OUTER HOUSE, COURT OF SESSION

[2024] CSOH 91

P584/24

OPINION OF LORD SANDISON

in the Note by

(FIRST) STUART PRESTON and (SECOND) JULIE TAIT
as joint administrators of
SIGNAL REAL ESTATE OPPORTUNITIES (LUX) INVESTCO IX S.À.R.L
(IN ADMINISTRATION)

Noters

for directions pursuant to paragraph 63 of Schedule B1 of the Insolvency Act 1986

Noters: DM Thomson KC, Boffey; DLA Piper Scotland LLP

26 September 2024

Introduction

[1] By this Note, the joint administrators of a company registered in Luxembourg but having its principal asset in the form of property situated in Scotland seek directions from the court as to whether it would be appropriate for them to enter into a contract (called a co-operation protocol) with a receiver to the company appointed by the *Tribunal d'arrondissement de Luxembourg*. Neither the receiver nor the company's principal and secured creditor has raised any objection to that course of action. The matter came before the court for a hearing on a motion to grant the prayer of the Note.

Relevant Statutory Provisions

[2] The Insolvency Act 1986 provides *inter alia* as follows:

> "**426.— Co-operation between courts exercising jurisdiction in relation to insolvency.**
>
> …
>
> (4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> (5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law."

[3] Schedule B1 to the 1986 Act contains *inter alia* the following provisions:

> "**3**
>
> (1) The administrator of a company must perform his functions with the objective of—
>
> (a) rescuing the company as a going concern, or
>
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
>
> (c) realising property in order to make a distribution to one or more secured or preferential creditors.
>
> (2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.
>
> (3) The administrator must perform his functions with the objective specified in sub-paragraph (1)(a) unless he thinks either—
>
> (a) that it is not reasonably practicable to achieve that objective, or
>
> (b) that the objective specified in sub-paragraph (1)(b) would achieve a better result for the company's creditors as a whole.

(4) The administrator may perform his functions with the objective specified in sub-paragraph (1)(c) only if—

(a) he thinks that it is not reasonably practicable to achieve either of the objectives specified in sub-paragraph (1)(a) and (b), and

(b) he does not unnecessarily harm the interests of the creditors of the company as a whole.

…

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(1) This paragraph applies to a company in administration.

(2) No resolution may be passed for the winding up of the company.

(3) No order may be made for the winding up of the company.

(4) Sub-paragraph (3) does not apply to an order made on a petition presented under—

(a) section 124A (public interest),

(aa) section 124B (SEs), or

(b) section 367 of the Financial Services and Markets Act 2000 (c.8) (petition by Financial Conduct Authority or Prudential Regulation Authority).

(5) If a petition presented under a provision referred to in sub-paragraph (4) comes to the attention of the administrator, he shall apply to the court for directions under paragraph 63.

…

63

The administrator of a company may apply to the court for directions in connection with his functions.

…

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(1) On the application of the administrator of a company the court may provide for the appointment of an administrator of the company to cease to have effect from a specified time.

(2) The administrator of a company shall make an application under this paragraph if—

(a) he thinks the purpose of administration cannot be achieved in relation to the company,

(b) he thinks the company should not have entered administration, or

(c) the company's creditors decide that he must make an application under this paragraph.

(3) The administrator of a company shall make an application under this paragraph if —

(a) the administration is pursuant to an administration order, and

(b) the administrator thinks that the purpose of administration has been sufficiently achieved in relation to the company.

(4) On an application under this paragraph the court may—

(a) adjourn the hearing conditionally or unconditionally;

(b) dismiss the application;

(c) make an interim order;

(d) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for)."

Background

[4] Signal Real Estate Opportunities (Lux) Investco IX S.À.R.L. (in Administration) ("the Company") is a private limited liability company incorporated under the laws of the Grand Duchy of Luxembourg. Its registered office is in Luxembourg and it is entered in the Luxembourg Trade and Companies Register, but also registered with the UK Registrar of Companies as an overseas entity.

[5] On 15 February 2024, I appointed the Noters as joint interim managers of the Company on the petition of Amber Green Spruce 2 LLP ("Amber Green"), a limited liability partnership registered in England. On 13 March 2024, I further appointed the Noters as

joint administrators of the Company. It is thought that the only secured creditor of the Company is Amber Green, which was owed £14,772,346.37 by it as at 13 February 2024, and that the Company's assets would be exhausted in the satisfaction of its claim. There are a number of unsecured creditors whose claims are thought to amount in aggregate to a few hundred thousand pounds. The Company's principal (and effectively sole) asset is its interest as tenant in a 125-year commercial lease of office premises in the International Financial Services District of Glasgow at 55 Douglas Street there. The Company has one sub-tenant at the property, which occupies approximately 15% of the available floor space, the remainder being unlet and empty.

[6] On 12 March 2024 the directors of the Company submitted an application to the *Tribunal d'arrondissement de Luxembourg* seeking its admission to bankruptcy (*faillite*). That application was granted on 15 March 2024 (two days after this court appointed the Noters as joint administrators) and Ms Natalia Zuvak, advocate, was appointed as its bankruptcy receiver (*curateur*). It is not clear whether the Luxembourg court was aware of the existence of the Scottish administration order when it granted the application before it, although given that the Noters had been installed as interim managers of the Company for a month at that point, it is to be expected that the Company's directors were aware, at least, of the prospect of an administration order being granted here. The Noters became aware of the actions of the Luxembourg court on 19 March 2024. There are two concurrent insolvency processes, in two separate jurisdictions, in dependence in respect of the Company. Neither has been declared ancillary to the other.

