IN THE SUPREME COURT OF BERMUDA
COMMERCIAL COURT
2008: 94

IN THE MATTER OF DICKSON GROUP HOLDINGS LIMITED (In Hong Kong Liquidation)

AND IN THE MATTER OF SECTION 99 OF THE COMPANIES ACT 1981

REASONS FOR RULING

Date of hearing: May 2, 2008
Date of Reasons: May 9, 2008

Ms. Jennifer Fraser, Appleby, for the Applicant

Introductory

1. The Applicant, acting by its Hong Kong Joint Liquidators, applied pursuant to section 99 of the Companies Act 1981 by Originating Summons dated April 29, 2008 for leave to summon a meeting to consider a scheme of arrangement ("the Scheme"). The Applicant, a Bermudian incorporated company, has not only been placed into provisional liquidation in Hong Kong, but a winding-up order has been made and permanent liquidators appointed by the Hong Kong Court.

2. Implicit in the application, which arose on what appeared to me to be unusual facts, was a request that this Court not simply accede to a routine section 99 application, but also both (a) recognise the orders of the Hong Kong Court winding-up the Company and appointing permanent joint liquidators, and (b) cooperate with the Hong Kong Court in supervising the promotion and potential implementation of parallel schemes of arrangement under Bermudian and Hong Kong law designed to restructure the Company's debt and capital so that its shares (substantially under new ownership) can once again trade on the Hong Kong Stock Exchange.

3. This Court has cooperated with foreign insolvency courts in the context of restructurings where a Bermuda company has been in provisional liquidation here but the US Bankruptcy Court has assumed the role of the primary liquidation court. It seemed to be unprecedented, however, for this Court to recognise and enforce insolvency orders of a foreign court in respect of a Bermudian company in circumstances where (a) no parallel insolvency proceedings have been commenced in Bermuda, and (b) the Bermudian company has not only been placed into a restructuring proceedings abroad, but has been placed into "full-blown" liquidation in what amount to primary (as opposed to ancillary) proceedings abroad.

4. In advance of the ex parte hearing counsel was requested to address the jurisdictional issues raised by the application. Counsel satisfied the Court that the jurisdiction to grant the application clearly existed and that commercial logic strongly supported such a result as well. It was obvious without the need for any reasoned analysis that the Court could properly accede to the application for leave to convene a section 99 meeting on its merits. After deciding to grant the application, I indicated that I would give reasons for what appeared to me to be a novel jurisdictional decision.

Counsel's submissions

5. Ms. Fraser firstly explained the commercial background to the proposed application. Although the Company was incorporated in Bermuda, no business activities took place here. The main focus of its business was Hong Kong and elsewhere in the People's Republic of China.

6. Secondly, counsel pointed out that although the Company had been placed into liquidation in Hong Kong, the aim of the Scheme was to restructure its affairs leaving it in a solvent position. The estate was relatively small, the winding-up took place on a creditor's petition and the Hong Kong liquidators had seen no need for a winding-up in Bermuda. The directors had remained in place for Bermuda law purposes, and they had passed a resolution supporting the present application.

7. Accordingly, bearing in mind that section 99 of the Companies Act 1981 implicitly permitted the promotion and sanctioning of schemes of arrangements in relation to insolvent companies independently of liquidation proceedings, it was submitted that the application could properly be granted without any need to formally recognise the foreign winding-up order or the appointment of the permanent liquidators. *Re APP China Group Ltd.* [2003] Bda LR 50 was cited as an illustration of an insolvent scheme being approved by this Court outside of a liquidation proceeding.

8. Ms. Fraser accepted that no precedents existed for parallel schemes of arrangement being implemented in Bermuda and elsewhere in circumstances where the Bermudian company was only in liquidation abroad. However, she referred by way of analogy to the unreported case of Interform *Ceramics Technology Ltd*., Supreme Court of Bermuda, Civil Jurisdiction 2001: 12, as an example of a case where parallel schemes of arrangement were implemented in Bermuda and Hong Kong in relation to a Bermudian company which was only in receivership in Hong Kong. Nevertheless it was clear that if the Court was required to recognise the Hong Kong winding-up and liquidator appointment orders, the jurisdiction to do so existed and there were good grounds for this Court exercising its discretion to do so.

