HOUSE OF LORDS SESSION 2007–08
[2008] UKHL 21
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OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

McGrath and another (Appellants) and others v Riddell and others (Respondents)
McGrath and another and others (Appellants) v Riddell and others (Respondents) (Conjoined Appeals)

Appellate Committee

Lord Hoffmann
Lord Phillips of Worth Matravers
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Neuberger of Abbotsbury

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LORD HOFFMANN

My Lords,

1. This appeal arises out of the insolvent liquidation of the HIH group of Australian insurance companies. On 15 March 2001 four of them presented winding up petitions to the Supreme Court of New South Wales. Some of their assets – mostly reinsurance claims on policies taken out in London – were situated in England. To realise and protect these assets, provisional liquidators were appointed in England. In Australia, the court has made winding up orders and appointed liquidators. The Australian judge has sent a letter of request to the High Court in London, asking that the provisional liquidators be directed, after payment of their expenses, to remit the assets to the Australian liquidators for distribution. The question in this appeal is whether the English court can and should accede to that request. The alternative is a separate liquidation and distribution of the English assets in accordance with the Insolvency Act 1986.

2. The English and Australian laws of corporate insolvency have a common origin and their basic principles are much the same. The general rule is that after payment of the costs of liquidation and the statutory preferred creditors, the assets are distributed pari passu among the ordinary creditors: see section 107 of the 1986 Act and section 555 of the Corporations Act 2001 (Cth). But Australia has a different regime for insurance companies. I need not trouble your Lordships with the details. It is sufficient to say that, in broad outline, it requires assets in Australia to be applied first to the discharge of debts payable in Australia (section 116(3) of the Insurance Act 1973 (Cth)) and the

proceeds of reinsurance policies to be applied in discharge of the liabilities which were reinsured (section 562A of the Corporations Act 2001 (Cth)). It is agreed that if the English assets are sent to Australia, the outcome for creditors will be different from what it would have been if they had been distributed under the 1986 Act. Some creditors will do better and others worse. Approximate figures are given in para 17 of the judgment of the Chancellor in the Court of Appeal. Generally speaking, insurance creditors will be winners and other creditors will be losers.

3. The Australian court made its request pursuant to section 426(4) of the Insolvency Act 1986:

> "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 relevant country…"

4. The Secretary of State has power under subsection (11) to designate a country as "relevant" and has so designated Australia. Subsection (5) describes the assistance which a UK court may give. A request from the court of a relevant country 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."

5. This provision was introduced into insolvency law in consequence of a recommendation in fairly general terms by the Cork Committee in 1982 (see *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8858) chapter 49.) The Committee drew attention to the inadequacy of the statutory provisions for international co-operation in personal bankruptcy and their complete absence in the law of corporate insolvency.

6. Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives world-wide recognition and it should apply universally to all the bankrupt's assets.

7. This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26; [2007] 1 AC 508, 517 at para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of "modified universalism": see also Professor Ian Fletcher, *Insolvency in Private International Law* (2nd ed 2005) at pp. 15-17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one.

8. In the late nineteenth century there developed a judicial practice, based upon the principle of universalism, by which the English winding up of a foreign company was treated as ancillary to a winding up by the court of its domicile. There is no doubt that an English court has jurisdiction to wind up such a company if it has assets here or some other sufficient connection with this country: *Re Drax Holdings Ltd Re InPower Ltd* [2003] EWHC 2743 (Ch), [2004] 1 WLR 1049. And in theory, such an order operates universally, applies to all the foreign company's assets and brings into play the full panoply of powers and duties under the Insolvency Act 1986 like any other winding up order: see Millett J in *Re International Tin Council* [1987] Ch 419, 446-447:

> "The statutory trusts extend to [foreign] assets, and so does the statutory obligation to collect and realise them and to deal with their proceeds in accordance with the statutory scheme."

9. But the judicial practice which developed in such a case 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. The court, so to speak, "disapplied" the statutory trusts and duties in relation to the

foreign assets of foreign companies. This practice was based partly upon the pragmatic consideration that any foreign country which applied our own rules of private international law would not recognise the title of an English ancillary liquidator to the company's assets. But it was also based upon the principle of universalism. In *Re Matheson Brothers Ltd* (1884) 27 Ch D 225 Kay J appointed a provisional liquidator, as in this case, to protect the English assets of a New Zealand company which was being wound up in New Zealand. He said, at pp 230-231:

> "[What] is the effect of the winding up order which it is said has been made in New Zealand? This court upon principles of international comity, would no doubt have great regard to that winding up order and would be influenced thereby [but there was nevertheless jurisdiction to make a winding up order, and therefore to appoint a provisional liquidator, to protect the English assets]…I consider that I am justified in taking steps to secure the English assets until I see that proceedings are taken in the New Zealand liquidation to make the English assets available for the English creditors pari passu with the creditors in New Zealand."

10. It seems clear from the last sentence that Kay J envisaged the English assets being distributed in the New Zealand liquidation, provided that English creditors shared pari passu with New Zealand creditors. It was on the authority of this and similar statements in other cases that Sir Richard Scott V-C held in *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, 247 that an English court had power in an ancillary liquidation (provisional or final) to authorise the English liquidators to transmit the English assets to the principal liquidators. The basis for the practice could only be what Kay J called principles of international comity, the desirability of a single bankruptcy administration which dealt with all the company's assets.

11. It is this jurisdiction, reinforced by the provisions of section 426, which the Australian liquidators (supported by two Australian insurance creditors who stand to gain from the application of Australian law) invite the court to exercise. But David Richards J, in a judgment which carefully examined all the arguments and authorities, held that the jurisdiction did not extend to authorising the assets to be remitted to principal liquidators for distribution which was not pari passu but gave preference to some creditors to the prejudice of others. The Court of Appeal (Sir Andrew Morritt C, Tuckey and Carnwath LJJ) held that

there was such a jurisdiction, which might be exercised if distribution in the country of the principal liquidation produced advantages for the non-preferred creditors which counteracted the prejudice they suffered. But the present case offered no such advantages. The appeal was therefore dismissed.

12. My Lords, I would entirely accept that there are no administrative savings to be gained from remitting the assets to Australia. In order to avoid delay in distributing the available assets, the English provisional liquidators and the Australian liquidators have co-operated in securing the approval of two alternative schemes of arrangement, one based on the outcome which would occur if all the assets were distributed according to Australian law and the other on the outcome of separate liquidations in England and Australia. Depending upon your Lordships' decision, one or the other will be carried into effect. All that remains is to press button A or button B. So the question is whether an order for remittal should be made, not to achieve any economies in the winding up, but simply because it is the right thing to do. Is it what principle and justice require?