[7] In order to avoid potential conflict between those processes, the joint administrators and the bankruptcy receiver have negotiated an agreement or draft co-operation protocol (described in its own terms as having "a fully binding effect" upon them) designed to enable

them to work together to realise the Company's assets for the benefit of its creditors. In terms of the protocol, the Noters would market and sell the Company's property in Scotland with some oversight by the receiver, but some aspects of the proposed arrangement would represent deviations from the statutory position provided in this jurisdiction in terms of the Insolvency Act 1986 and the Insolvency (Scotland) (Company Voluntary Arrangement and Administration) Rules 2018. In particular, any net sale proceeds from the sale of the Company's Scottish property after deduction of the remuneration, costs and outlays of both the administrators and the receiver up to the date of completion of sale, and a substantial interim distribution to Amber Green, would be transferred to a Luxembourg escrow account and distributed by the receiver in accordance with the order of priority prescribed by Luxembourg law, which would have the effect of prioritising payment of sums believed to amount to around €100,000 owed by the Company to the Luxembourg tax authorities, ahead of Amber Green's ranking.

[8] The judge supervising the bankruptcy process in Luxembourg has intimated that the receiver does not need his permission to enter into the protocol. Amber Green is said strongly to favour the management and sale of the Company's Scottish property being conducted by the Noters within the administration process, and under this court's supervision, but beyond that does not object to the protocol being entered into. It is acknowledged that the costs of the administration are likely to be higher than would have been the case had the appointment of the receiver not taken place.

[9] In those circumstances, the Noters make this application to the court for directions in terms of paragraph 63 of Schedule B1 of the Insolvency Act 1986 as to whether it is appropriate for them to enter into the protocol, or such other direction as seems to the court

to be in the best interests of the creditors of the Company and the fulfilment of the purposes of its administration.

Submissions for the Noters

[10] On behalf of the Noters, senior counsel noted under reference to Goode's Principles of Corporate Insolvency Law (5th ed) at para 16-63 that it was common to have concurrent insolvency proceedings in different jurisdictions, sometimes but not necessarily with one set of proceedings ancillary to another. In the present case, neither set of proceedings had been declared ancillary to the other, and it could not be regarded as clear whether or not the subsequent Luxembourg winding-up proceedings had implicitly rendered the Scottish administration ancillary to them or, if they had, what the nature of the ancillary office-holder's rights and duties might be in such a situation. Indeed, counsel's researches had not revealed any judicial recognition of the idea that administration proceedings could ever be regarded conceptually as ancillary to a winding-up in another jurisdiction.

[11] Counsel referred to the observations of Sir Richard Scott V-C in *Re Bank of Credit and Commerce International SA (In Liquidation) (No. 10)* [1997] Ch 213 at 242A – B, [1997] 2 WLR 172 at 193C – D that in English law an ancillary winding-up involved that:

> "The liquidators must get in and realise the company's assets as best they may whatever may be the country in which the assets are situated. But, if the company is incorporated abroad, English liquidators' ability to get in and realise the company's foreign assets will be very limited. It follows that, if a foreign company has a winding up order made against it in its country of incorporation and a winding up order made against it in England, the English liquidators' role is likely, perforce, to be limited to getting in, realising and distributing the English assets."

and to the conclusions drawn from the authorities by the Vice-Chancellor at [1997] Ch 246C – F, [1997] 2 WLR 197C – F:

> "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."

[12] Reference was further made to the discussion in Goode at 16-65 of the practice of agreeing protocols between insolvency office-holders in different jurisdictions and having them approved by the respective supervising courts, including the observations that such protocols commonly contained provisions *inter alia* confirming the sovereignty and independence of the two courts involved; recording that each office-holder was subject only to the jurisdiction of his own court; and directing the office-holders to submit to their respective courts reorganisation plans in substantially the same form.

[13] Counsel further noted the observation in Lightman & Moss on The Law of Administrators and Receivers of Companies (6th ed) para 12.048, made under reference to *Gould* v *Advent Computer Training Ltd* [2010] EWHC 1042 (Ch), [2011] BCC 52, that:

> "In appropriate (albeit rare) circumstances, the court may also direct the administrator to disregard otherwise mandatory requirements of the Insolvency Act 1986 and the 2016 Rules where it is necessary to ensure the convenient, economical and sensible management of the company's affairs."

[14] I highlighted to counsel certain aspects of the draft co-operation protocol which appeared to me to give rise to potential matters of concern. These included:

1. A provision that the administrators bound themselves not to request or exercise any clawback action or remedy available under the Insolvency Act or (Luxembourg) *Code de Commerce* or at common law including but not limited to any payments or acts made, or to be made by the receiver in the exercise of her function since her appointment.

2. An acceptance that the admission of claims (*reddition des comptes*) against the Company, together with the distribution of assets, would be carried out in accordance with Luxembourg law and procedure, subject only to a right of "consultation" on the part of the Noters in relation to the adjudication of the claims of the local tax authorities and Amber Green before they were accepted.

3. A provision that the Noters would require to seek the consent of the receiver before incurring any costs in excess of £25,000, entering into any tenancy agreement of the Company's Scottish property, or accepting any offer for its sale which was recommended by the appointed marketing agents, with no provision as to how these matters were to be resolved in the event that the receiver refused so to consent.

4. A requirement for the approval of the Luxembourg supervisory judge to any proposed sale of the Scottish property, with no corresponding involvement of the Scottish court and no provision for what should happen if the requisite approval from the Luxembourg judge was not forthcoming.

5. An agreement to remit the net sale proceeds of any sale of the Scottish property to Amber Green after making provision for the remuneration, costs and expenses of the administrators, for the remuneration of the receiver, for the amount

of any salaries owed by the Company and for any social security contributions and Luxembourg tax liabilities owed by it, but not for the claims of any other secured or unsecured creditors.