9. Counsel referred to the leading authority on the common law power to recognise foreign corporate rescue proceedings without the need to commence parallel proceedings in the place of incorporation: *Cambridge Gas Transportation Corp.-v- Committee of Unsecured Creditors* [2007] 1 AC 508 (PC). She fairly conceded that there was no judicial authority illustrating the recognition of a foreign winding-up order in respect of a local company. However, counsel referred to academic authority which suggested that any general rule that such an order would not ordinarily be recognised was subject to an exception. The exception was that where there was no likelihood of a winding-up at all in the place of incorporation, which was precisely the present case, the foreign order might be recognised by the courts of the company's domicile: Smart, '*Cross-Border Insolvency*' (Butterworths: London, 1998) pages 178-180; Lawrence Collins (ed.), '*Dicey and Morris on the Conflict of Laws*' 13th edition, paragraph 30-094.

10. However Ms. Fraser also made the subtle yet practical point that in substance the foreign winding-up order was really irrelevant, because the ultimate goal of the Scheme was to permanently stay the foreign winding-up proceedings[1]. Counsel insisted that although cases might exist where this Court would be reluctant to assist the foreign liquidation of a Bermudian company in the absence of parallel proceedings here, the facts of the present case did not give rise to such concerns.

[1] If approved, the Scheme will discharge the Company's debt to its unsecured creditors, so that a new investor can acquire most the Company's shares which will be re-listed on the Hong Kong Stock Exchange. While the liquidation return to unsecured creditors is likely to be only 4%, the return if the Scheme is approved is likely to be in the region of 9%.

The issues falling for determination

11. Two issues of legal principle arose for consideration. Firstly, and most technically, did this Court possess the jurisdictional competence to recognise the winding-up order made in Hong Kong and the related order appointing the Hong Kong liquidators, both made in relation to a Bermudian company which was not being wound-up in its place of incorporation.? Secondly, and more practically, what factors were relevant to the exercise of any discretion the Court possessed to recognise the foreign proceedings, and were the principles governing recognition of and judicial cooperation with foreign restructuring proceedings brought into play?

12. Two important factual issues arose for determination. Firstly, and more technically, could the Court simply dodge any recognition bullets on the grounds that in substance the application for leave to promote the Scheme was made on behalf of the Company and its directors, as a matter of Bermuda law, despite the fact that the application was on its face made by the Company in liquidation under Hong Kong law? Secondly, and more substantively, did the present case not in real terms essentially fall within the well recognised parameters of this Court playing an ancillary role in relation to a primary foreign insolvency proceeding aimed at restructuring a Bermudian company whose business was more closely tied to the foreign forum than to Bermuda?

Jurisdiction to recognise foreign winding-up orders in respect of local companies

13. In the absence of statutory provisions delineating the circumstances in which foreign winding proceedings, orders and appointments of liquidators may be recognised, recourse must be had to the common law. The present concern is not the commonplace issue of recognising foreign ancillary proceedings in respect of a local company; rather it is how the courts of a company where a company is incorporated should respond to foreign proceedings which have been prosecuted as if they were a liquidation taking place in the company's place of incorporation. The common law position appears to be that this Court undoubtedly possesses a discretionary jurisdiction to recognise foreign primary or non-ancillary insolvency proceedings in relation to a Bermudian company, although the conditions governing the exercise of that discretion are not crystal clear. This conclusion may be supported as a matter of inference by a review of some of the leading academic texts. The learned authors of such texts appear to assume that jurisdiction to recognise foreign proceedings in relation to a local company exists and merely question whether or not and, if so, in what precise circumstances, such jurisdiction would be exercised. By common accord, no direct judicial authority on point can be found.

14. In Lawrence Collins (ed.), '*Dicey and Morris on the Conflict of Laws*', 12th edition, Rule 160 provides as follows[2]: "*The authority of a liquidator appointed under the law of the place of incorporation is recognised in England.*" The learned authors caution against regarding this statement as representing the global position:

