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INSOLVENCY, INTERNATIONALISM & SUPREME COURT JUDGMENTS

INSOLVENCY LAW DINNER

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(1) Introduction

1. This evening I would like to discuss some issues arising out of a decision of the House of Lords to which I was party. It is *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852. In addition to being of some interest, the case has a bearing on two rather topical, if rather different, matters. The first is the international dimension in insolvency, an issue which has long been a matter of considerable concern. Of course, with the reverberations of the events of September 2008, the importance of this factor has markedly increased. The second matter is the workings of the UK Supreme Court, an institution which has been on the cards at least since it was raised by that great constitutional and political expert, Walter Bagehot in the middle of the 19th century. In particular I want to talk about how the Supreme Court may approach its judgments in future and the means by which they are reached.[1]

(2) Re HIH Casualty and General Insurance

2. HIH was a large insurance company which had been formed, and was resident and domiciled, in Australia where the majority of its business dealings were based. However, it also had a fairly extensive international book, much of which was in the

[1] I would like to thank John Sorabji for all the help he provided in the preparation of this lecture.

UK. In particular, HIH had substantial assets and substantial unsecured creditors in this jurisdiction. Owing to its insolvency, HIH was put into winding up by order of the Australian court. The Australian liquidators then set about getting in the assets with a view to distributing them in accordance with Australian insolvency law, which, among many other provisions, required proceeds of reinsurance policies to be applied to discharge reinsured liabilities. This was different from the then-current English insolvency rules which required strict *pari passu* distribution between all unsecured creditors, and which recognised no such ring-fencing provisions.

3. Meanwhile, HIH was placed in provisional liquidation by the English High court. In due course, an application was made by the Australian liquidators to the High Court for an order that the assets of HIH in England, and the claims against HIH in England be remitted to Australia. This would have required the English court effectively to sanction the liquidators getting in the English assets, and then treating them as part of the overall assets (in so far as they were not the subject of any effective charge) to be distributed to the English creditors, as well as the Australian creditors, in accordance with Australian insolvency law. The proposal involved all the creditors (wherever they or their claims may have been based) being treated on the same basis, namely on the basis that the distribution of the proceeds of sale of all the assets of HIH (wherever they may have been located) would be effected according to the Australian insolvency rules.

4. Neither the Judge, David Richards J, nor the Court of Appeal would accede to this course. They thought, to paraphrase the Prime Minister's well known expression, that there should be English assets for English creditors. To be more precise and less facetious, they thought that the Insolvency Act 1986 and established case law effectively required the English courts to ensure that the proceeds of sale of the assets of an insolvent company in winding up, which had traded in England, should be distributed in accordance with English insolvency law principles, at least insofar as they required strict adherence to the *pari passu* rule.

5. The issue, therefore, was whether it was right for an English liquidator in an ancillary liquidation to remit assets and claims to the main Australian liquidation so that distribution could be effected in accordance with Australian insolvency law

principles. The Judge thought that the point was one of jurisdiction: he couldn't do what the Australian liquidators asked; the Court of Appeal thought the point was one of discretion: they shouldn't do what the Australian liquidators asked. The matter then went to the House of Lords, who disagreed with both the lower courts: they could and would do what the Australian liquidators asked. While the five members of the house were agreed in the result, there was a split, which I can only describe as 2.5 v 2.5 as to the reasons.

6. Lord Hoffmann invoked the universal application of insolvency proceedings. This was a topic on which he had already shown his hand. In the Privy Council case of *Cambridge Gas Transport Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508, para 16, he said that:

"*There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.*"

In *HIH*, he was prepared to give what Gerard McCormack has called "*free rein to the principle of universalism*".[2] Accordingly, he held that the remission of assets could be ordered at common law on the basis that foreign main proceedings in the country of incorporation should, prima facie, be allowed to have universal effect.

7. Having decided that he could order remission, Lord Hoffmann considered that, while some English creditors would be worse off if the assets were remitted than if English insolvency rules applied, the differences between the two systems was not a great one, and that the Australian rules did not run counter to any fundamental policy issues – not a surprising view as EU Directive 2001/17 had by then been adopted in the UK, and it had substantially the same effect as the Australian rules. Lord Walker agreed with Lord Hoffmann.