13. The judge denied the existence of a power to order remittal to Australia on two grounds. The first was the absence of a power in the English court to disapply any part of the statutory scheme for the collection and distribution of the assets of an insolvent company. That included the provision in section 107 for pari passu distribution. The second was the weight of authority, in the specific context of an ancillary winding up, which laid emphasis upon the fact that the co-operation of the English court was given on the assumption that there would be a pari passu distribution in the principal liquidation.

14. In my opinion there is force in both of these reasons but the judge carried them too far. There is no doubt that , at least 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. As Wynn-Parry J said of an ancillary winding up in *Re Suidair International Airways* Ltd [1951] Ch 165, 173:

> "[T]his 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…"

15. Similarly Sir Richard Scott V-C decided in *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 that in settling a list of creditors, the English court was bound to apply English law. It could not disregard rule 4.90 of the Insolvency Rules 1986 (SI 1986/1925), which requires that the amount owing by the company to the creditor or vice versa shall be determined after setting off mutual debts against each other.

16. However, my noble and learned friend went further and directed the English ancillary liquidators not to remit the assets in their hands to the principal liquidators in Luxembourg (which did not recognise rights of set off) without making provision to ensure that the overall distributions to English creditors were in accordance with English law.

17. On the facts of the case I think, if I may respectfully say so, that the decision was correct. The mutual debts which were set off against each other appear to have been entirely governed by English law, which regards set off as a matter of substantial justice between the parties: see *Forster v Wilson* (1843) 12 M & W 191, 204. The court of the principal winding up in Luxembourg had made it clear that it was going to apply its *lex fori* and disallow the set off, notwithstanding the close connection of the transactions with England. In the circumstances, I think that justice required that a remittal of the assets should have been qualified by a provision which ensured that the English set off was given effect. Luxembourg has not been designated a "relevant country" under section 426 and there was accordingly no jurisdiction to apply Luxembourg law, but, as at present advised, I think that even if there had been, I would not have thought it appropriate to do so. The mutual debts were too closely connected with England.

18. Where I respectfully part company with my noble and learned friend is in relation to the reason which he gave, and maintains in his speech in this appeal (which I have had the privilege of reading in draft) for deciding that he should not remit the assets to Luxembourg without protecting the position of creditors who had proved in England. In my opinion he was right to do so as a matter of discretion. But he says that he had no jurisdiction to do otherwise because creditors in an English liquidation (principal or ancillary) cannot be deprived of their statutory rights under English law.

19. In my opinion, however, the judicial practice to which I have referred and which my noble and learned friend approved in *Re Bank of*

Credit and Commerce International SA (No 10) [1997] Ch 213 is inconsistent with the broad proposition that creditors cannot be deprived of their statutory rights under the English scheme of liquidation. The whole doctrine of ancillary winding up is based upon the premise that in such cases the English court may "disapply" parts of the statutory scheme by authorising the English liquidator to allow actions which he is 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.) These may or may not be the same as English law. Thus the ancillary liquidator is invariably authorised to leave the collection and distribution of foreign assets to the principal liquidator, notwithstanding that the statute requires him to perform these functions. Furthermore, the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme.

20. Once one accepts, as my noble and learned friend rightly accepted in *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, that the logic of the ancillary liquidation doctrine requires that the court should have power to relieve an English ancillary liquidator from the duty of distributing the assets himself but can direct him to remit them for distribution by the principal liquidator, I think it must 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.

21. It would in my opinion make no sense to confine the power to direct remittal to cases in which the foreign law of distribution coincided with English law. In such cases remittal would serve no purpose, except some occasional administrative convenience. And in practice such a condition would never be satisfied. Almost all countries have their own lists of preferential creditors. These lists reflect legislative decisions for the protection of local interests, which is why the usual English practice is, when remittal to a foreign liquidator is ordered, to make provision for the retention of funds to pay English preferential creditors. But the existence of foreign preferential creditors who would have no preference in an English distribution has never inhibited the courts from ordering remittal. I think that the judge was inclined to regard these differences as *de minimis* variations which did not prevent the foreign rules from being in substantial compliance with the pari passu principle. But they are nevertheless foreign rules. The fact that the differences were minor

might be relevant to the question of whether a court should exercise its discretion to order remittal. But any differences in the English and foreign systems of distribution must destroy the argument that an English court has absolutely no jurisdiction to order remittal because it cannot give effect to anything other than the English statutory scheme.

22. The other ground relied upon by the judge was based upon a number of statements by eminent judges (including Sir Richard Scott V-C in *Re Bank of Credit and Commerce International SA (No 10)*) to the effect that the object of an ancillary liquidation was to ensure that all the company's assets world-wide were made available for distribution pari passu to all its creditors. One example is the passage I have quoted from the judgment of Kay J in *Re Matheson Brothers Ltd* (1884) 27 Ch D 225 (see para 9 above) in which he said that he would continue the provisional liquidation "until I see that proceedings are taken in the New Zealand liquidation to make the English assets available for the English creditors pari passu with the creditors in New Zealand." That, said David Richards J, showed that pari passu distribution in the principal liquidation was a sine qua non for the assistance of the ancillary liquidator.

23. In my opinion, however, such observations have to be read in their context. Kay J was plainly anxious to secure that English creditors were treated equally with New Zealand creditors. He never directed his mind to the question of whether it would matter if New Zealand law gave preferences on grounds unrelated to the residence or nationality of the creditor. And your Lordships have not been referred to any case in which this question has been considered. In my opinion the authorities relied upon by the judge do not justify limiting the court's jurisdiction.

24. It follows that in my opinion the court had jurisdiction at common law, under its established practice of giving directions to ancillary liquidators, to direct remittal of the English assets, notwithstanding any differences between the English and foreign systems of distribution. These differences are relevant only to discretion.

25. Even on the question of whether the court should make the kind of provision for protecting rights of set off which Sir Richard Scott V-C made in *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, much will depend upon the degree of connection which the mutual debts have with England. If the country of principal liquidation does not recognise bankruptcy set off and the mutual debts

arise out of transactions in that country, it is hard to see why an English court should insist on rights of set off being preserved in respect of claims by the foreign creditors against assets which happen to be in England. The English court would be entitled to exercise its discretion by remitting the assets to the principal jurisdiction and leaving it to apply its own law. (Compare *Re Paramount Airways Ltd* [1993] Ch 223, discussing the discretion not to apply the English law on voidable dispositions).