> "*Rule 160…merely states the position which has been established to date. First, and generally, in determining whether to exercise its jurisdiction to wind up a foreign corporation, we have seen that the English court will consider whether there is any other jurisdiction which is more appropriate for the winding-up and it is possible that a more appropriate jurisdiction might be in a country other than the place of incorporation. This does not suggest that in the admittedly different context of recognition, that such recognition should only be accorded to an appointment under the law of the place of incorporation. More particularly, it has been suggested that an appointment made in a country other than the place of incorporation may be recognised in England if it is recognised under the law of incorporation of the company. More speculatively it may also be possible that an appointment made under the law of the country where the company carries on business will, in appropriate circumstances, be similarly recognised.*
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> *Recognition of a liquidator's authority may be sought by reference to an appointment made in the exercise of a foreign jurisdiction similar to that conferred on the English courts in regard to companies incorporated outside the United Kingdom…This treatment of the argument based on comity is defensible because where there is a liquidation in the country of incorporation and the English courts exercise their own jurisdiction to make an order, they seem concerned to ensure that the liquidator should not go beyond dealing with the company's English affairs without special direction. Such concern is not shown where there is no likelihood of a liquidation in the country of incorporation.*"[3]

15. The tentative nature of the foregoing views is perhaps understandable in the context of a text which does not focus on the insolvency terrain. Writers specifically addressing insolvency law may be expected to be more instructive to present concerns. Nevertheless in Philip R Wood, '*Principles of International Insolvency Law*' 2nd edition, writing after Britain adopted the UNCITRAL Model Law on Cross-Border Insolvency, the learned author reflects (for the benefit of other common law countries) on what used to be the position under English common law in equally tentative terms :

[2] (Sweet and Maxwell: London, 1993), Volume 2, page 1137.
[3] Ibid, pages 1137-1138.

> "*A liquidation at the place of incorporation would always be recognized in England…But, it was possible that a liquidation at the principal place of business abroad would be recognized in England in an appropriate case, eg where the company was a mere brass-plate at its place of incorporation, but England would probably not have recognized a foreign liquidation of an English-incorporated company…*
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> *The disadvantage of recognizing a liquidation only at the country of incorporation is that many companies are incorporated in one jurisdiction, but carry on their principal business elsewhere. This is true of tax-haven countries, such as Cayman, or shipping jurisdictions such as Panama and Liberia. It would seem odd therefore to refuse recognition of liquidation where the main assets are located.*"[4]

16. A more positive statement of principle may be derived from Ian F Fletcher, '*Insolvency in Private International Law*', where the learned author opines as follows:

> "*Where the foreign liquidation has been commenced in a country other than that in which the company's incorporation occurred, there is considerable uncertainty with regard to the prospects of such proceedings being recognized in England, and as to the principles on which such recognition might be based. The lack of explicit authority on this matter in reported cases is to be regretted. Clearly, the possible circumstances in which such foreign liquidations may take place can vary considerably, so that it is important that a flexible approach should be adopted. One situation in which the English position seems to be reasonably predictable is where the foreign liquidation concerns a company actually formed and registered in England. The primacy of the law of the country of incorporation is likely to form the basis of the English court's reaction to such a case….However, if no winding-up proceedings are taking place in England, despite the company having been formed here (as may be the case if there are no assets in this country, and perhaps no English creditors with interests to defend), it may be that the foreign proceedings can be considered to be the most appropriate way in which to wind up the company, although it is possible that the final process of effecting the dissolution might be reserved by English law to itself, using the power of the Registrar of companies to strike it off the register as a defunct company.*"[5]

[4] (Sweet and Maxwell: London, 2007), paragraph 28-041.
[5] Second Edition (Oxford University Press: Oxford, 2005) paragraph 3.93.

17. The latter analysis is now supported by high judicial authority. Where a shareholder of an insolvent Isle of Man company sought to challenge a Chapter 11 Plan which transferred all shares to the company's creditors under US bankruptcy law without implementing a Manx parallel proceeding or even a scheme, the Judicial Committee of the Privy Council held that the Manx court could recognize the US Plan in the exercise of its common law discretion: *Cambridge Gas Transportation Corp.-v- Committee of Unsecured Creditors* [2007] 1 AC 508 (PC). Lord Hoffman (at pages 517-518) opined as follows:

