

The ILA Technical Committee wishes to draw members' attention to the House of Lords judgment in *McGrath and another and others v Riddell and others* [2008] UKHL 21 (*Re HIH Group*)

In this case the Australian liquidators and two supporting Australian insurance creditors were successful in obtaining an order that obtained an order pursuant to S426 Insolvency Act 1986 directing English provisional liquidators to remit assets in the UK to them, to be distributed in accordance with Australian rules on priority.

Background

This case concerned four insolvent insurance companies which were incorporated in Australia. The companies were part of the HIH Group which, until it failed in 2001, was the second largest insurance group in Australia. The companies were authorised to carry on insurance, inter alia, in the UK. Although the majority of the companies' assets and liabilities were in Australia, a significant proportion of assets and liabilities were also located in England. Winding up orders were made in Australia in 2001 and provisional liquidators had also been appointed in England. In July 2005 the Supreme Court of New South Wales issued a letter of request to the English Court pursuant to s426 Insolvency Act 1986 asking the English Court to direct the provisional liquidators in England to pay all sums collected by them to the Australian liquidators. The effect of remitting assets to Australia would be that they would be distributed in a different priority to the priority prescribed by the English rules, with the result that some creditors (insurance creditors) would be better off and others (non-insurance creditors) affected to their detriment.

First instance

At first instance the judge had held that the English Court's jurisdiction did not extend to authorising assets to be remitted for distribution which was not *pari passu* but gave a preference to some creditors.

Court of Appeal

The Court of Appeal held that the English Court did have the necessary jurisdiction, but that it should not be exercised if as a result of the preference afforded to some creditors, others suffered a disadvantage. See further previous Technical Update August 20 06 #2.

House of Lords judgment

Power under s426 Insolvency Act 1986

Each of the judges of the Appellate Committee of the House of Lords: Lords Hoffmann, Phillips, Scott, Walker and Neuberger found in favour of the Australian liquidators. They held that the assets realised by the English liquidators should be remitted to the Australian liquidators for distribution in accordance with Australian rules on priority.

Lords Phillips, Scott and Neuberger based their opinions narrowly, however, in reliance solely on the English Court's power derived from s426 of the Insolvency Act 1986. They held that the English Court has an obligation to apply the English statutory insolvency scheme, including the *pari passu* principle. It was only in cases where S426 Insolvency Act 1986 applied that the court is able, in its discretion, to order that assets be remitted abroad and be subjected to an insolvency system with principles diverging from English insolvency law principles. They considered the provisions at s426 Insolvency Act 1986 to be as much

a part of the English statutory insolvency scheme as the principle of *pari passu*. They concluded that in exercising their power under s426, which had the effect of imposing a different priority regime pursuant to the insolvency law of foreign court making the request, absent any "manifest injustice to a creditor", (not simply a different priority), the request should not be refused.

The reason that Scott LJ and Neuberger LJ limited their decisions in this way may be in part due to the fact that Lord Scott had in the earlier seminal case of *Re BCCI (No10) [1997] 1 Ch 213* found that the English Court had no inherent jurisdiction to remit assets to another liquidator which would deprive some creditors of statutory rights of set off under Rule 4.90 Insolvency Act 1986. The *BCCI (No10)* case was distinguished from the present case insofar as the principal liquidation in *BCCI (No10)* was taking place in Luxembourg. As Luxembourg is not one of the relevant countries for the purposes of s426 the Court's decision was confined to a consideration of common law principles and it did not involve a consideration of the position under s426.

English Court's inherent power

Lord Hoffmann came to the same conclusion as the other Law Lords, but articulated his reasons for allowing the appeal on the basis of the principle of universalism: by which the English winding up of a foreign entity was treated as ancillary to a winding up by the court of its domicile. This principle "*which has been the golden thread running through English cross-border law since the Eighteenth century*" required the English Court, in his words:

"so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

In his view, the power to remit assets is exercised where the English Court decides that there is a foreign jurisdiction more appropriate in dealing with the winding up. The fact that Australian law treats insurance creditors differently did not in his view offend English principles of justice or public policy. The differences were in Lord Hoffmann's view only relevant to the question of whether the English Court would in fact exercise its discretion. In reaching these conclusions he emphasised the fact that the liquidations were dealing with Australian incorporated companies, and the principal reason for there being assets in England was as a result of the companies placing their reinsurance business in the London market.

In his opinion, whilst there were circumstances in which s426 could be used to extend the choice of law which the English Courts can make, the request for the remittal of assets by the Australian Court by way of an order under s426 should not be characterised as the English court applying the insolvency law of Australia. He was of the view that the English Court directing that the assets be remitted was within the English Court's "own jurisdiction and powers" and the distribution in accordance with Australian law priority would be effected by the Australian liquidators, not the English Court.

Comment

The result for the Australian liquidators and the Australian insurance creditors is a significant victory as they succeeded in overturning a decision from the Court of Appeal which had been essentially based on the exercise of its discretion. The judgment provides much needed clarity on the English Court's powers under s426. In cases where s426

Insolvency Act 1986 cannot be invoked, the English Court's inherent jurisdiction to make remittal orders to countries may be limited to cases where the foreign court's rules do not infringe the principles of English insolvency law. It is, however, interesting to note that under the provisions of the Cross-Border Insolvency Regulations 2006 ('CBIR'), Article 21(2) provides that there is power for the court to order remission of UK assets to a foreign representative '*provided that the court is satisfied that the interests of creditors in Great Britain are adequately protected.*' The CBIR do not apply to insurance companies and were not in force when this case began.