26. It was submitted by the appellants that the argument for the existence of such a jurisdiction under section 426 was even stronger, because it expressly gives the court power to apply the foreign insolvency law to the matter specified in the request. As Sir Andrew Morritt C said (at para 49), section 426 is "itself part of the statutory scheme", no less than section 107. The court therefore has power to apply the Australian law of distribution. It may be that it does, but in my opinion that is not what a court directing remittal of the assets is doing. It is exercising its power under English law to direct the liquidator to remit the assets and leave their distribution to the courts and liquidators in Australia. It is they who apply Australian law, not the English ancillary liquidator. As Morritt LJ said in *Hughes v Hannover Ruckversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497, 517, a court asked for assistance under section 426 may exercise "its own general jurisdiction and powers" as well as the insolvency laws of England and the corresponding laws of the requesting state. The power to direct the remittal of assets collected in an ancillary liquidation falls within the former category.

27. This point highlights, I think, the difference between my noble and learned friend Lord Scott and myself. In relying upon section 426, Lord Scott holds that a court which directs remittal of the English assets to the Australian principal liquidator is applying the insolvency law of Australia. My own view is that the order cannot be characterised in this way and that the court is exercising a power, established well before the 1986 Act, under the insolvency law of England.

28. The power to remit assets to the principal liquidation is exercised when the English court decides that there is a foreign jurisdiction more appropriate than England for the purpose of dealing with all outstanding questions in the winding up. It is not a decision on the choice of the law to be applied to those questions. That will be a matter for the court of the principal jurisdiction to decide. Ordinarily one would expect it to apply its own insolvency laws but in some cases its rules of the conflict of

laws may point in a different direction. Section 426, on the other hand, extends the jurisdiction of the English court and the choice of law which it can make in the exercise of its own jurisdiction, whether original or extended. For example, section 426 can confer jurisdiction to make an administration order in respect of a foreign company when that jurisdiction is ordinarily confined to UK companies: *Re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621. Or it may enable the court to apply a foreign law when, as in *Re Suidair International Airways* Ltd [1951] Ch 165, it would otherwise be obliged to apply only English law, as in *England v Smith* [2001] Ch 419 (Australian law applied to examination of accountant connected with insolvent Australian company). But the present case involves neither an extension of the English jurisdiction or an application by the English court of a foreign law.

29. I therefore agree with the Court of Appeal that the court has jurisdiction, even if not for precisely the same reasons. But the Court of Appeal nevertheless decided that the jurisdiction should not be exercised because the outcome for some creditors would be worse than if the English assets were distributed according to English law. There was, said Carnwath LJ at para 72, no "rule of private international law or any other countervailing benefit" which would require the court to disregard the principles applicable under English insolvency law.

30. I must respectfully disagree. The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, 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. That is the purpose of the power to direct remittal.

31. In the present case I do not see that it would offend against any principle of justice for the assets to be remitted to Australia. In some cases there may be some doubt about how to determine the appropriate jurisdiction which should be regarded as the seat of the principal liquidation. I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council

Regulation on insolvency proceedings ((EC) No 1346/2000 of 29 May 2000) uses the concept of the "centre of a debtor's main interests" as a test, with a presumption that it is the place where the registered office is situated: see article 3.1. That may be more appropriate. But in this case it does not matter because on any view, these are Australian companies. They are incorporated in Australia, their central management has been in Australia and the overwhelming majority of their assets and liabilities are situated in Australia.

32. It is true that Australian law would treat insurance creditors better and non-insurance creditors worse than English law did at the relevant time. But that seems to me no reason for saying that the Australian law offends against English principles of justice. As it happens, since the appointment of the provisional liquidators, English law has itself adopted a regime for the winding up of insurance companies which gives preference to insurance creditors: see regulation 21(2) of the Insurers (Reorganisation and Winding Up) Regulations 2004 (SI 2004/353), giving effect to the European Parliament and Council Directive 2001/17/EC on the reorganisation and winding up of insurance companies. So English courts are hardly in a position to say that an exception to the pari passu rule for insurance creditors offends against basic principles of justice.

33. Furthermore, it seems to me that the application of Australian law to the distribution of all the assets is more likely to give effect to the expectations of creditors as a whole than the distribution of some of the assets according to English law. Policy holders and other creditors dealing with an Australian insurance company are likely, so far as they think about the matter at all to expect that in the event of insolvency their rights will be determined by Australian law. Indeed, the preference given to insurance creditors may have been seen as an advantage of a policy with an Australian company.

34. As for UK public policy, I cannot see how it would be prejudiced by the application of Australian law to the distribution of the English assets. There is no question of prejudice to English creditors as such, since it is accepted that although section 116(3) of the Insurance Act 1973 (Cth) gives creditors whose debts are payable in Australia a first call upon Australian assets, this provision will not in practice prejudice the interests of creditors in the English assets. Furthermore, if there were to be a separate liquidation of the English assets in England, all creditors would be entitled to prove. Those Australian (or other foreign) creditors who see an advantage in proving in England after bringing into

hotchpot their dividends in Australia would no doubt do so. But UK public policy does not require them to be afforded this facility.

35. The fact that there are assets in England is principally the result of the companies having placed their reinsurance business in the London market. For the purposes of deciding how the assets should be distributed, that seems to me an entirely adventitious circumstance. Indeed, it may not be to the advantage of London as a reinsurance market if the distribution of the assets of insolvent foreign reinsurance companies is affected by whether they have placed their reinsurance business in London rather than somewhere else.

36. In my opinion, therefore, this is a case in which it is appropriate to give the principle of universalism full rein. There are no grounds of justice or policy which require this country to insist upon distributing an Australian company's assets according to its own system of priorities only because they happen to have been situated in this country at the time of the appointment of the provisional liquidators. I would therefore allow the appeal and make the order requested by the Australian court.

LORD PHILLIPS OF WORTH MATRAVERS

My Lords

37. I have had the benefit of reading in draft your Lordships' speeches. They contain areas of common ground that result in the conclusion that this appeal should be allowed. I share those areas of common ground and agree with the result to which they lead. They are:

i. Section 426(4) and (5) of the Insolvency Act 1986 give the court jurisdiction to accede to the request of the Australian Court and
ii. On the facts of this case the court ought to accede to that request.

38. I had initially reservations about the second proposition. The business of insurance has certain special characteristics. These include the fact that, for a premium paid at the start of the contractual

relationship the insurer undertakes obligations that may extend over a considerable future period. It is commonplace for countries to regulate insurance business under conditions that require insurers to demonstrate that they have adequate resources to meet such obligations before being authorised to enter into contracts of insurance. That is certainly the case in the United Kingdom. It appears also to be the case in Australia.

39. Where the law of a country requires an insurer to maintain assets, which may include rights under contracts of reinsurance, that are designed to protect policy holders who have taken out insurance within that country, one would normally expect the insolvency law of that country to afford priority to those policy holders in relation to such assets. In such circumstances, one would not expect rules of private international law or international comity to require the transfer of those assets to liquidators in another country who would not recognise such priority.