> "***18*** *As Professor Fletcher points out (*Insolvency in Private International Law*, 1st ed (1999), p 93) the common law on cross-border insolvency has for some time been "in a state of arrested development", partly no doubt because in England a good deal of the ground has been occupied by statutory provisions such as section 426 of the Insolvency Act 1986, the European Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L160, p 1) and the Cross-Border Insolvency Regulations 2006 (SI 2006/1030), giving effect to the UNCITRAL Model Law. In the present case, however, we are concerned solely with the common law.*
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> ***19*** *The underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out. For example, the rule that English moveables vest automatically in a foreign trustee or assignee has so far been limited to cases in which he was appointed by the court of the country in which the bankrupt was domiciled (in the English sense of that term), as in* Solomons v Ross, *or in which he submitted to the jurisdiction: In re Davidson's Settlement Trusts (1873) LR 15 Eq 383. It may be that the criteria for recognition should be wider, but that question does not arise in this case. Submission to the jurisdiction is enough. In the case of immovable property belonging to a foreign bankrupt, there is no automatic vesting but the English court has a discretion to assist the foreign trustee by enabling him to obtain title to or otherwise deal with the property.*
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> ***20*** *Corporate insolvency is different in that, even in the case of moveables, there is no question of recognising a vesting of the company's*
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> *assets in some other person. They remain the assets of the company. But the underlying principle of universality is of equal application and this is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England. In addition, as Innes CJ said in the Transvaal case of* In re African Farms Ltd *[1906] TS*

> *373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, "recognition which carries with it the active assistance of the court". He went on to say that active assistance could include:*
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> > *'A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to such conditions as the court may impose for the protection of local creditors, or in recognition of the requirements of our local laws.'*
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> > ***21** Their Lordships consider that these principles are sufficient to confer upon the Manx court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan. As there is no suggestion of prejudice to any creditor in the Isle of Man or local law which might be infringed, there can be no discretionary reason for withholding such assistance.*"

18. This decision is most notable for confirming the scope of the common law discretionary power of the Bermuda court to recognize a foreign restructuring order and to assist a foreign insolvency court. But it also is important, for present purposes, in confirming that such recognition and assistance is not automatic: it may be withheld in order to avoid any prejudice to any local creditors or any infringement of local law. These principles, which draw upon cases dealing with traditional winding-up proceedings long before the modern corporate rescue culture evolved, hold good for recognizing foreign winding-up orders and their consequences as well.

19. All of this learning suggests the following principles which I adopt: (a) the fact that this Court would in similar circumstances entertain primary winding-up proceedings in respect of a foreign company is an important factor in deciding whether or not to recognize a foreign principal winding-up proceeding in relation to a local company which is not being wound-up at all its own domicile; and (b) the main practical consideration is whether or not a foreign primary proceeding is the most convenient means of winding-up the company's affairs, having regard to all relevant commercial and/or public policy concerns in the case at hand. These two broad considerations must in my judgment be applied having regard to two fundamental principles of insolvency law: (a) the universalist principle under which all reasonable efforts ought normally to be made to subject a company's liquidation to a single coherent regime so that all creditors share ratably, irrespective of the accidental location of creditors outside the jurisdiction of the primary liquidation court; and (b) the presumption that most creditors dealing with the company before it became insolvent would reasonably have contemplated that their rights in any insolvency would be dealt with in accordance

with the law of the company's place of incorporation, irrespective of the accidental location of assets outside of that jurisdiction. The application of all of these guiding principles will vary depending on the facts of the specific case.

20. This Court has apparently only on one occasion exercised its own jurisdiction to wind-up an overseas company which carried on all of its business from Bermuda in proceedings which essentially amounted to primary liquidation proceedings: *Informission Group Inc.-v- Convertix Corporation* [2000] Bda LR 75. In this case, the company was incorporated in the British Virgin Islands ("BVI") but was commercially managed from Bermuda. The respondent company was not registered as an overseas permit company in which case the bare jurisdiction to wind-up in Bermuda would have been far clearer. A creditor's petition was presented and the Court was explicitly invited to wind-up the company on the basis that the Bermuda proceedings would be the only winding-up proceedings in connection with the BVI-incorporated company. Justice Norma Wade[6] granted the winding-up order observing (at pages 3-4):