8. Lord Scott and I adopted a different approach. We thought that the issue was governed by section 426 of the Insolvency Act, subsection (4) of which empowers the

[2] McCormack, *Jurisdictional Competition and Forum Shopping in Insolvency Cases*, [2009] CLJ 169 at 171.

English courts to assist the courts of any territory designated by the Secretary of State "in relation to insolvency law". Given that Australia has been so designated, we held that the English courts could provide the Australian liquidators, as officers of the Australian court, in the present case, with the orders they sought, and, essentially for the same reasons as Lord Hoffmann, we thought it right to do so.

(3) The decision: Tremendous Importance and Tremendous Confusion

9. Gabriel Moss QC has noted how, in his words, while our '*decision [is] of tremendous importance, [it is one] sadly of tremendous confusion.*'[3]. He has hotly criticised the views expressed by Richard Scott and me, contending that section 426 has nothing to do with the issue. I agree as that the case may be of some importance. The confusion point I will return to later. I must confess that the criticism he raises may well have some merit. The Lords, now the Supremes perhaps, even including the Master of the Rolls, are human, not divine, so we may err from time to time. In confessing though, this is not a case of some might say 'buyer's remorse', but a recognition of the fact that if Gabriel Moss is right the issues in *Re HIH* may well need to be revisited by the courts.

10. In his article Gabriel Moss presents an analysis of the four substantive judgments. In doing so he highlights the points of departure between Lord Hoffmann (with whom Lord Walker agreed), on one side of the fence, and Lord Scott with whom I agreed on the other side of the Fence. Lord Phillips' judgment, as Moss puts it respectfully, is one which engages in, to quote '*rather obscure fence-sitting*'.[4] The consequence of the split and the fence-sitting was that, as Moss puts it,

> "*There is no majority in the House of Lords sanctioning the application of the ancillary liquidation doctrine in a case where the remission is to a non-s.426 country and the distribution is not substantially in accordance with English law priorities . . . but nor is there any majority in the House denying that the ancillary liquidation doctrine can apply to such cases.*"[5]

[3] Moss, *"Modified Universalism" and the Quest for the Golden Thread*, 22 Insolvency Intelligence (Nov/Dec 2008) (10) 145 at 145.
[4] Moss, *ibid*, at 150.
[5] Moss, *ibid*, at 150.

As I said earlier, 2.5 v 2.5 split. Rather than as Moss says, the House of Lords finally speaking on this subject,[6] you might take the view in light of this that, to adapt the immortal words of Karen Carpenter, they've only just begun.

11. One of the central points of divergence between the rival camps centred on the question whether the Insolvency Act 1986 is, or is not, effectively a complete insolvency code, a point on which Lords Hoffmann and Walker take the negative view, and Lord Scott and I take the positive view. It may well be that Moss is correct in saying that the former are right, and the complete code theory is wrong. But I am not sure. The 1986 Act and the 1986 Rules appear to be a pretty comprehensive set of principles and rules, and there is a pretty strong presumption that, where the legislature has intervened and purported to codify the law, the courts should not step in. The examples Moss gives of the extra-statutory principles may not be particularly telling. The power of the court to order its officers to repay sums or to make just and proper payments, and the "estate costs rule" could be said to be powers which are ancillary to those of liquidators as officers of the court, and to be part of the court's inherent jurisdiction. The rule against double proof could be said to be inherent in the provisions of the Act and the Rules.

12. Even if that is not right, the universalist approach seems to involve the courts saying, "Never mind whether the Secretary of State has designated a territory under section 426, so that there is no statutory jurisdiction to assist; we can still assist and approve remission of assets to a territory which has not been so designated under our inherent jurisdiction." That seems a bit rum. Moss's answer is that section 426 has nothing to do with the case, as he would give a relatively restricted meaning to section 426(4). Even if that is the correct meaning, it would still be a bit surprising if, although section 426(4) powers could only be exercised in relation to courts in designated territories, the court had a wider power to assist courts and their officers in territories which are not designated.