6. An agreement that the disposal of any assets of the Company other than its property in Scotland be carried out by the receiver and according to Luxembourg law.

7. Provision that the administrators' fees and expenses be treated as costs and expenses (*dettes de la masse*) in the Luxembourg bankruptcy process and be subject to the approval of the supervising judge there.

8. A stipulation that the agreement and any non-contractual obligations arising out of or in connection with it were to be governed by the laws of the Grand Duchy of Luxembourg and that any dispute arising out of or in connection with it would be subject to the exclusive jurisdiction of the courts of Luxembourg city.

9. A provision that the agreement might be supplemented, modified or replaced in any manner by the written agreement of the administrators and the receiver, with the approval of the superintending courts required only if the administrators and receiver considered that necessary.

10. A rather curious statement that the administrators and receiver were all entering the agreement on behalf of the Company, which was apparently designed to exclude any personal liability for any of them, but which seems to result (at least from the point of view of Scots law) in the agreement being one essentially entered into by the Company with itself, coupled with a stipulation that the agreement was to be binding on "respective successors representatives, executors, administrators, trustees, receivers, custodians or curators".

[15] Those aspects of the draft protocol appeared to me to raise three types of concern, albeit the demarcation lines between those groups may not in every case be very clearly defined. Firstly, there are the provisions which seem in practice to render the administration a mere adjunct to the Luxembourg liquidation process, without that having been the intention of the court when it appointed the administrators and without any subsequent order of the court to that effect having been sought or obtained (e.g. points 2, 5 and 6 above). Secondly, the provisions which effectively remove from this court any sensible power of oversight in relation to the administration (e.g. points 4, 7 and 8 above). Thirdly, provisions which raise doubts about the workability or (even allowing for the wide discretion conferred – at least in the first instance – on administrators in matters of commercial and managerial judgment) the justification for certain aspects of the protocol (e.g. points 1, 3, 9 and 10 above).

[16] Counsel acknowledged the force of some if not all of those concerns, but in general terms submitted that the terms of the protocol reflected the outcome of negotiation between the administrators and the receiver which unavoidably involved compromise. The administrators continued to regard what was proposed as the most sensible way forward in order to minimise or avoid the tensions which would otherwise arise out of the existence of competing insolvency processes, but had approached the court with an open mind as to what it might determine.

Decision

[17] The present application undoubtedly raises a suitable issue for the direction of the court. Indeed, it would have been preferable had directions been sought under paragraph 63 of Schedule B1 to the Insolvency Act 1986 as soon as reasonably practicable

after the administrators became aware of the competing insolvency proceedings in Luxembourg. Although this is not a case which would have fallen under the terms of the (now repealed) section 124B of the 1986 Act relating to the winding up of certain categories of *Societas Europaea* during an administration, where application for directions was mandatory in terms of paragraph 42 of Schedule B1, it is sufficiently analogous to that situation to render such an application highly desirable at the first opportunity. In the event, an application which could have been made in the third week of March 2024, once the administrators had become aware of what was happening in Luxembourg, was not made until about four months later, by which time a great deal of work had been done by them and arrangements had been made and implemented, in particular in relation to interim funding from Amber Green, which would be hard satisfactorily to undo. Had an application for directions been made more promptly, it appears to me to be highly likely, for the reasons set out in *Münchener Hypothekenbank eG, Noters, Re Seventeen Yellow Crowns SÀRL* [2023] CSOH 36 (and despite the fact that things happened in a slightly different order in that case) that the administrators would have been invited or directed by the court to make an application under paragraph 79 of Schedule B1 with a view to ceding control of the realisation of the Company's Scottish property to the receiver, or otherwise regulating comprehensively at that early stage the relationship between the respective processes. However, although there have been instances where facilitative directions which would otherwise have been given have been refused because of unreasonable delay in applying for them (e.g. *Re Consumer & Industrial Press Ltd (No. 2)* (1988) 4 BCC 72) the situation in this administration plainly requires the court to provide some input towards the resolution of the difficulties which would otherwise confront it.

[18] A primary question which arises is whether it is competent, and if so appropriate, for the Scottish administration to be recognised as ancillary only to the Luxembourg winding-up. If so, that might well serve to redefine the way in which the object of the administration can be achieved and render lawful what would otherwise represent departures from mandatory provisions of the insolvency legislation.

Ancillary liquidations

[19] The concept of an ancillary liquidation has long been recognised in Scots law. In *Marshall, Petr* (1895) 22 R 697, the First Division ordered a company incorporated in the State of Iowa to be wound up under the provisions of the Companies Acts 1862 to 1890, a receiver having been appointed to it in that State. The law report notes that the court expressed the view that the proceedings here should be ancillary to those in Iowa, the proper domicile of the company. The winding-up was placed under the supervision of a nominated Lord Ordinary, with the court ordering that no proceedings were to be taken under its order without his leave. No previous Scottish authority in point could be found, but amongst the English cases cited to the court was *Re Commercial Bank of South Australia* (1886) 33 ChD 174, of which more will shortly be said.