> "*Finally I deal with the question of whether these liquidation proceedings will operate as ancillary or principal winding-up proceedings.*
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> *The essence of* [counsel]*'s argument on this question is this-whenever a winding up order is sought against a company outside the domicile of its incorporation this question arises irrespective of whether winding up proceedings are on foot or anticipated in the place of the Company's incorporation. He says that it is clear that this Court can exercise primary winding up competence where Bermuda is shown to be the most appropriate forum for compulsory winding up. In support he referred to the affidavit of the Provisional Liquidator which he says provides a basis for concluding in accordance with applicable law in this area that Bermuda is the most appropriate forum. In this respect he relied upon the learning found in Smart Cross Border Insolvency (Butterworths: London), 1991, pp 236-238 where the learned author said at p237:*
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> > *'…when dealing with the insolvency of a foreign corporation it is necessary to consider whether, in the interests of all the parties and for the ends of justice, the English court is the proper tribunal in which a liquidation should proceed. If the English court is the appropriate forum, then the English winding-up need not be ancillary to any other liquidation.'*
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> [counsel] *also relied upon the decision in Re A Company (No. 00359 of 1987)[1988] Ch 210 where it was held:*

[6] Now Justice Wade-Miller.

> *'that for the Court to make a winding up order against a foreign company it was not necessary to show that the company had assets within the jurisdiction, but a sufficiently close connection with the jurisdiction had to be established; that the facts that the loan agreement had been negotiated, executed and performed in England, the company's directors were resident in England, the company had bank accounts in England, while there was no evidence that the company had carried on business outside England, demonstrated a sufficient connection with the jurisdiction; and that accordingly, since there was no more appropriate jurisdiction for the winding up of the company and since there was a reasonable possibility of benefit accruing to the creditors from the making of the winding up order, an order would be made and the provisional liquidator appointed'*.
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> **Having considered the authorities relied upon in this matter I accept** [counsel]**'s submission as to the principles to be applied to this case**."

21. The *Convertix* judgment, like the present Judgment, was rendered following an ex parte hearing and so the relevant principles have not been decided by a court which has received the benefit of full argument. Nevertheless, it does provide explicit support for the proposition that this Court might well feel inclined to make a winding-up order in relation to a Hong Kong company that had conducted all of its business in Bermuda and had only formal constitutional ties with its place of incorporation, despite the absence of parallel winding-up proceedings its place of incorporation . So as regards the Company in the present case, it appears that the Hong Kong Court has done no more than to assert jurisdiction which this Court presented with equivalent facts might potentially assert. The factual matrix of the present case will be considered further below.

Factors relevant to the exercise of the Court's discretion

22. The facts of the present case make it unnecessary to consider in any depth what sort of policy factors might give this Court cause to decline to recognize foreign winding-up proceedings in relation to a Bermudian company. Although a winding-up order was made in Hong Kong, it is no longer intended to actually wind-up the Company at all. The winding-up is intended to be stayed and the restructured business returned to solvency. This Court, through the Scheme, is to cooperate in the restructuring process in a manner which is now well established both with respect to parallel schemes of arrangement and parallel insolvency proceedings. In *Re Akai Holdings Ltd; Re Kong Wah Holdings Ltd* [2001] Bda LR 31, the companies were wound-up firstly in Hong Kong and shortly thereafter in Bermuda. Recognition will obviously come more easily when the foreign

proceedings take place in a jurisdiction such as Hong Kong which has a similar legal system and a long history of judicial cooperation ties.

23. Text writers tend to treat the recognition of foreign corporate rescue proceedings and the orders made therein as a distinct topic from the recognition of a foreign winding-up order[7]. This distinction, subject to at least two obvious exceptions alluded to below, may have greater historical than current significance in the context of considering the factors relevant to the exercise of this Court's discretion to recognize. The Court's focus will usually be on, broadly speaking, whether the foreign proceeding as a whole ought to be recognized. In the offshore world in particular, the traditional delineations between principal and ancillary proceedings will often be blurred. Cooperation will take place through parallel proceedings, be they corporate rescue proceedings, winding-up proceedings or insolvent schemes implemented without winding-up proceedings at all with the leading role typically being determined by the commercial centre of gravity rather than the jurisdictional centre of gravity. This does not mean that in the context of parallel proceedings where this Court recognizes the foreign proceedings generally that each and every order made in the foreign court will be given effect to here. But the traditionally fixed notion that a foreign insolvency court is only competent to deal with matters within its ancillary jurisdiction is potentially always subject to modification in the case of Bermudian companies which have few tangible connections here. While the centre of main interest ("COMI") concept appears to have mandatory statutory force under European insolvency law and the UNCITRAL Model Law, its underlying assumptions are hardly anathema to Bermudian common law.