13. Having said that, on revisiting the decision for the purpose of this little talk, I think that there is considerable attraction in the Hoffmann – Walker view. In practice that

[6] Moss, *ibid*, at 145.

view has to a large extent prevailed as a result of article 21(2) and (3) of schedule 1 to the Cross-Border Insolvency Regulations 2006 (SI 2006/1030).

(3) Cross-border insolvency in the present age

14. The decision in *HIH* emphasises the need to ensure that there is clarity and cooperation between states in respect of insolvency. One thing which the credit-crunch and its after effects have highlighted is that, as we all really knew, the world we live in today is truly borderless, at least where business is concerned. Banks span continents. Their counter-parties, and the counter-parties of their counter-parties, criss-cross the globe. Business conglomerates operate on as wide a global scale, with parent companies in one jurisdiction, subsidiaries, special purpose vehicles, project companies, joint venture partners spanning many more jurisdictions. In many ways we live in a world of capitalism *sans frontiéres*. Living in such a world opens out the possibility, as the credit crunch has rather painfully shown, of bankruptcy *sans frontiéres*.

15. In such a world it seems to me, and I am not alone in this, that we must do everything we properly can to ensure that such cross-border insolvencies are capable of being administered seamlessly across those very borders. We have now, it could be said, a greater need for universalism – the view as McCormack put it, '*that the assets of an insolvent company should be administered on a worldwide basis. . . under the auspices of a single judicial authority which would normally be in the country of incorporation.*'[7] At the very least that national courts should pull together and co-operate in the administration of insolvencies to a degree not before seen. This, of course, was Lord Hoffmann's view in *Re HIH*. It also underpins the Cross-Border Insolvency Regulations. In fostering co-operation between jurisdictions will we perhaps see further developments of this kind? Will UNCITRAL again take the lead, as it did with its Model Law on Cross-Border Insolvency, which lies at the heart of the 2006 Regulations?

16. Turning back to the first issue arising from *Re HIH*, will our courts have to grapple with and develop the common law? Let us assume, for the sake of argument that Lords Hoffmann and Walker, and Gabriel Moss QC are correct and that the

[7] McCormack, *ibid*, at 170

Insolvency Act 1986 does not provide a complete code. Given a rapidly developing and globalised economy is it the case, as Lord Denning put it in *Eves v Eves*, that equity, the common law, is not past the age of child bearing.[8] It may well be that in appropriate cases the courts will have to adopt a principled development of the law. But in doing so they will need to have recourse to the Insolvency Act. It might be correct that it does not set out a complete code, but I would have thought that there could be no challenge to the notion that any common law developments could only properly be made in areas where the Act was silent and be carried out in ways that did not conflict with the Act.

17. It may well be though that any future developments will arise as a necessity of the courts having to give effect to Article 25(1) of Schedule 1 of the 2006 Regulations. That article requires the '*court to cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a British insolvency officeholder*.' It is required to do so in respect of matters set out in paragraph 1, Article 1, Schedule 1 of the 2006 Regulations. That is to say it requires maximum cooperation where,

"*This Law applies where—*

(a) assistance is sought in Great Britain by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) assistance is sought in a foreign State in connection with a proceeding under British insolvency law; or

(c) a foreign proceeding and a proceeding under British insolvency law in respect of the same debtor are taking place concurrently; or

(d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under British insolvency law."

18. The 2006 Regulation may well, on its own, provide a necessary spur to the development of a universalist approach; to Lord Hoffmann's approach. It may well serve as the basis for that, without anyone having to adjudicate between his and Lord Walker's view and my and Lord Scott's view, that such an approach is justified in the

[8] [1975] 1 WLR 1338.