[20] *Morris, Noter* [2007] CSOH 165, [2008] SC 111, 2007 SLT 1149 (sub. nom *Liquidator of Bank of Credit and Commerce International SA, Noter*) was an application for directions and other orders from the Court of Session thought to be useful and advantageous in order to close a liquidation process in Scotland. Lord Drummond Young observed that the noter had been appointed joint liquidator of BCCI, which was incorporated in Luxembourg, following letters of request made to the Court of Session under section 426 of the Insolvency Act 1986 by the High Court in England, on the application of the ancillary liquidators who had been

appointed to the company by that court. His Lordship noted that the Scottish winding up had been an ancillary one in the sense that the only functions of the Scottish liquidators had been to realise the assets of the company's Scottish branch and to make up a list of, and adjudicate upon, the claims of its creditors in Scotland, adding that in practice the adjudication of the claims of the Scottish creditors had been performed through the agency of the English liquidators. A pooling arrangement had been entered into between the English and Luxembourgish liquidators which recognised rights to set-off and other preferential rights available in English and Scots law but not under the law of Luxembourg, and judicial co-operation in the form of letters of request passing between the English and Scottish courts had authorised the Scottish liquidators to transfer the proceeds of their realisation of the company's assets in Scotland to the English liquidators, for the Scottish creditors' claims to be filed in the English winding up, and for them to obtain distributions from that winding up and from the principal liquidation process in Luxembourg. The case well illustrates the great degree of flexibility which can be achieved by judicial co-operation in this sphere.

[21] The work of the Scottish liquidator had been completed and his accounts and remuneration approved by the court. He sought a direction that in the circumstances he was not obliged by section 146 of the 1986 Act to summon a final meeting of the company's Scottish creditors. The question which thus arose was whether the apparently mandatory terms of section 146 were indeed mandatory in an ancillary winding up. The court confirmed, under reference to *Marshall*, that the concept of an ancillary winding up was recognised in Scots law, although it was not mentioned expressly in the 1986 Act or any of its predecessor statutes, and had this to say about the rationale for, and the principal features of, such a winding up, at [9]:

> "The reason for making one winding up ancillary to another is reasonably clear. It is obviously desirable in the winding up of a company that one court should have overall control in order to ensure that the fundamental objectives of insolvency law are realised on a consistent basis. Those objectives, at least as recognised in Scotland and the remainder of the English-speaking world, are to pay the expenses of the liquidation, to pay any creditors with a preference or security duly recognised by the appropriate system of law, and otherwise to divide the company's assets *pari passu* among the ordinary creditors. In addition, in countries that recognise rights of set off on insolvency, those rights must be given effect; in the present case that was the reason for the qualifications relating to the Scottish and English winding up proceedings. It is obviously important that the fundamental objectives of insolvency law should be achieved consistently, especially as their primary objective is securing the equal treatment of creditors of each class. That is why a single jurisdiction, normally that of the country or state of incorporation, should have overall control. Nevertheless, if the company has carried on business in other jurisdictions it is likely that there will be significant assets and liabilities there. The realisation of the assets, in particular, is likely to depend on the local legal system, and the rights of creditors will probably also be governed by that system. In those circumstances it is preferable that a local liquidator should be appointed because he will best be able to deal with rights and obligations that arise under the local legal system. In order to secure the primacy of the jurisdiction that has overall control, however, the winding up proceedings in the local jurisdiction must be made ancillary to those in the former jurisdiction."

[22] Lord Drummond Young observed that the reasons for making one winding up ancillary to another were compelling, and that he would be reluctant to impose any legal requirement that would threaten the possibility of such procedure. The general conclusions arrived at by the Vice-Chancellor in *BCCI (No. 10)* set out above were referred to with approbation, with one caveat. Whereas the Vice-Chancellor had stated that the ancillary character of an English winding up did not relieve an English court of the obligation to apply English law, including its insolvency and conflict of law rules, to the resolution of any issue arising in the winding up which was brought before the court, Lord Drummond Young observed that he considered that that statement applied only to the resolution of issues of substantive law, and not to rules of procedure, which might be subject to important modifications in an ancillary winding up. His Lordship considered that his conclusion in this regard was also supported by the judgment (then at first instance only) in *Re HIH*

Casualty and General Insurance Ltd [2005] EWHC 2125 (Ch). The critical point was that the fundamental policy objectives in the passage in *Morris* already set out should always be recognised by the court conducting an ancillary winding up, and that subject to that, rules of procedure might be modified in such a way as best achieved the objectives of the ancillary winding up. After reviewing the facts of the application before him, Lord Drummond Young concluded that, because of the ancillary nature of the winding up, no useful purpose would be served by a Scottish final meeting, and that he could dispense with the apparently mandatory requirement of section 146 as a procedural provision that would not serve any useful purpose in such a winding up.

[23] Doubt is cast on the relative clarity which one might have thought to exist after the decision in *Morris* by two considerations. Firstly, it is perhaps not entirely clear in the judgment of the Vice-Chancellor in *BCCI (No. 10)* that there exists in it the distinction between substantive and procedural matters which Lord Drummond Young was able to identify, and secondly, the basis for that judgment may in certain regards have been overtaken by the decision in the House of Lords to overturn the first-instance and Court of Appeal judgments in *Re HIH Casualty and General Insurance Ltd*. I thus turn to the English authorities.

[24] In the *BCCI (No. 10)* case, Sir Richard Scott V-C discussed the nature of an ancillary winding up at [1997] Ch 238F – 248B, [1997] 2 WLR 190B – 199A. His Lordship set himself the task of ascertaining from the existing judicial authorities "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." ([1997] Ch 239A – B, [1997] 2 WLR 190 D - E). It will be noted that his Lordship

framed the question as relating to issues of both law and procedure. At [1997] Ch 239F, [1997] 2 WLR 191A the Vice-Chancellor stated as an initial conclusion that "The courts have, in my judgment, no more inherent power to disapply the statutory insolvency scheme than to disapply the provisions of any other statute." and added that there was no "clear source of the alleged power of the court to authorise or direct liquidators in an English winding up to disapply parts of the statutory insolvency scheme" ([1997] Ch 240D, [1997] 2 WLR 191G – H).