24. Nevertheless, it may be useful to note that persons incorporating companies in Bermuda which are substantially managed abroad ought not to expect this Court to give "rubber-stamp" recognition to foreign principal winding-up proceedings which are commenced without parallel proceedings here. In most cases, commercial logic will likely be the best guide as to whether it is appropriate to commence winding-up proceedings abroad in respect of a local company without also commencing proceedings here. Legally, a Bermuda company can never be wound-up and dissolved for all purposes without a dissolution taking place under Bermuda law. Even if a company is struck-off the register and dissolved without a winding-up under Bermuda law, any disgruntled creditor (or perhaps, a shareholder as well) may subject to limitation constraints apply to set aside a dissolution and open a winding-up under local law. In any liquidation of substance, it will be impossible for the place of incorporation to be ignored. And where the way in which a Bermudian company is wound-up has implications for the reputation of Bermuda as an international financial centre, public policy may well dictate that this forum ought to play a more significant role than purely commercial concerns might otherwise dictate.

[7] See e.g. Fletcher, '*Insolvency in Private International Law*', paragraphs 3.114-3.118.

25. One obvious exception to the rule contended for above, namely that no distinction generally arises between recognizing foreign restructuring proceedings and foreign liquidation proceedings, relates to the issue of management and control. The practice has developed in jurisdictions such as Bermuda which lack statutory corporate rescue rules of appointing a provisional liquidator to supervise the company's management as it affects the restructuring under supervision of the local and any relevant foreign court. Where there are parallel restructuring proceedings, the company's management will remain in place both in Bermuda and in the foreign forum. If a foreign winding-up order is made without an equivalent Bermudian order, the foreign order displaces the directors under the foreign law but does not displace them under Bermuda law. From a Bermuda regulatory perspective, it may be problematic to countenance a situation where the only persons responsible for a Bermudian company as a matter of Bermuda law are still in office yet have lost effective control of the company under the law which governs the company's entire commercial operations. This suggests that it is probably accurate to regard the approach to recognition of foreign corporate rescue proceedings generally as being more generous than the approach to foreign winding-up proceedings, to this extent. The position would likely be less problematic if Bermudian directors stayed in place under local law while in their company's principal place of business abroad their corporate powers were merely limited by the appointment of provisional liquidators appointed with "soft" monitoring powers.

26. The second and somewhat less concrete exception to the posited rule that no distinction ordinarily arises between recognizing foreign corporate rescue and winding-up proceedings is as follows. In resolving jurisdictional conflicts in the cross-border context generally, regard is often informally had to what the reasonable expectations of persons dealing with the company before it became insolvent must have been. However the proposition that the expectations of those dealing with the company as to what would happen in the event of insolvency is relevant in the cross-border context is explicitly articulated in Lord Hoffman's most recent exposition on this area of the law in the House of Lords decision in *McGrath and others-v-Riddell and others (Re HIH Casualty and General Insurance Co. Ltd)* [2008] UKHL 21. Here, the universalist principle was reiterated with greater force as justifying the remittal of UK assets to the Australian liquidators of HIH to be distributed under Australian insolvency rules which were different to those prevailing under English law[8]. Although the primary focus was section 426 of the UK Insolvency Act 1986, the common law power to assist a foreign liquidation was also considered. The following observations of Lord Hoffman are therefore highly persuasive in seeking to answer the broad question of how a Bermuda court should determine where the principal winding-up of a company should take place:

[8] It appears that these legal differences were insignificant by the time the case reached the House of Lords.