40. There are now in place in this jurisdiction Regulations which make special provision for distribution to creditors of insolvent insurance companies. These are the Insurers (Reorganisation and Winding-up) Regulations 2004, S.I. 2004/353, which implement Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001.

41. These Regulations do not apply to the insolvencies with which this appeal is concerned because they were not in force when the provisional liquidators were appointed. Those insolvencies are, however, subject to Australian legislation whose overall effect will be, if the English assets are remitted to the Australian liquidators, that insurance and reinsurance creditors as a whole will benefit at the expense of other creditors. On the other hand insurance and reinsurance creditors whose liabilities are not in Australia will be worse off. This is not, however, the result of any special priority given to them under English law.

42. When considering the exercise of discretion under section 426(4) and (5) of the 1986 Act the following matters seem to me to be material

i) The companies in liquidation are Australian insurance companies.

ii) Australian law makes specific provision for the distribution of assets in the case of the insolvency of such companies.

iii) These do not conflict with any provisions of English law in force at the material time designed to protect the holders of policies written in England.

iv) The policy underlying these provisions appears to accord with the policy of Regulations that have since been introduced in this jurisdiction.

43. These matters have persuaded me that it is in accordance with international comity and with the principle of universalism, as explained by my noble and learned friend Lord Hoffmann that the English court should accede to the request of the Australian liquidators.

44. These are my reasons for agreeing that this appeal should be allowed. I do not propose to stray from the firm area of common ground onto the controversial area of whether, in the absence of statutory jurisdiction, the same result could have been reached under a discretion available under the common law.

LORD SCOTT OF FOSCOTE

My Lords,

Introduction

45. This appeal concerns the question whether the English assets of four insolvent Australian insurance companies, each of which is in compulsory liquidation in Australia and, in England, is under the control of provisional liquidators appointed by the High Court pursuant to a request made by the Australian liquidators, should in principle be remitted to the Australian liquidators for distribution in accordance with the Australian statutory scheme applicable to the liquidation of insolvent insurance companies, or should be retained in England and distributed in accordance with the English statutory scheme. Both David Richards J at first instance and the Court of Appeal (Sir Andrew Morritt C and Tuckey and Carnwarth LJJ) held that an order for the remission of the English assets to the Australian liquidators could not, or should not, be

made. The Australian liquidators and two of the Australian insurance creditors have appealed to this House. The respondents are the provisional liquidators appointed by the High Court. The appeal depends on the answer to the question I have referred to, and the answer to that question depends, in my opinion on how section 426(4) and (5) of the Insolvency Act 1986 should be applied in a case such as this. The facts that have given rise to a need for an answer to the question are fully set out in the 7 October 2005 judgment of David Richards J (paragraphs 9 to 21) and the judgment of the Chancellor (paragraphs 2 to 9). It is not necessary for me to do more than outline the nature of the problem that has arisen and sufficient of the details to explain why I, and I believe all your Lordships, have come to a different conclusion from that reached by the courts below.

The facts

46. The four insolvent companies were incorporated in Australia. They are conveniently referred to in the judgments below as HIH C & G, FAIG, WMG and FAII and I shall so refer to them (for their respective full corporate names, see para.10 of David Richards J's judgment). They are members of the HIH Group which, until its collapse in March 2001, was the second largest insurance group in Australia. Its corporate members, 274 in number, included eight companies that were licensed insurance companies in Australia. The four companies with which this appeal is concerned were among them but were authorised also, under the Insurance Companies Act 1982, to carry on insurance business in the United Kingdom, and did so, as well as carrying on business in Australia and elsewhere. The majority of the assets and liabilities of the four companies are located in Australia but each has significant assets and liabilities in England. The relative size of the assets and liabilities in each of these countries can be judged from the table set out in paragraph 12 of David Richards J's judgment and, for convenience, repeated here. The figures are approximate, based on estimates as at 31 March 2005 and expressed in Australian $ millions.

Assets	HIH C&G	FAIG	FAII	WMG
Australia	864	799	33	15
UK	206	23	10	8
Total	1111	892	43	23
Liabilities				
Australia	3488	2274	1903	35
UK	882	5	85	12

Elsewhere	129	50	154	0
Total	4500	2329	2142	47

The figures demonstrate the great preponderance of Australian assets and Australian liabilities over those in the United Kingdom.

47. Winding up orders in respect of the four companies were made in Australia on 27 August 2001 (they had previously been in provisional liquidation). Petitions for winding-up orders against the four companies in England had been presented on 24 July 2001 by a corporate member of the HIH Group that was a creditor of each of the companies. Those petitions remain pending but each of the companies is insolvent and, pursuant to letters of request issued by the Australian court on 10 September 2001, the High Court in England made orders appointing the respondents joint provisional liquidators (and at the same time revoking a similar appointment that had been made before the presentation of the petitions). The orders appointing the provisional liquidators do not contain any provision permitting the remission of English assets to Australia.

48. On 4 July 2005 the New South Wales Supreme Court issued a Letter of Request asking the High Court in England to assist the Australian liquidators by hearing and determining an application issued on the same day. The application asked the High Court to direct the provisional liquidators in England to pay over to the Australian liquidators

> " … all sums collected, or to be collected, by them in their capacity as English Provisional liquidators, after paying or providing for all proper costs, charges and expenses of the English Provisional Liquidators."

This application, together with an application to the High Court by the provisional liquidators for directions, was heard by David Richards J and led to his judgment to which I have referred. He rejected the Australian liquidators' request for the direction above referred to.

49. It had been common ground that the way in which a winding-up of the four companies would be most satisfactorily achieved would be

via a scheme of arrangement approved under section 411 of the Corporations Act 2001 in Australia and section 425 of the Companies Act 1985 in England. The schemes would need to reflect the priorities that would be applicable to the distribution of assets among creditors if the liquidations were to run their ordinary course (see para.4 of David Richards J's judgment). It was here that the problem which led to David Richards J's refusal to make the order for remission to Australia of the English assets arose. Australian law has certain statutory provisions relating to insurance companies which depart from the insolvency principle of a *pari passu* distribution of assets among unsecured creditors. It is necessary to describe the effect of those provisions.

50. Section 116(3) of the Australian Insurance Act 1973 provides that in the winding-up of a company authorised under the Act to carry on insurance business

> "… the assets in Australia of the [company] shall not be applied in the discharge of its liabilities other than its liabilities in Australia unless it has no liabilities in Australia."