[25] In a comprehensive and useful examination of the authorities, his Lordship noted that in *Re Commercial Bank of South Australia* (which, it will be recalled, was cited in the earliest Scottish case of *Marshall*), North J had observed in the context of what would nowadays be recognised as an ancillary winding up that his goals would be to avoid conflict between the two supervising courts, to have regard to the interests of all the creditors and all the contributories, and to keep down the expenses of the winding up so far as possible, noting that the liquidator should not without special direction act otherwise than to get in the English assets and to settle a list of the English creditors, presumably (although this was not expressly said) with a view to transmitting the assets and the list of creditors to the principal liquidator for the payment of a *pari passu* dividend to all creditors.

[26] In *Re Federal Bank of Australia Ltd* (1893) 62 LJ Ch 561 Vaughan Williams J had ordered the institution of a compulsory ancillary liquidation, so that the liquidator could "act much more efficiently as an assistant to the principal liquidators" but had imposed (unspecified) limits on his authority, in a way which amounted to directions to him not to carry out some of the functions that would, in any ordinary liquidation, have formed part of his duties.

[27] In *Re English, Scottish, and Australian Chartered Bank* [1893] 3 Ch 385 the same judge had explained that the court of the country of the domicile of the company in liquidation should be the principal court to govern the liquidation, with other courts, if need be, acting as ancillary to that principal liquidation, subject to the proviso that the ancillary court would never give up the "forensic rules" which governed the conduct of its own liquidation. Although some doubt had been expressed about the true extent of that principle by Roxburgh J in *Re Hibernian Merchants Ltd* [1958] Ch. 76, [1957] 3 WLR 486, it had been followed by Wynn-Parry J in *Re Suidair International Airways Ltd* [1951] Ch 165. On the question of some distinction being drawn between matters of substantive law and mere questions of procedure, the judge had observed, at [1951] Ch 173 – 174, in relation to Vaughan Williams J's remark that the ancillary court would never give up its own forensic rules:

> "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 African 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?"

[28] In *Felixstowe Dock & Railway Co* v *United States Lines Inc* [1989] QB 360, [1989] 2 WLR 109, Hirst J had noted that the English practice was 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 had assets in England, the usual practice was to carry out an ancillary winding up in England in accordance with English rules, while working in harmony with the foreign courts, and had added that on the application of that principle, the English courts would not and should not favour an order which removed the English assets entirely outside their control.

[29] The Vice-Chancellor noted the submission made to him that, unless the court had power to direct English liquidators in an ancillary liquidation to transmit assets to the principal liquidators, the concept of an ancillary liquidation would be meaningless. His Lordship observed that powers could become vested in the courts by accretion of judicial decisions, and that in ancillary liquidations, the paradigm example of which would be a company in liquidation in its country of incorporation and against which a winding-up order had been made in England, it had become accepted by implication that at some stage in the liquidation the court would authorise the English liquidators to transmit the assets they had got into the principal liquidators in order to enable a *pari passu* distribution to worldwide creditors to be achieved. However, that power had not been established to extend to an ability to disapply any "substantive rule" forming part of the statutory scheme established under the 1986 Act and relative subordinated legislation.

[30] *Re HIH Casualty and General Insurance Ltd* progressed, after being referred to in *Morris*, to the House of Lords: [2008] UKHL 21, [2008] 1 WLR 852. Insurance companies incorporated and managed in Australia were authorised to, and did, also carry on business in the United Kingdom. Winding up orders were made over them in New South Wales and

pursuant to letters of request joint provisional liquidators were also appointed in England by the High Court. A further letter of request was issued by the Australian court pursuant to section 426(4) of the 1986 Act, asking that the English provisional liquidators be directed, after payment of their expenses, to remit the English assets to the Australian liquidators for distribution. The Australian scheme of distribution gave preference to certain insurance creditors to the prejudice of others. The alternative to the requested remit was a separate liquidation and distribution of the English assets in accordance with the 1986 Act.

[31] Lord Hoffmann (with whom Lord Walker of Gestingthorpe agreed) observed that, despite an absence of statutory provision for international co-operation in corporate insolvency matters until the enactment of what had become section 426 of the 1986 Act in consequence of a recommendation of the Cork Committee in 1982, in practice a degree of such co-operation had been achieved by judicial action, based upon the general principle of private international law that bankruptcy (whether personal or corporate) should be universal and that there should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which received worldwide recognition and should apply to all the bankrupt's assets. That principle had resulted in a judicial practice whereby an English winding up of a foreign company was treated as ancillary to a winding up by the court of its domicile, but which in theory at least operated universally, applied to all the foreign company's assets, and was subject to all the powers and duties under the 1986 Act. However, the judicial practice which had developed in such cases was to limit the powers and duties of the liquidator to collecting the English assets and settling a list of the creditors who sent in proofs, disapplying the statutory trusts and duties in relation to the foreign assets of foreign companies. That practice was based on pragmatism and universalism. It had led to the recognition in *BCCI (No. 10)* that an English court had power in an ancillary

