whether the creditors received anything more than a nominal payment depended on delicate negotiations between the commissaire and the majority shareholders. Second, as BCCI was incorporated in Luxembourg the court in Luxembourg was where the prime winding-up proceedings, if the case proceeded that far, would have to be conducted. The relationship of the High Court in London and the court of Luxembourg was therefore a delicate one. Third, the court should be careful not to suggest that it was concerned to look after the interests of depositors whose claims were against BCCI in England at the expense of other creditors. Any administration under English law would be a worldwide administration of all the assets of BCCI wherever situated for all its creditors wherever they were to be found. In virtually all jurisdictions where court officers had been appointed to preserve the assets of BCCI on an interim basis, the officers were either members of or associated with Touche Ross thereby achieving a co-ordinated system of worldwide administration. To appoint an additional provisional liquidator from a firm other than Touche Ross who was not part of that co-ordinated system would be to send out an entirely erroneous message as to the intentions of the court.

Per curiam. Provisional liquidators do not represent one or another class of

creditors but are independent persons operating under the direction of the court for the purpose of preserving a company's assets for an interim period.

Applications

Three separate groups of depositors in BCCI SA who had applied to the court for the appointment of a provisional liquidator in addition to the liquidators already appointed by the court, sought the leave of the court to adjourn their applications. The facts are set out in the judgments.

Michael Crystal QC, Richard M Sheldon and *Robin Dicker* (instructed by *Freshfields*) for Mr Smouha and the liquidators already appointed by the court.

James Wadsworth QC and *David Mabb* (instructed by *Richards Butler*) for the Richards Butler group of creditors.

Peter Harvey (instructed by *Zaiwalla & Co*) for the Zaiwalla group of creditors.

Edward Evans-Lombe QC and *Peter Griffiths* (instructed by *Edwin Coe & Co*) for the Edwin Coe group of creditors.

Mark Phillips (instructed by *Freshfields*) for the Bank of England.

SIR NICOLAS BROWNE-WILKINSON V-C. These are three applications made by three separate groups of depositors in BCCI SA asking for the appointment of a provisional liquidator in addition to those already appointed by the court who are partners in Messrs Touche Ross. Unhappily, the three groups of creditors cannot even agree who the additional provisional liquidator should be. Those represented by Messrs Richards Butler put forward a member of Messrs Cork Gully, those represented by Messrs Zaiwalla & Co a partner in Messrs Halpern & Woolf and those represented by Messrs Edwin Coe & Co a partner in Messrs Grant Thornton. The Richards Butler creditors total directly and indirectly some $658m, the Zaiwalla creditors some $32m and the Edwin Coe creditors some $135m.

The application for the appointment of an additional provisional liquidator is with a view to establishing, jointly with the existing provisional liquidators, a representative of the creditors the exact ambit of whose functions has not as yet been outlined. Those three applications were due to come before me today. But on 24 August Messrs Simmons & Simmons (representing the majority shareholders in BCCI, the government of Abu Dhabi and its ruler) wrote indicating that they regarded the suggestion of there being an additional liquidator as unhelpful and not calculated to assist in the very delicate negotiations which are currently proceeding between Mr Smouha, the commissaire appointed by the Luxembourg court and also a partner in Touche Ross, and the majority shareholders, with a view to seeing whether any form of rescue operation in whole or in part can be evolved. In the light of that letter all three of the applicants have indicated that they do not wish at this stage to do anything that would conflict with the views of the majority shareholders and therefore do not wish to move their applications for the appointment of additional liquidators. Instead they ask that I should adjourn the matter so that, if the circumstances hereafter change, they could bring back their applications at that stage.

The application for an adjournment is opposed by the provisional liquidators themselves and by the Bank of England. All that I have to do at this stage is to decide whether or not there should be an adjournment. In anything like an

ordinary case, it might well be an open question whether there should or should not be an adjournment of an application of this kind. But the one thing that I should have thought was now clear to everybody was that this is in no way anything like an ordinary case. It is a case of the greatest delicacy, difficulty and complication. So far as the present application is concerned, there are three particular aspects of it that are delicate.