> "***31*** *In the present case I do not see that it would offend against any principle of justice for the assets to be remitted to Australia. In some cases there may be some doubt about how to determine the appropriate jurisdiction which should be regarded as the seat of the principal liquidation. I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings (Council Regulation (EC) No 1346/2000 of 29 May 2000) uses the concept of the "centre of a debtor's main interests" as a test, with a presumption that it is the place where the registered office is situated: see article 3(1). That may be more appropriate. But in this case it does not matter because on any view, these are Australian companies. They are incorporated in Australia, their central management has been in Australia and the overwhelming majority of their assets and liabilities are situated in Australia.*
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> ***32*** *It is true that Australian law would treat insurance creditors better and non-insurance creditors worse than English law did at the relevant time. But that seems to me no reason for saying that the Australian law offends against English principles of justice. As it happens, since the appointment of the provisional liquidators, English law has itself adopted a regime for the winding up of insurance companies which gives preference to insurance creditors: see regulation 21(2) of the Insurers (Reorganisation and Winding Up) Regulations 2004 (SI 2004/353), giving effect to the European Parliament and Council Directive 2001/17/EC on the reorganisation and winding up of insurance companies. So English courts are hardly in a position to say that an exception to the pari passu rule for insurance creditors offends against basic principles of justice.*
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> ***33*** **Furthermore, it seems to me that the application of Australian law to the distribution of all the assets is more likely to give effect to the expectations of creditors as a whole than the distribution of some of the assets according to English law. Policy holders and other creditors dealing with an Australian insurance company are likely, so far as they think about the matter at all to expect that in the event of insolvency their rights will be determined by Australian law. Indeed, the preference given to insurance creditors may have been seen as an advantage of a policy with an Australian company.**" [emphasis added]

27. So when one is considering an actual winding-up of a Bermuda company's business and a distribution of assets under an insolvency regime, the reasonable expectations of the creditors as to what law would apply will be potentially relevant to this Court's decision as to whether to recognize a foreign winding-up

proceeding as the sole or primary winding-up in relation to a Bermudian company, especially where materially different distribution rules apply in the respective fora. This concern would not necessarily arise in relation to a corporate rescue procedure which does not substantially engage the winding-up process and its distribution rules at all but instead merely reflects a commercial bargain assented to by the requisite statutory majorities and sanctioned by the relevant court.

Does the Scheme application require the Court to recognize the Hong Kong winding-up order and the order appointing the Joint Liquidators?

28. Ms. Fraser's submission that no need to recognize the foreign winding-up order nor the appointment of the Joint Liquidators truly arises because the directors who remain in place as a matter of Bermuda law support the application is an elegant yet highly technical point. This sort of point, I believe, is sometimes referred to in the barrister's trade as "*a Temple point*". It would in my judgment be completely artificial to hold that this Court can grant leave to promote the Scheme without implicitly recognizing (a) the validity of the Hong Kong winding-up order; and (b) the validity of the Hong Kong order appointing the Joint Liquidators. This conclusion is inevitable for the following reasons.

29. Firstly, the Ex Parte Originating Summons under which the application is made is expressed to be made by "*Dickson Group Holdings Limited (in Hong Kong liquidation)*". The application is supported by the Affirmation of Stephen Liu Yiu Keung, one of the Joint Liquidators appointed by the Hong Kong High Court on May 29, 2007. Quite rightly, there is no pretence that the application is being made by the Company on the basis that it is not in liquidation as a matter of Bermuda law. So formally, therefore, the Court is being requested to grant an application made by the Company in its capacity as a company in liquidation in Hong Kong, not in its capacity as a company which is not in liquidation in Bermuda.

30. Secondly, it is clear that this Court is being asked to permit the Joint Liquidators appointed in Hong Kong to promote the Scheme. There is no suggestion that the directors have any material control over the Company in liquidation in Hong Kong, or are intended to promote the Bermuda version of the Scheme. It is true that on March 27, 2008, all the Company's directors passed a resolution confirming Mr. Liu's authority to make the application. But this resolution has a hollow ring to it. As long ago as December 16, 2006, Madam Justice Kwan of the Hong Kong High Court of First Instance ordered the Company to be wound-up in its principal place of business displacing the directors from operational control of the Company. The directors under Hong Kong law (which substantively governs the Company's business affairs) have no competence to empower the Joint

Liquidators at all. Paragraph 31 of the Liu Affirmation moreover provides as follows:

> "*It is suggested that the Scheme Meeting should be held in Hong Kong because to the best of my knowledge and belief a vast majority of the Company's creditors are located in Hong Kong. It is also suggested that I, or failing me, a director of Ernst & Young Transactions Limited who is an individual qualified to act as liquidator of a company in Hong Kong and/or experienced in the restructuring or insolvency of companies in Hong Kong be appointed Chairman of such Scheme Meeting.*"