liquidation to authorise the English liquidators to transmit the English assets to the principal liquidators. Until the passing of section 426, an English court and an English liquidator had no option but to apply English law to whatever they actually did in the course of an ancillary winding up: Wynn-Parry J in *Suidair* at 173 and *BCCI (No. 10)*. However, the whole doctrine of ancillary winding up was based upon the premise that in such cases the English court might disapply parts of the statutory scheme by authorising the English liquidator to allow actions which he was obliged by statute to perform according to English law to be performed instead by the foreign liquidator according to the foreign law (including its rules of the conflict of laws), whether or not that was the same as English law. Once one accepted that the logic of the ancillary liquidation doctrine required the court to have power to relieve an English ancillary liquidator from the duty of distributing the assets himself and to direct him to remit them for distribution by the principal liquidator, it had to follow that those assets need not be distributed according to English law. The principal liquidator would have no power to distribute them according to English law any more than the English liquidator, if he were doing the distribution, would have power to distribute them according to the foreign law. Any differences between the domestic and foreign principles of distribution might sound in the exercise of the court's discretion to direct ancillary liquidators to remit English assets abroad. The existence of the section 426 jurisdiction made the court's powers even more pronounced, as it expressly gave the court power to apply the foreign insolvency law to the matter specified in the request, and the section was itself part of the domestic statutory scheme. In exercising its power under English law to direct the liquidator to remit the assets and leave their distribution to the courts and liquidators abroad, the court was exercising its own general jurisdiction and powers as well as the insolvency law of England. That power existed well before the 1986 Act and fell to be

exercised when the English court decided that there was a foreign jurisdiction more appropriate than England for the purpose of dealing with all outstanding questions in the winding up. It was not a decision on the choice of the law to be applied to those questions, which would be a matter for the court of the principal jurisdiction to decide. Section 426 extended the jurisdiction of the English court and the choice of law which it could make in the exercise of its own jurisdiction, whether original or extended, for example by enabling the court to apply a foreign law when it would otherwise be obliged to apply only English law. The guiding principle remained that English courts should, so far as was 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 were distributed to its creditors under a single system of distribution. Since no grounds of justice or policy required the English courts in the circumstances of the case to insist upon distributing the company's assets according to its own system of priorities simply because they happened to have been situated in England at the time of the appointment of the provisional liquidators, the order requested by the Australian court should be granted.

[32] Lord Phillips of Worth Matravers agreed that section 426(4) and (5) of the 1986 Act gave the court jurisdiction to accede to the request of the Australian court and that on the facts of the case the court ought to do so. His Lordship declined to express a view on what he called the "controversial area" of whether, in the absence of the statutory jurisdiction, the same result could have been reached under a discretion available at common law.

[33] Lord Scott of Foscote (as the Vice-Chancellor in *BCCI (No. 10)* had since become) observed that his reasoning in that case was confined to the inherent power of the court and had nothing to do with section 426. Luxembourg had not been designated a "relevant country" for the purposes of section 426 and so no letter of request under that section asking

for the remission to Luxembourg of the assets held by the English liquidators had or could have been issued. The exercise of the section 426 power so as to direct the remission of the assets to Australia would not constitute the disapplication of the English insolvency scheme, as section 426 was part of that scheme. Where section 426 did not apply, the English courts had a statutory obligation in an English winding up to apply the English statutory scheme and had no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme. That was what *BCCI (No. 10)* had decided and his Lordship adhered to the opinion he had expressed in that case. It would not be proper for the courts of this country, in reliance on an inherent jurisdiction, in effect to extend the benefits of section 426 to a country that had not been designated a "relevant country or territory" by the Secretary of State, and thereby to deprive some class of creditors of statutory rights to which they would be entitled under the English statutory insolvency scheme: *English, Scottish and Australian Chartered Bank*; *Suidair*; *BCCI (No. 10)*. His Lordship re-iterated the conclusion that he had reached in the latter case, that "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." The proposition that the assistance and directions sought in the present case could be given under an inherent power of the court without reliance on section 426(4) and (5) was unacceptable. The request could and should, however, be acceded to in terms of the section.

[34] Lord Neuberger of Abbotsbury concluded that, while remittal of assets could be effected pursuant to established judicial practice, the power to do so where the distribution would not be in accordance with the English insolvency regime derived from section 426. As a matter of general principle, in the absence of section 426(4) and (5), where a company

was wound up in England, its assets were held on terms that they must be applied in accordance with that statutory insolvency regime. That principle applied in the case of an English liquidation of a foreign company. The application of the English insolvency regime applied in theory to all the assets of the foreign company, and in theory and practice to its assets within the jurisdiction. In the absence of a provision such as section 426, it was therefore difficult to see on what basis an English court could have jurisdiction to disapply the English insolvency regime to assets there of a company subject to a winding up order made by an English court. There was no suggestion in any of the earlier authorities that the court, when exercising its jurisdiction to remit to another jurisdiction for distribution the assets of a company subject to a winding up order in England, could authorise the distribution of those assets other than in accordance with the English insolvency regime. The mandatory nature of the English regime had, on the contrary, been highlighted in *English, Scottish and Australian Chartered Bank*, *Suidair* and *BCCI (No. 10)*. On that basis, the value of the English court's inherent ancillary liquidation powers was very much more limited than if it could effectively disapply, or authorise the disapplication of, the English insolvency regime. The fact that the English court had an inherent power to relieve an ancillary liquidator from the duty of distributing the assets himself, and to order that the assets be remitted to be distributed by a foreign liquidator, did not mean that it necessarily followed that those assets could then be distributed other than in accordance with the English insolvency regime. The fact that English assets were bound to be distributed in accordance with certain principles did not prevent the assets being passed to someone else so that they could be distributed in accordance with those principles, but it would prevent the passing on of those assets for distribution in accordance with different principles. The notion that the court had inherent jurisdiction to remit English assets to liquidators in

another jurisdiction on the basis that the insolvency regime of that jurisdiction would apply sat uneasily with the provisions of section 426(4) and (5), at least in relation to remittal of assets. However, the power to accede to the request in the current case fell under the terms of section 426, and should be granted.