The Australian courts have held that "assets in Australia" in section 116(3) means assets in Australia at the time of the winding-up (*New Cap Reinsurance Corp. v Faraday Underwriting* (2003) 117 FLR 52 and *Re HIH Casualty and General Insurance Ltd* (2005) 215 ALR 562). It is common ground, therefore, that section 116(3) would not apply to assets transferred or remitted to Australia after the commencement of the winding-up. Moreover, in the *New Cap Reinsurance* case it was held that the principle of hotchpot applied in relation to section 116(3) so that creditors with "liabilities in Australia" who received distributions from the proceeds of "assets in Australia" would not be entitled to participate in a distribution of the proceeds of other assets until the same level of dividend had been paid on debts which were not liabilities in Australia. David Richards J held that section 116 did not constitute a bar to an order directing remission to Australia of the English assets of the four companies and there has been no cross-appeal on that point.

51. Section 562A of the Australian Corporations Act 2001 does, however, present a more substantial problem. The section is fully set out in paragraph 44 of the judgment of David Richards J. It provides, in summary, that the re-insurance recoveries of an insurance company must be distributed, in priority to other creditors, to those creditors who

have insurance claims against the company. It has been held by the High Court of Australia that the term "contract of insurance" in section 562A(1) includes a contract of re-insurance and that "contract of re-insurance" includes a contract of retrocession (*Asset Insure Pty Ltd v New Cap Reinsurance Corporation Ltd* (2006) 226 ALR 1). Accordingly, it is common ground that section 562A confers on all creditors of an insurance company with insurance and reinsurance claims priority over all other creditors in respect of re-insurance, including retrocession, recoveries. Moreover, section 562A(4) gives the court power, in relation to amounts received under a contract of re-insurance or retrocession, to confer further priority on a particular insurance or re-insurance creditor, in "… a manner that the Court considers just and equitable in the circumstances." Section 562A has no territorial limits. Its application is mandatory so far as Australian liquidators are concerned. And, in *Re HIH Casualty and General Insurance Ltd* (2005) 215 ALR 562 at 591 the Supreme Court of New South Wales held that the principles of hotchpot do not apply so as to require dividends received by a creditor under section 562A (3) or (4) to be brought into account by the creditor when proving against other assets of the insolvent insurance company.

52. By contrast, David Richards J held, and it was common ground before the Court of Appeal and not disputed before your Lordships, that, in a winding-up in England governed by English distribution rules, creditors who had received dividends under section 562A in Australia would have to bring them into account, by way of hotchpot, when claiming dividends in the English winding-up.

53. The approximate effect on creditors of the remission to Australia of the English assets, according to a table produced by the Australian liquidators and the English provisional liquidators (but not agreed by the 3rd and 4th appellants) is set out below.

Type of creditor	**Company**	**Anticipated dividend (cents/A$) if there is no remission of English assets**	**Anticipated dividend (cents/A$) if there is remission of English assets**
Insurance/reinsurance	HIH	25.8	28.5
Creditors with	WMG	49.0	55.1
liabilities	FAII	1.3	13.3
in Australia			

Insurance/reinsurance creditors with liabilities that are not liabilities in Australia	HIH WMG FAII	25.4 49.0 1.3	19.3 39.49 12.8
Other creditors with liabilities in Australia	HIH WMG FAII	25.4 49.0 1.3	19.3 44.9 0.9
Other creditors with liabilities that are not liabilities in Australia	HIH FAII	25.4 1.3	19.3 0.4

According to the Agreed Statement of Facts and Issues (para.41) the Australian liquidators believe that the dividends receivable by the creditors of FAIG would be unaffected by the remission.

54. Following the judgment of David Richards J the proposed schemes of arrangement were redrafted. They have, as I understand it, been drafted on alternative footings, dependant on whether your Lordships dismiss this appeal and hold that David Richards J and the Court of Appeal were right to refuse to direct the remission of the English assets to Australia, or allow this appeal and hold that in principle the English assets ought to be remitted to Australia. These schemes of arrangement providing for alternative modes of distribution, I understand, have been approved both in Australia and in England. How they will be implemented depends upon your Lordships' decision, first, whether the High Court has power to direct the remission of the English assets to Australia and, second, whether in the circumstances of this case that power should, in principle, be exercised. There are two possible sources of such a power. One, espoused by my noble and learned friend Lord Hoffmann, whose opinion I have had the advantage of reading in draft, is an inherent power in the court established not by statute but by previous judicial decisions. The other is section 426 of the Insolvency Act 1986, introduced into our law, as Lord Hoffmann has explained (para.5 of his opinion), in consequence of a recommendation by the Cork Committee in 1982.

Section 426

55. The section is headed "co-operation between courts exercising jurisdiction in relation to insolvency" and subsections (4) and (5) provide as follows :

> "(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 sub-section (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."

By the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI.1986/2123) Australia was designated a "relevant country" for the purposes of section 426.

56. David Richards J, in paragraph 112 of his judgment, expressed the conclusion that

> "… in an English liquidation of a foreign company, the court has no power to direct the liquidator to transfer funds for distribution in the principal liquidation, if the scheme for pari passu distribution in that liquidation is not substantially the same as under English law."

He said that he regarded that conclusion as an application of my reasoning in *Re BCCI (No 10)* [1997] Ch.213. I think, with respect, that that was a mistaken basis for his conclusion. My reasoning in *Re BCCI (No.10)* related only to the inherent power of the court. It had nothing to do with section 426. The *BCCI (No 10)* case was concerned with the question of remission of assets from England to Luxembourg, the country where BCCI had been incorporated and the seat of the principal liquidation. Luxembourg had not been designated a "relevant country"

for the purposes of section 426. A letter of request under section 426, asking for the remission to Luxembourg of the assets held by the English liquidators, had not been, and could not have been, issued by the Luxembourg court to the High Court. The issue was whether the High Court had an inherent jurisdiction to authorise the English liquidators, conducting an ancillary liquidation in England, to remit assets to the liquidators conducting the principal liquidation and, if so, the scope of that inherent jurisdiction. It was common ground in *Re BCCI (No.10)* that the High Court had no statutory jurisdiction to remit the assets or to direct the liquidators to do so.

57. Although David Richards J expressed his conclusion as a lack of "power" to give the direction sought by the Australian liquidators, I think, reading his judgment as a whole, that he was not really taking a jurisdictional point but was concluding that it would not be right to direct a remission of assets in circumstances where the remission would reduce the dividends that would have been recovered under the English scheme of insolvency distribution by those creditors who were not insurance creditors. That certainly was the approach of the Chancellor when the case reached the Court of Appeal. He said, in paragraph 35 of his judgment that

> "… the concept of 'assistance' should not be restrictively construed so as to limit the jurisdiction of the court"

and that the assistance that the New South Wales court had requested by its Letter of Request of 4 July 2005 did not fall "outside the ambit of that concept." He concluded that –

> "if the Companies were in liquidation in England the Court in England would have jurisdiction to entertain a request under s.426 for directions to the liquidators in England to transfer the assets collected by them to the liquidators in the principal liquidation even though the result of such a transfer would be to interfere with the statutory scheme imposed on those assets by [the] Insolvency Act 1986" (para.50)

With all of that I respectfully agree. The Chancellor went on to consider whether the High Court could "properly" give the requested direction.