The first are the negotiations between Mr Smouha and the majority shareholders, negotiations upon which will depend to a great extent whether any creditors anywhere get more than a nominal payment. It is quite clear that those negotiations are very delicate. Mr Smouha and the other party of majority shareholders wish it to be in no doubt that he is not in a position to conclude a bargain: he is negotiating with a view to proposing a possible solution if one can be found.

The second delicate aspect is the relationship between this court and the court of Luxembourg. BCCI 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.

Thirdly, there are proceedings in the United States brought by the provisional liquidators in this country, by the commissaire in Luxembourg and the court-appointed officers in the Cayman Islands designed to freeze the assets in the United States. Interim relief has been granted providing to a substantial extent the freezing order required, but there are further inter partes proceedings pending. If it is suggested in those proceedings (as I am told that it is suggested) that this court is in some way concerned to look after the interests of the English depositors or those whose claim is against BCCI in England at the expense of creditors elsewhere, the message that would go out would be extremely dangerous and totally erroneous. I have asked all counsel before me today, including those representing the three batches of creditors, whether they were maintaining that there could be any sort of ring fence rendering assets in any one jurisdiction applicable for the benefit of the creditors in that jurisdiction only. They have all disowned that proposition. There is therefore unanimity amongst the bar, unanimity with which I totally concur, that any administration in any jurisdiction under English law would be a worldwide administration for the administration of all assets wherever to be found for the benefit of all creditors wherever to be found. That is reflected by the fact that hitherto in virtually all jurisdictions where court proceedings have been taken the court officers appointed to preserve on an interim basis the assets of the BCCI group have either been members of Touche Ross or associates of Touche Ross. Thereby the accountancy profession has managed to achieve, at least in part, a worldwide system for regulating international insolvency which the civilised countries of the world have failed to achieve so far as the law is concerned. For this court to contemplate on the existing state of affairs that there could be imported into that machinery somebody who was not part of the otherwise co-ordinated system of administration would be to send out an entirely erroneous message about what were the intentions and likely intentions of this court.

I do not believe that it can be right for this matter to be adjourned and stood over. Either it must be moved today or it must be dismissed so that it is clear that this application is not going forward. I must therefore ask each of the creditors whether they intend to move this motion further an adjournment having been refused.

Counsel for the creditors declined to move.

SIR NICOLAS BROWNE-WILKINSON V-C. Thank you. Can I then add a few words, because there is a matter that does give me concern? That is the widespread statement that there is unease amongst the creditors as to the fact that they do not have what is sometimes called a representative amongst the number of the provisional liquidators. In the hope that what I say may carry some weight if put to the unbelieving creditors, can I shortly state the role of the provisional liquidators?

They are accountants appointed by the court to get in and to safeguard assets of BCCI. They may not take any major step without obtaining directions from the court as to the steps that are appropriate to be taken. They are not responsible for any distribution of assets. All they are doing is holding assets. If there is an application to be made to the court which might substantially affect one or more of the creditors, it is the function of the provisional liquidators' lawyers to notify creditors who may be affected to give them an opportunity to be heard before the court.

The provisional liquidators are not a body that has representatives of one class of creditor or another class of creditor. The provisional liquidators are independent persons operating under the direction of the court for a purpose that is one entirely of preservation during an interim period.

For myself I cannot see what ground for mistrust there is. I hope that legal advisers will do their best to press the nature of the provisional liquidators' role on the creditors. I will certainly explore with Mr Crystal QC now the possibility that I would welcome, if it is feasible, of a committee of inspection of an informal nature to which information can be communicated by the provisional liquidators and through which requests for information or action can be channelled to the provisional liquidators. I believe that an informal committee of that kind, representing creditors worldwide if they wish to be represented on it, is much more likely to provide what the creditors need than to complicate the task, and to increase enormously the expense, of the provisional liquidation by the introduction of yet another firm of accountants into the matter.

Order accordingly.

Evelyn M C Budd Barrister.