[35] I recall, finally, that the subject of modified universalism which formed the theoretical underpinning of the speech of Lord Hoffmann in *HIH Casualty and General* was discussed in the Scottish context by Lord Tyre in *Hooley Ltd, Petr* [2016] CSOH 141, 2017 SLT 58 (revd. on unrelated grounds [2019] CSIH 40, 2019 SC 632, 2019 SLT 994), where his Lordship observed at [35] that although that principle had not at that point been the subject of examination by a Scottish court, nothing had been placed before him to indicate that it should not be recognised, and that Scots law had long recognised that there might be a principal liquidation in the country of the company's incorporation and an ancillary liquidation in another jurisdiction.

[36] In the present case, the supervening Luxembourg insolvency process had in itself no implicit effect on the nature or status of the Scottish administration, which the court did not contemplate as having any ancillary quality at its inception. Whether the Scottish process can and should be recognised as ancillary would require to be a matter of express determination by this court. If the court were so to decide, that would accord with the universalist principle that the primary insolvency process relating to the Company should be in its place of incorporation, Luxembourg.

[37] In the context of a winding-up, it is of the essence of ancillary status that it involves the ingathering of assets situated in the ancillary jurisdiction and (subject to the court's approval and compliance with such conditions as it may lawfully impose) their remit to the principal jurisdiction for the declaration of dividends and distribution to the creditors of the

company. The power of the court to give directions under paragraph 63 of Schedule B1 to the 1986 Act is circumscribed and controlled by the ancillary nature of the process in which the directions are sought, and it would be over-simplistic to maintain that such directions as seem necessary to ensure the convenient, economical and sensible management of process may be given, without regard to that nature.

[38] The leading Scottish case on ancillary winding up is *Morris*. Although that case also involved a Luxembourg-registered company, it is useful to recall that the Scottish ancillary liquidation had been commenced on a request of the English High Court (which had itself instituted a liquidation ancillary to the principal process in Luxembourg) in terms of section 426 of the 1986 Act, and very significant that the arrangements which assured the rights of set-off enjoyed by the Scottish creditors were again achieved by way of a further request by the English court under section 426. In the present case, there being no intervening process in a relevant country capable of generating a section 426 request, and Luxembourg not being a jurisdiction from which such a request may lawfully emanate, the question of what can and cannot properly be ordered as an incident of any ancillary process in the present case depends on the common law. In *Morris*, further, the Scottish liquidators were afforded the power to adjudicate on the claims of the Scottish creditors (albeit in practice they appear to have permitted the English liquidators to do so on their behalf) and the Court of Session retained the right to, and did, examine and approve the liquidators' remuneration – features which appear to be absent from the draft co-operation protocol in the present case.

[39] The two salient legal points which emerge from *Morris* are, firstly, that it appears that Lord Drummond Young considered that the set-off rights which would have been enjoyed by the Scottish creditors had the liquidation been an entirely domestic one had to be given

effect in the arrangements made in relation to the ancillary liquidation, the implication being that the court would not have sanctioned any arrangement which did not secure them. Secondly, and as a related matter, what his Lordship took from *BCCI (No. 10)* was that rules of insolvency procedure could be modified in such ways as would best achieve the objectives of an ancillary winding up, but that rules of substantive law (such as the right to set off) could not.

[40] For my own part, I find it difficult to discern in *BCCI (No. 10)* a distinction being drawn between procedural and substantive matters, particularly given the Vice-Chancellor's citation without adverse comment of *Suidair*, in which Wynn-Parry J rejected the suggestion that Vaughan Williams J's judgment in *English, Scottish, and Australian Chartered Bank* could be read as making such a distinction, and expressed the further view that it would be an unworkable one. In any event, the question whether any element of domestic law, whether substantive or procedural, is indispensable in an ancillary winding up may have been rendered otiose, depending on what is to be made for the purposes of Scots law of the speeches in the House of Lords in *HIH Casualty and General*, to which I now turn.

[41] The approach taken by Lord Hoffmann and Lord Walker in that case starts from first principles, and in particular the proposition that insolvency should ideally be regarded as universal and subject to a unitary process. I do not consider that that eminently pragmatic proposition would be thought controversial as a matter of Scots law, and indeed would suggest that it underlies in large measure the rationale and decision taken in *Seventeen Yellow Crowns*. As their Lordships point out, and leaving aside the impact in certain cases of section 426, that principled approach seems inexorably to lead to the conclusion that in an ancillary winding up (that is to say, one in which the domestic jurisdiction has determined that the courts of another jurisdiction – very probably that of the relevant company's place

of incorporation – are more suited to deal with the overarching issues in the insolvency process) the duties of the domestic liquidators should be limited to the ingathering of local assets and the determination of local claims, and, crucially, that the statutory trusts and duties which would ordinarily attach themselves to a liquidator and to the assets ingathered by him need not be regarded as applying to anything beyond those specific tasks unless some particular consideration of justice or policy requires them to do so. For my own part, I find that principled approach and its logical application to arrive at that conclusion convincing and indeed compelling. The alternative view, espoused by Lord Scott and Lord Neuberger, appears to me to be principally based on the English precedents of *English, Scottish and Australian Chartered Bank*, *Suidair* and *BCCI (No. 10)* which are not binding in Scots law and which appear to lack the analytical force underpinning the approach favoured by Lord Hoffmann and Lord Walker. I was initially somewhat attracted by the argument that that more liberal approach to the question of the nature of an ancillary winding up risked cutting across the statutory jurisdiction provided by section 426 of the 1986 Act, as is particularly suggested by Lord Neuberger, but ultimately have come to the view that the statutory jurisdiction (in the exercise of which certain presumptions are generally judicially applied) and the common law can co-exist without necessary conflict. I conclude, then, that the description of the nature and incidents of an ancillary winding up given by Lord Hoffmann in *HIH Casualty and General* falls to be regarded as representing the law of Scotland on the matter.

Ancillary administrations?