That, he thought, was the critical question (para.36). Again, I respectfully agree.

58. The reason why the Chancellor concluded that the court's power under section 426 to direct the provisional liquidators to remit the English assets to Australia ought not to be exercised appears from paragraph 52 of his judgment. He held that, on the authority of *Hughes v Hannover Ruckversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497 and *England v Smith* [2001] Ch.419, the court should comply with the Letter of Request issued by the Australian Court "if it may properly do so" and went on to say this –

> "That will involve a consideration of all the circumstances including whether the transfer sought will prejudice the creditors or any class of them and whether there would be other advantages sufficient to counteract such prejudice. In relation to the facts of this case it is quite clear that the transfer sought would prejudice all creditors of each of the Companies except FAIG and except Australian Insurance and Reinsurance Creditors of HIH, WMG and FAII and non-Australian Insurance and Reinsurance Creditors of FAII. The advantage to the latter classes of creditor cannot counteract the prejudice suffered by all the other classes. Nor can those advantages and any benefit obtained from avoiding duplication enable the court to conclude that a transfer would be for the benefit of the estate as a whole."

The last sentence in this citation was a response to a submission made by the Australian liquidators that the remission of the English assets should be directed if it would be for the benefit of the estate or the creditors as a whole (see para.51 of the Chancellor's judgment).

59. The Chancellor's reasoning does not, however, seem to me to explain why the identification of disadvantage to creditors other than the insurance and re-insurance creditors referred to should require the conclusion that the English assets should not be remitted to Australia. 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. Section 426 is part of the English insolvency scheme. To hold that the power under the section to direct the remission of assets from the country where an ancillary liquidation is being

conducted (England) to the country where the principal liquidation is being conducted (Australia) cannot be exercised if the effect would be to reduce the amount of dividends receivable in England by any class of creditors, or, I suppose, by any individual creditor, would be to deprive the section, at least in relation to remission of assets from an ancillary to a principal liquidation, of much of its intended potential to enable a single universal scheme for insolvency distribution to be achieved. If an ancillary liquidation is being conducted in England under an insolvency scheme that does not include section 426, e.g. where the country of the principal liquidation is not a United Kingdom country and, has not been designated a "relevant country or territory"; the position seems to me quite different. The English courts have a statutory obligation in an English winding-up to apply the English statutory scheme and have, in my opinion, in respectful disagreement with my noble and learned friend Lord Hoffmann, no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme. I expressed that opinion in *Re BCCI (No 10)* and remain of that opinion. Luxembourg was not a "relevant country or territory". Australia, however, is and, accordingly, section 426 is part of the statutory scheme applicable under the 1986 Act to these four Australian companies. I do not think it would 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. There is no case law that supports the proposition that the inherent jurisdiction can be used so as to bring about such deprivation.

60. Indeed, the case law is to an entirely contrary effect. Vaughan Williams J in *re English, Scottish and Australian Chartered Bank* [1893] 3 Ch.385 said at 394 :

> "One knows that where there is a liquidation of one concern the general principle is – ascertain what is the domicile of the company in liquidation; let the court of the country of domicile act as the principal court to govern the liquidation; and let the other courts act as ancillary, as far as they can, to the principal liquidation. *But although that is so, it has always been held that the desire to assist in the main liquidation – the desire to act as ancillary to the court where the main liquidation is going on – will not ever make the court give up the forensic rules which govern the conduct of its own liquidation.*"(My emphasis)

In *Re Suidair International Airways Ltd* [1951] Ch.165 Wynn-Parry J, having cited the passage from the judgment of Vaughan-Williams J in *re English, Scottish and Australian Chartered Bank* cited above, said at 173

> "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 [i.e. the English court's] 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."

I cited these authorities, and others, in *Re BCCI (No.10)* [1997] 1 Ch 213 in coming to the conclusion at 246 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."

61. It is, of course, desirable as a general proposition that there should be one universally applicable scheme of distribution of the assets of an insolvent company. And it is also obvious that, in general, where a company is being wound-up not only in its place of incorporation but also in other countries where it carried on some of its business the winding-up process in the latter countries should be regarded as ancillary to the principal winding-up being conducted in the country of its incorporation. In such a case there is, therefore, a potential conflict between, on the one hand, the desirability of that general proposition and, on the other hand, the undesirability of the confusion to which Wynn-Parry J referred in the *Suidair* case coupled with the obligation of English courts to accord to claimant creditors in an English winding up the statutory rights to which they are entitled under English insolvency statutes. This conflict has been resolved by Parliament in enacting section 426. Section 426 has become part of the statutory scheme. But the resolution achieved by section 426 does not apply to all countries. It does not apply where the principal winding up is being conducted in a

country which is neither part of the United Kingdom nor has been designated by the Secretary of State as a "relevant country or territory". The proposition that the assistance and directions sought by the Australian court and the Australian liquidators in the present case could be given under an inherent power of the court without reliance on section 426(4) and (5) is, in my respectful opinion, unacceptable. It would mean that the assistance and directions could be given in relation to a winding up being conducted in a foreign country that had not been designated a "relevant country or territory" by the Secretary of State. It would constitute the usurpation by the judiciary of a role expressly conferred by Parliament on the Secretary of State. Moreover, the issue is one that does not arise in the present case. If the assistance and directions sought cannot, on a proper exercise of the court's discretion, be given pursuant to section 426(4) and (5), they could hardly be given as a proper exercise of the court's inherent power. Exactly the same considerations would come into play. And, as I understand it, your Lordships all agree that the directions sought should be given.