31. So it is clearly legally and/or factually impossible to grant leave to convene the Scheme meeting intended to be chaired by a Joint Liquidator without implicitly recognizing the validity of his appointment. More substantively still, the Scheme is unequivocally being promoted by the Hong Kong Joint Liquidators. The letter which was proposed to accompany the Scheme is headed "*LETTER FROM THE LIQUIDATORS*". The Explanatory Statement is according to its terms prepared by the Liquidators and Notices of Claim for voting purposes are to be sent to the Liquidators. The Explanatory Statement contemplates that "*the Company, acting by the Joint Liquidators may consent, for and on behalf of all persons concerned, to any modifications or additions to the Scheme or any condition which the Bermuda Court may see fit to approve or impose.*" (paragraph 7.12). This merely confirms what is otherwise obvious; that the Joint Liquidators are making the present application and promoting the Scheme; further, if the Scheme is approved by the requisite majority, they will be seeking its sanction.

32. Finally, it is clear from the Scheme documentation which was placed before the Court that the Scheme is to be administered by one of the Joint Liquidators together with a Scheme Committee comprised of creditors. One of the Joint Liquidators is a Scheme Administrator (Scheme, paragraph 1.1) who will adjudicate creditors' claims and make distributions. The other Scheme Administrator is also a professional liquidator although not formally appointed as such in relation to the Company. In practical terms, the Joint Liquidators are the Scheme Administrators.

33. In all the circumstances granting the application under section 99 of the Companies Act 1981 unarguably required this Court to implicitly recognize the Hong Kong winding-up order and the subsequent appointment of the Joint Liquidators.

Should this Court recognize the Hong Kong winding-up and permanent liquidator appointment orders in the exercise of this Court's well-established common law discretion to cooperate with a foreign restructuring court?

34. When the commercial realities are looked at in isolation from the legal formalities, the Hong Kong Joint Liquidators in promoting parallel schemes of arrangement in Hong Kong and Bermuda are in essence requesting this Court to assist the Hong Kong Court to restructure the Company. It is impossible on the facts to identify any or any cogent reasons why this assistance may properly be declined.

35. The aim of the Scheme, most directly, is to eliminate the Company's existing unsecured debt. But this debt restructuring will only become operative if the Restructuring Agreement in relation to the Company's share capital become effective, outside of the Scheme. Under the latter arrangements, an Investor will acquire most of the Company's shares. The purchase monies will fund the creditors' Scheme claims. The Company will be returned to solvency, its shares will be re-listed and the Hong Kong winding-up proceedings will be permanently stayed. As Ms. Fraser rightly submitted, the foreign winding-up order will (if the scheme is implemented) fall away, and no question of the need for a winding-up in Bermuda will arise.

36. This Court is being invited to assist the Hong Kong Court through implementing a parallel scheme of arrangement in Bermuda in circumstances where (a) the Company was registered as an overseas company in Hong Kong where its principal business and the majority of its assets are clearly located, (b) the estate is apparently not a large one and (c) there is no suggestion of any prejudice to local interests. In these circumstances there is no apparent reason why this Court should decline to assist the Hong Kong Joint Liquidators merely because no winding-up proceedings have been started here. As I observed in the context of parallel receivership proceedings:

> "*In the present case, with its centre of gravity clearly more in Hong Kong than Bermuda, this Court has, in my view rightly, been content to accord a leading role as regards assessment of costs and otherwise to the High Court of Hong Kong. In cases where Bermuda-based office holders subject to the primary supervisory jurisdiction of this Court were involved, this jurisdiction would logically expect to play a larger role.*" [9]

37. At the end of the day this Court was not asked to recognize a foreign winding-up order which purported to wind-up, for all purposes, the business of a Bermuda-incorporated company.

Conclusion

38. For the above reasons, the Company's application for leave to promote the Scheme in tandem with the Hong Kong Scheme, in relation to which a similar order was previously made in Hong Kong on March 11, 2008 by Mr. Justice

[9] *Re Shanghai Merchants Holding Ltd.* [2004] Bda LR 33 at page 6.

Reyes, was granted on May 2, 2008 despite the fact that (a) a winding-up order has been made in Hong Kong, (b) permanent liquidators have been appointed in Hong Kong, and (c) no parallel liquidation proceedings have been commenced in respect of the Company here, in its place of incorporation.

Dated this 9th day of May, 2008 _____

KAWALEY J