[42] Having thus identified the nature of an ancillary winding up in Scots law, it is next necessary to consider whether there can be such a thing as an ancillary administration. The

primary difficulty is that an administration requires to serve one of the objectives set out in the hierarchy of purposes contained in paragraph 3 of Schedule B1 to the 1986 Act, namely the rescue of the company in question as a going concern, the achievement of a better result for the company's creditors as a whole than would be likely if the company were to be wound up without first being in administration, or the realisation of property in order to make a distribution to one or more secured creditors (in this case without unnecessarily harming the interests of the creditors of the company as a whole). The first objective seems impossible to reconcile with an ongoing winding up process in the principal jurisdiction, although it may be compatible with a different form of insolvency process there. Similar considerations apply to the second objective, at least if one reads (as I think one should) the reference there to a winding up as a reference to a winding up in the domestic jurisdiction. The third objective (being the one which, the court was informed at the outset of the administration proceedings, was that being pursued in the present case) is more obviously compatible with the existence of a wider range of insolvency processes in the principal jurisdiction.

[43] Counsel's researches had not revealed any judicial recognition of the possibility of an ancillary administration. However, *Re Dallhold Estates (UK) Pty Ltd* [1992] BCC 394, [1992] BCLC 621 might be thought to fit the bill. In that case, Chadwick J made an administration order in relation to a company registered in Western Australia at the request (in terms of section 426 of the 1986 Act) of the Federal Court of Australia, a provisional liquidator having been appointed to the company in both Australia and in England, where it held a potentially valuable leasehold interest in an estate which would be imperilled should a winding-up order be made against it. The company was the wholly-owned subsidiary of another Australian company which had itself been placed in liquidation in Australia, and whose

liquidator had made an unsatisfied demand for payment from the subsidiary, thus constituting its apparent insolvency. The administration order was made in terms of the section 426 jurisdiction notwithstanding that the court at the material time otherwise lacked the power to make such an order in relation to a company incorporated overseas. The principal purpose for which the Federal Court had made its request that the subsidiary be placed in administration was to attempt to achieve the best possible realisation of its assets for the benefit of all its unsecured creditors, and the letter of request specifically stated that it wished "the assistance of the English court to act in aid of and be auxiliary to" the Federal Court. The case evidently had various specialities which are not present in the current proceedings and which are unlikely to occur as a matter of routine, but seems to me to confirm the conclusion that I would in any event have reached as a matter of principle, namely that there is no bar in theory to an administration under the 1986 Act being ancillary in nature, any more than there is such a bar to a liquidation being so conducted having that status.

[44] It may well be that in practice, and absent at least some such circumstances as were present in *Dallhold Estates*, a court would be wary of instituting an administration in the knowledge that it was to be ancillary only to a principal insolvency process elsewhere, because of the need for any administration, even of an ancillary nature, to be capable of serving one of the objectives set out in paragraph 3 of Schedule B1, and because the reasons explained in *Seventeen Yellow Crowns* may militate against the conclusion that an ancillary administration, even if competent, would represent a particularly useful or economical solution to the situation presenting itself. The utility of an ancillary administration at all, and exactly what constraints its ancillary status places upon its conduct and the rights and

duties of the administrators, are matters which will require to be considered and regulated on a case-by-case basis.

[45] In the present case, however, the court is not being asked to institute an ancillary administration; rather, it is being asked to give directions as to the future conduct of an extant administration in which the administrators wish the court's sanction to enter into an arrangement with the receiver appointed by the court of the company's place of incorporation on terms which seem to me not so tacitly to acknowledge the *de facto* ancillary nature of the administration. I can see no reason why the court should not formally recognise that Luxembourg is a more appropriate forum than Scotland for the purpose of dealing with the overall insolvency of the Company by directing that the administration should henceforth be regarded as ancillary to the insolvency proceedings there. The implication of that is that the powers and duties of the administrators fall to be regarded as limited to the realisation of the Company's property in Scotland without causing unnecessary harm to the interests of the creditors of the Company as a whole, and the determination of claims against the Company recognised as secured or preferential according to Scots law.

[46] Once the Scottish property has been realised and the claims of secured or preferential creditors according to Scots law have been determined, it will be for the administrators to seek further directions from the court. It seems to me to be premature to seek such directions until the amount realised from the Scottish property is known. Only then will it be apparent whether there are sufficient funds to meet costs, secured and any preferential claims and, if so, what might remain for unsecured creditors. If, as seems likely, it transpires that realisations are insufficient to meet demands, the administrators will need to decide whether to propose that funds are retained in Scotland to ensure that the claim of the

secured creditor is not prejudiced by whatever the Luxembourg preferred claims may transpire to be (by analogy with *Morris*) or whether the entire distribution should take place in Luxembourg and according to the Luxembourgish law (by analogy with *HIH Casualty and General* and the reasons in support of such a course of action there identified). There may also be some middle ground worthy of consideration.

[47] Should it be considered necessary for a protocol to be entered into between the administrators and the receiver as an aspect of whatever is to be proposed to the court, regard will no doubt be had to the difficulties identified above which the current proposal for such a protocol presented. Some of the fundamental difficulties noted will have been resolved by the clarification of the nature and status of the administration in which this application for directions has resulted. Others will require further consideration. For the avoidance of doubt, it is as an abstract proposition unlikely that the court would be prepared to accept a protocol governed by the laws of the Grand Duchy, granting exclusive jurisdiction over any dispute arising out of the protocol to the courts of Luxembourg, or ceding the right and duty to approve the administrators' remuneration to a Luxembourg judge.

Conclusion

[48] I shall direct that the administration shall henceforth be regarded as ancillary to the primary insolvency process underway in Luxembourg, with the consequences already explained, and make no further order meantime.