62. If the country of the principal winding up is a "relevant country or territory" for section 426 purposes and the liquidators in that country have requested English liquidators to remit to them the assets collected in England so that they (the principal liquidators) can, pursuant to the insolvency law of that country, implement a universal scheme of *pari passu* distribution to ordinary unsecured creditors, the request is one to which, in principle, the English liquidators ought, in my opinion, to accede. I agree, as I think is common ground, that the English liquidators should first discharge the debts of those creditors who, under the English insolvency scheme, are entitled to preferential payment. There may be other circumstances in which a refusal to remit assets pursuant to such a request might be justified. It has been suggested that a refusal would be justified if it would give rise to "manifest injustice to a creditor". So indeed it might. But reliance simply on the fact that under the insolvency scheme applicable to the principal winding-up there would be a significant class or classes of preferential creditors whose debts would not have priority under the English insolvency scheme is not, in my opinion, sufficient to justify a refusal. It would, in my opinion, as I hope I have made apparent, have been sufficient if the country of the principal winding up had not been a "relevant country or territory" for section 426 purposes. These four companies are Australian companies whose principal place of business, as well as their place of incorporation, was Australia. The Australian statutory scheme allows insurance and reinsurance creditors of insolvent insurance companies to be paid in priority to ordinary creditors. There is nothing unacceptably discriminatory or otherwise contrary to public policy in these statutory provisions. The general acceptability by English law

standards of the Australian insolvency scheme is confirmed by the designation of Australia as a "relevant country or territory" for section 426 purposes. I can see no sufficient reason why the Australian liquidators' request for the remission of the English assets should not be acceded to. I would allow this appeal but repeat that I would do so on the footing that the power to accede to the Australian liquidators' request derives from section 426 and not from any inherent jurisdiction of the court.

LORD WALKER OF GESTINGTHORPE

My Lords,

63. I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I am in full agreement with his opinion, which dispels several obscurities on the authorities and clarifies the nature of the court's powers under section 426 of the Insolvency Act 1986. I too would allow this appeal and make the order requested by the Supreme Court of New South Wales.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

64. This appeal concerns the English assets of four insolvent Australian insurance companies, in compulsory liquidation in Australia and in provisional liquidation in England, pursuant to the Australian liquidators' request. The question is whether those assets should be remitted to the Australian liquidators for distribution in accordance with the Australian insolvency regime, or whether they should be distributed here in accordance with the English insolvency regime.

65. Your Lordships all agree that the answer is that the assets should be remitted for distribution in accordance with the Australian insolvency regime, albeit that the Australian liquidators and the English provisional liquidators have very sensibly agreed what the practical consequences are to be in either case, as my noble and learned friend Lord Hoffmann

explains in para 12 of his speech (which I have had the opportunity of seeing in draft), so that there will be no need for any formal remittal. However, there is disagreement as to the basis upon which the assets can be distributed in accordance with the Australian insolvency regime. Accordingly, I shall give my reasons for allowing the appeal, albeit that they can be expressed relatively shortly, as the relevant facts, statutory provisions, case law and the relevant principles are comprehensively covered in the preceding speeches.

66. The question I shall primarily address is whether the remittal of the English assets to the Australian liquidators for distribution in accordance with the Australian insolvency regime can be effected pursuant to the established judicial practice described in paras 8 and 9, or whether it can only be effected pursuant to section 426 of the Insolvency Act 1986. I have come to the conclusion that, while remittal of assets can be effected pursuant to established judicial practice, the power to do so where the distribution will not be in accordance with the English insolvency regime derives from section 426.

67. The main substantive features of the English insolvency regime in relation to unsecured creditors can be broadly summarised as follows. First, preferential creditors (listed in schedule 6 to the 1986 Act) enjoy priority on a *pari passu* basis as between themselves (sections 175 and 386 of the 1986 Act). Secondly, all other creditors rank behind them, also on a *pari passu* basis as between themselves (rule 4.181 of the 1986 Rules). Thirdly, there is a mandatory set-off requirement (rule 4.90 of the 1986 Rules) as explained by Lord Hoffmann (albeit in a bankruptcy context) in *Stein v Blake* [1996] 1 AC 243.

68. As a matter of general principle, it seems to me that, at any rate in the absence of section 426(4) and (5), where a company is wound up in this country, its assets are held on terms that they must be applied in accordance with that statutory insolvency regime: see *Ayerst v C & K (Construction) Limited* [1976] AC 167 at 176E to 177F. As Millett LJ put it in *Mitchell v Carter* [1997] 1 BCLC 673 at 686, "the making of a winding-up order divests the company of the beneficial ownership of its assets which cease to be applicable for its own benefit. They become instead subject to a statutory scheme for distribution among the creditors and members of the company."

69. This principle applies in the case of an English liquidation of a foreign company. In particular, section 221(1) of the 1986 Act confirms

that the provisions of that Act "about winding up" apply to "unregistered companies", which includes foreign companies, in the same way that they apply to English companies. That is confirmed by the judgment in *Re International Tin Council* [1987] Ch. 419 at 446G – 447B. As Millett J there explained, the application of the English insolvency regime applies 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, I therefore find it difficult to see on what basis an English court could have jurisdiction to disapply the English insolvency regime to assets in this jurisdiction of a company subject to a winding up order made by an English court.

70. Of course, in this case the companies have not been the subject of a winding up order in England, although winding-up petitions have been presented and provisional liquidators appointed. Further, as David Richards J said in para 184 of his judgment at first instance ([2005] EWHC 2125 Ch), there is "a significant prospect that, in the absence of schemes of arrangement, winding-up orders would be made" by the High Court in respect of each of the four companies. He went on to say, it was "a principal function" of the provisional liquidators "to safeguard the assets of the companies for the benefit of those interested in their distribution in the event of a winding-up." Accordingly, he considered that he should not authorise them to do anything whose "effect would be to undermine the proper working out of the statutory insolvency scheme which would be mandatory if winding-up orders were made".

71. That appears to me to be right. It seems clear that the companies are insolvent, and that the only reason that the English court has accepted jurisdiction is because the Australian courts have ordered them to be wound up because of their insolvency. Although no formal winding up orders have been made, provisional liquidators have been appointed ultimately because of the companies' insolvency. In those circumstances, I consider that the court's powers should not be more flexible or wider in connection with the remitting or distribution of assets than if formal winding up orders had been made. Accordingly, I approach the issue, as the parties and the courts below did, on that basis.

72. There appears to be no suggestion in any of the earlier authorities cited to your Lordships 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 this country, could authorise the distribution of those assets other than in accordance with the English insolvency regime. However, there are judicial observations which

emphasise the mandatory nature of the English regime, although they are not directly concerned with the question of remittal, in relation to foreign insolvent companies. I have in mind the observations of Vaughan Williams J (whose decision was upheld by the Court of Appeal) in *Re English Scottish and Australian Chartered Bank* [1893] 3 Ch. 385 at 394 and of Wynn-Parry J in *Re Suidair International Airways Limited* [1951] Ch. 165 at 173-174, as applied by Sir Richard Scott V-C, as he then was, in *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch. 213 at 246D – E. The relevant passages are quoted by my noble and learned friend, Lord Scott of Foscote (whose speech I have had the opportunity of seeing in draft) in para 60.