common law. That it will play such a developmental role is certainly the view of Judge Barrett, of the New South Wales Supreme Court.[9] He reports on a divergence of opinions between judges of 25 jurisdictions in Victoria in 2009, as to the propriety of their discussing with judges of other jurisdictions cross-border issues in insolvency cases they are trying. But it has worked very well between Canadian and US judges, as Chief Justice Brenner of the British Columbia Supreme Court has explained in (2009) 83 ALJ 290. Informal telephone calls between judges won't do, although they might pass muster in a structured environment (as in *re Cenargo International plc* (2003) 294 BR 571). More likely, I suspect, are simultaneous hearings with satellite communication.. Whether the two judges who hear proceedings together should then discusss the case, with a view to agreeing the outcome, in the absence of the parties, like two members of an appellate court, is more questionable. Another possibility is division of issues between the two courts. I suspect that we are moving inexorably towards the development of inter-court, cross-jurisdictional, framework agreements, of joint and simultaneous hearings via videolink, and so on. It may well see, who knows, the development of insolvency jurisdiction *sans frontiéres* to match capitalism and bankruptcy *sans frontiéres*.

19. Will we see the laws of different countries getting closer? We very recently gave judgment in a Lehman Brothers case, which involved our deciding whether a provision which improved the position of noteholders under synthetic collateralised debt obligations vis-à-vis a Lehman subsidiary on the insolvency of the Lehman parent was contrary to the bankruptcy law (*Perpetual trustee Co Ltd v BNY Corporate Trustee Services Ltd*). We held that it was not, and we were told that the New York bankruptcy court was waiting to hear the outcome, in order to decide how to proceed. It seems pretty likely that our decision is different from what it would be in US law. What will happen in the New York court? Watch this space**.**

(4) The Supreme Court: Its Future Approach to Judgments

20. Finally, I wish to turn to the second question I raised at the outset: how should the new Supreme Court approach its judgments in future? I realise that some might say that having passed on the opportunity to be a Supreme Court Justice and elected for

[9] Barrett, *Thoughts on Court-to-Court Communications in Insolvency Cases*, Closing address to the Current Issues in Insolvency Conference (31 July 2009) University of Sydney.

what one of my colleagues called an elective demotion, choosing the Court of Appeal and the office of Master of the Rolls, I ought to adopt a self-denying ordinance in respect of the Supreme Court. Those of a philosophical bent might say that I should follow Wittgenstein and declare that '*whereof I cannot speak, I must remain silent.*'[10] Those who heard my reported views on the Supreme Court might think that a wise course of action. Such an approach would no doubt leave you all feeling short-changed. So with all due respect to Wittgenstein, I shall offer some brief thoughts on the subject of judgment writing in the Supreme Court.

21. One of the great advantages of starting out on a new venture, such as the Supreme Court, is that there is no need, whether in matters of procedure or otherwise, to feel hidebound by the past. I am far from saying that the past is to be jettisoned. That would be both arrogant and wasteful. The past need not limit us. Rather it should inform us where it usefully and properly can.

22. Historically, as we all know, judgments were delivered in the Lords as if they were speeches in debates. Each Law Lord had therefore to deliver his or her own speech, which had either to be a substantive one or one which agreed with that of another. Five separate and separately reasoned judgments were the norm. In those rare cases which warranted more judges up to nine reasoned judgments could be given. This, of course, has its advantages. It also has its disadvantages. *Re HIH* perhaps shows the disadvantages, in that, in Gabriel Moss' view, there is little clarity and a hung result on the complete code vs common law point. Matters need not be so stark as that though, for problems to arise. Five reasoned judgments, each with slightly different ratios, all reaching the same result, can cause problems for discerning what the highest court has actually decided. Clarity in the law, that long recognised necessity, is lost along the way.

23. The Supreme Court could easily simply replicate the Lords' approach. It need not though. There is no necessity that it does. It delivers judgments in court rather than speeches in the chamber of the House of Lords. It could adopt a different approach to judgments; an approach which could deliver greater clarity and coherence in the law. In doing so it could take either of two approaches. It could adopt the single judgment

[10] Wittgenstein, *Tractatus Logico-Philosophicus*, (Routledge) (1974) at 74

approach, so beloved of the European Court of Justice and the Privy Council. Alternatively, it could adopt the approach, beloved of the US Supreme Court, and quite often adopted by the Australian High Court, of a single majority judgment with dissenting and/or concurring judgments. Or, it could adopt a single majority with dissenting judgment approach. Each has their advantages. Each has their drawbacks.