73. In paras 95 to 107 of his excellent judgment at first instance, David Richards J considered a number of cases in this jurisdiction, Canada and Australia, in which courts were invited to remit to foreign liquidators local assets of a foreign company which was being wound up. In all those cases, it was made clear that the court had to be satisfied that the foreign liquidators would distribute *pari passu*, in accordance with the domestic insolvency regime. Of course, it can be said that those cases merely emphasise the importance of the *pari passu* principle, but they appear to me to indicate that the courts concerned were seeking to ensure that the principles of their local insolvency regime were honoured.

74. I accept that in no case where the court has been asked to exercise its power to remit assets to liquidators in another jurisdiction has it refused to do so on the grounds that the categories of preferential creditors, or other aspects, of that other jurisdiction's insolvency regime differed from those in this country. However, I do not consider that that argument goes anywhere, because, so far as I am aware, that point has not been raised in any case where the court has been invited to remit assets. Even if the court would have had power to remit in such circumstances at some point in the past, it seems to me that, absent section 426 of the 1986 Act, it would not have such power now.

75. I accept that, on this basis, the value of the English court's inherent ancillary liquidation power is very much more circumscribed than if it could effectively disapply, or authorise the disapplication of, the English insolvency regime. However, the fact that the English court has an inherent power to relieve an ancillary liquidator in this country from the duty of distributing the assets himself, and to order that the assets be remitted to be distributed by a foreign liquidator does not mean that it necessarily follows that those assets can then be distributed other

than in accordance with the English insolvency regime. The fact that English assets are bound to be distributed in accordance with certain principles does not prevent the assets being passed to someone else so that they can be distributed in accordance with those principles, but it would prevent the passing on of those assets for distribution in accordance with different principles. If this is right, it means that the court's inherent power to remit assets is, I accept, of much more limited value than if the law were otherwise, but the power would nonetheless not be valueless: it could assist in achieving administrative convenience.

76. The notion that the court has inherent jurisdiction to remit English assets to liquidators in another jurisdiction on the basis that the insolvency regime of that jurisdiction would apply, seems to me to sit uneasily with the provisions of section 426(4) and (5), at least in relation to remittal of assets. The inherent jurisdiction to remit must be exercisable in relation to any other country whereas section 426 only applies to a "relevant country or territory", i.e. one designated by the Secretary of State. If the courts had an inherent power to remit to a country with a different insolvency regime, either the courts could exercise that power in relation to a country which was not so designated, or section 426 impliedly restricts the inherent jurisdiction to designated states. The former possibility renders the significance of designation questionable in a case where remittal is sought; indeed it can be said to involve the inherent jurisdiction almost thwarting the statutory purpose. The latter possibility not only involves an implication as to the effect of section 426 which is not exactly obvious: it would mean that the inherent power (if it ever existed) had very little, if any, further purpose.

77. Accordingly, in agreement with Lord Scott, were it not for section 426, I would have been of the view that this appeal should be dismissed.

78. I should add that I agree with Lord Hoffmann when he says that "the common law power to remit is about choice of jurisdiction, whereas section 426 is about choice of law", at least in relation to the present type of case. What section 426(5) says in terms is that an English court, to which an appropriate request is made, may "apply…the insolvency law which is applicable by [the foreign court making the request]". Whether the English court does that in the present case by ordering the English provisional liquidators to distribute in accordance with the Australian regime, or whether it orders remittal of the assets to Australia in accordance with its common law powers, to enable the Australian liquidators to distribute in accordance with the Australian regime, is a

decision for the English court in each case. However, the questions whether to remit assets to another country and whether to apply, or to permit the application of, the distribution law of that country are two different issues, although resolution of the latter question will no doubt often dictate the answer to the former question. I consider that the first of those questions is governed by the common law and the second is governed by section 426 of the 1986 Act.

79. That leads me to the second aspect which I should deal with, namely the ultimate issue in this case: should the English court accede to the Australian liquidators' request to remit the English assets for distribution in accordance with the Australian insolvency regime? This aspect can be disposed of more quickly, as I agree with all your Lordships that this would be an appropriate case for remission of the English assets to Australia for distribution by the liquidators in accordance with Australian law. It is true that this will mean that some of the creditors will be worse off than under a distribution in accordance with the English insolvency regime, but, by the same token, it will mean that some of the creditors will be better off. That is almost inevitable where one applies any regime which differs in any way from the English regime.

80. More importantly, I do not consider that any fundamental principle of English insolvency law would be offended, or any unfairness would be perpetrated, by the application of the Australian insolvency regime. Under Australian law, preferential treatment is accorded to certain creditors of insurance companies, who would not have been given such treatment in English law. However, that does not in itself mean that the application of Australian regime should be rejected. Further, as my noble and learned friend, Lord Phillips of Worth Matravers (whose speech I have read in draft) points out, the companies are, and always have been, Australian insurance companies, and Australia has been designated as a "relevant country or territory" for section 426 purposes. Clearly the fact that Australia has been so designated cannot be the end of the matter, but it does indicate, at least in general terms, that the Secretary of State considers that the insolvency law of Australia is acceptable in principle in this jurisdiction.

81. More particularly, the notion of preferential creditors is, and long has been, part of our insolvency regime, and it is almost inevitable that different insolvency regimes will have slightly different categories of preferential creditors. It cannot be right that such differences should always, or (arguably) even frequently, be a bar to an order for remittal,

as that would appear inconsistent with the purpose of section 426(4) and (5), especially in view of the slightly mystifying reference therein to "the rules of private international law". The fact that the categories of preferential creditors have changed significantly in this jurisdiction more than once over the past fifteen years rather underlines the point. Further, there is nothing unreasonable or unfairly discriminatory in the application of the Australian statutory provisions with regard to preferential creditors in this case. On the contrary, as Lord Hoffmann and Lord Phillips point out in paras 32 and 40 respectively, since 2004 the English insolvency regime has now included preferential provisions for insurance companies which are very similar to the Australian regime. It is not as if the Australian regime would distribute assets between groups of unsecured creditors (whether preferential or not) other than on a *pari passu* basis, or has significantly different set-off rules from those which apply in this jurisdiction.

82. Accordingly, although I take the view that it would not have been open to an English court to make the order sought by the Australian liquidators in the absence of section 426(4) and (5) of the 1986 Act, I consider that a different answer is appropriate in light of section 426. David Richards J and the Court of Appeal ([2006] EWCA Civ 732) thought otherwise, but that was at least in part because they were constrained by the reasoning in *Hughes v Hannover Ruckversicherungs-AG* [1997] 1 BCLC 497 (much of which is unexceptionable as Lord Hoffmann and Lord Scott have said).

83. For these reasons, I too would allow this appeal.