24. There is an element of horse for courses. Where the law is being developed in a significant area on a case-by-case basis there will be much to be said for a multi-judgment decision so that the judges lawyers and academics can feel their way in a discursive manner. Where a practical rule is being propounded for application in the County Courts, it is much better to have a single authoritative judgment.

25. However, in general, there is much to be said for the US Supreme Court approach, as the Australian High Court seems to think. The single majority judgment with dissenting and/or concurring judgments, allows for a variety of opinions while providing relative clarity.

26. The ECJ approach, with its single judgment, almost inevitably gives the appearance that its decisions are works of compromise and committee – not least because it's what they are. They are not infrequently unhelpful, as much is removed so that every judge can sign up, and it is not unusual for them to be internally inconsistent. The possibility always remains a live one that a judgment may be nothing more than the expression of the lowest common denominator reached to ensure that a sufficient majority was carried in order to produce the judgment of the court. As Professor Adrian Briggs has argued in trenchant terms, such judgments may impede the proper development of the law.[11] Equally, it can be said that judicial independence and accountability is to a degree lost where there is no more than a single judgment. Deciding cases without fear or favour and setting out your reasons for doing so, can become lost in unknown compromise. In this way too accountability is lost. Accountability comes through ensuring that the public can see why each Justice decided the case the way they did.

[11] Cf Briggs, *Anti-Suit Injunctions and Utopian Ideals*, LQR 2004, 120 (OCT), 529-533; also see Arden, *A Matter of Style? The form of judgments in common law jurisdictions: a comparison*, (Oxford) (20 June 2008) (http://www.judiciary.gov.uk/docs/speeches/amatter_of_style_bingham_conference.pdf).

27. Most importantly singular judgments mask the problems of the law from the public and the legislature. They do so because they cannot reflect where there were, as in *Re HIH*, marked differences of opinion on key issues. They do so because they fail to illuminate a matter where the law may need to develop. It may point the way in which Parliament may wish to legislate. Single judgments hide away signposts to possible future developments. In all of this they could be said to impoverish the law and its development.

28. These problems are largely avoided by the US Supreme Court approach. Dissenting judgments can be given. Concurring judgments can be given. In both cases judges can give expression to their individual judgments and their reasons for arriving at them. In this way independence and accountability are maintained. In this way the public and Parliament can clearly see the signposts to future possible developments. They too can clearly see where the judiciary is concerned that Parliament may wish to consider the law or the policy underpinning it. In all of these ways the disadvantages of the ECJ/Privy Council approach are avoided. Equally in this way, the spectre of judgment reached through compromise and committee is avoided.

29. Equally, importantly, from the perspective of the law's development is the US Supreme Court's approach to a single majority judgment. This carries with it the great advantage of clarity and coherence in the law. The majority's judgment sets out the ratio. It obviates the need to search through five or more separate judgments, to hunt amidst the nuance of words, for the ratio. It obviates argument as to what if anything is the ratio. In this it provides a clear picture of why the law is as the court has declared it to be. (And of course, where individual judges have their own additional and separate reasons, they can express them in the form of concurring judgments. Judgments which would, contain reasons that do not form part of the ratio and which would clearly express which aspects of the majority judgment were agreed with.)

30. It seems to me that such an approach, if adopted by the UK Supreme Court, would be of advantage to all; lawyers, the courts, Parliament and the public alike. It would focus the minds of the Supreme Court Justices in discussing appeals both before, during and after hearings as well as in the preparation of their judgments. It would

give rise to greater clarity in the law, whilst still assisting its development through useful dissents and concurrences. It would maintain judicial independence, which is to say as Dame Mary Arden has rightly described it, decisional independence.[12] It would equally maintain accountability in the eyes of the public and Parliament. As they say in the United States, what's not to like.

(5) Conclusion

31. I have this evening strayed wide from the issues that arose in *Re HIH*. In doing so though I think I can safely say that those issues are ones which it highlighted, whether they were issues of Insolvency law, cross-border jurisdiction or the UK Supreme Court and its judgments. That however is enough from me, apart from to thank you all for inviting me here to tonight and listening to me so patiently. Thank you.

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[12] Arden, *ibid* at (6).