IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No 3 of 2010
FSD41-4/2009

IN THE MATTER OF THE COMPANIES LAW (2009 REVISION)

AND IN THE MATTER OF HSH CAYMAN I GP LTD
AND IN THE MATTER OF HSH CAYMAN II GP LTD
AND IN THE MATTER OF HSH CAYMAN V GP LTD
AND IN THE MATTER OF HSH COINVEST (CAYMAN) GP LTD

BETWEEN:

HSH CAYMAN I GP LTD
HSH CAYMAN II GP LTD
HSH CAYMAN V GP LTD
HSH COINVEST (CAYMAN) GP LTD

Appellants

AND

ABN AMRO BANK NV LONDON BRANCH

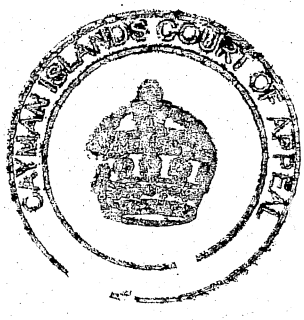
Respondent

Before: The Right Hon. Sir John Chadwick, President
The Hon. Mr. Justice Forte, Justice of Appeal
The Hon. Dr. Justice Conteh, Justice of Appeal

Appearances : Michael Crystal QC instructed by Colette Wilkins of Walkers for the Appellants and Terence Mowschenson QC instructed by Graeme Halkerston of Appleby for the Respondent.

Heard: 17th March 2010 Judgment delivered: 24th May, 2010.

JUDGMENT



Sir John Chadwick, President:

1. Each of the four appellant companies ("the Companies") was incorporated as an exempt company under the laws of the Cayman Islands for the purpose of acting as the general partner of a corresponding limited partnership ("the Limited Partnerships") established under the laws of the Province of Alberta in the Dominion of Canada. The Limited Partnerships were established as special purpose vehicles to acquire and hold shares in HSH Nordbank AG, a German regulated bank. Funding for the share acquisition was provided by a syndicate of banks under facility credit agreements.

2. It is not in dispute: (i) that monies due from the Limited Partnerships under the facility credit agreements have become payable and have not been paid; (ii) that, pursuant to the laws of the Province of Alberta, the general partner of a limited partnership is liable for the debts and obligations of that limited partnership; (iii) that, accordingly, each Company is liable to pay the debt due from the corresponding Limited Partnership under the relevant facility agreement; (iv) that the Companies are unable to pay those debts; and (v) that each of the Companies is insolvent for the purposes of section 92(d) of the Companies Law (2009 Revision).

3. On 8 September 2009 petitions for the winding up of the Companies under the Companies Law were presented to the Grand Court by ABN AMRO Bank NV London Branch ("the Petitioner") as facility agent for the lending banks under the facility credit agreements. Winding up orders were made on those petitions by Justice Foster on 13 November 2009; but, for reasons set out in the judgments of this Court on 9 December 2009, those orders were set aside. On 17 December 2009 Justice Andrew Jones QC gave leave to amend the petitions. The amended petitions came before that judge for hearing on 26 and 27 January 2010.

4. On 21 January 2010 proceedings were commenced in the Federal Bankruptcy Court for the District of Delaware seeking protection under Chapter 11 of the United States Bankruptcy Code in respect of the Limited Partnerships. When the amended winding up petitions came before Justice Jones a few days later he was told that "the initial Chapter 11 process will take, in the first instance, approximately four months". It was submitted on behalf of the Companies that, in those circumstances, "the proper course as a matter of pragmatism and comity is for the Cayman Court to let the Chapter 11 process unfold, unhindered." The Companies proposed that the petitions be stayed (alternatively, adjourned to the first open date in June 2010), on the giving of certain undertakings. The judge rejected that proposal. For the reasons which he set out in a written judgment delivered on 12 February 2010 he made the winding up orders sought under the amended petitions.

5. This is an appeal from those winding up orders. The issue raised by the appeal is whether – in the events which had happened - the judge erred in law in refusing to stay (or adjourn) the winding up proceedings. The order now sought in this Court is that the petitions be adjourned until the first open date after June 2010.

The underlying facts

6. The underlying facts are not in dispute. They are summarised at paragraphs 5 to 10 of the judgment of 12 February 2010. For the purposes of this judgment it is sufficient to rehearse the following:

   (1) HSA Nordbank was formed in 2003 on the merger of two state-owned banks. In 2006 seven investment vehicles advised by J C Flowers & Co - a private equity investment adviser based in New York – acquired, in aggregate, 26.58% of the shares in HSA Nordbank from West Deutsche Landesbank for an aggregate price of €1.25 billion. The acquisition was funded, in part, by borrowing some €350 million. The seven investment vehicles ("the Shareholder Entities") comprised the four Alberta Limited

Partnerships, two Luxembourg companies and a Delaware limited partnership.

(2) On 19 October 2006, each of the Companies, in its capacity as a general partner of the corresponding Limited Partnership, entered into a Loan Facility Agreement with the Petitioner. Shortly thereafter, in December 2006 and January 2007, the Petitioner syndicated the loans amongst itself and six other British and other European banks. The syndicate of lending banks ("the Lenders") acts in concert through the Petitioner as facility agent.

(3) The Loan Facility Agreements comprised two elements: (i) a term loan which could be used only for the purpose of acquiring the shares in HSH Nordbank; and (ii) a revolving credit facility which could be used only in or towards financing interest, certain expenses incurred in connection with the share acquisition and refinancing revolving loans. The only external source of funds available to the Limited Partnerships (or to the Companies) for the purpose of servicing the loans were the dividends to be received from HSH Nordbank. Nevertheless, the loan facility agreements were not limited recourse agreements.

(4) The global financial crisis in 2008 had the effect that HSH Nordbank suffered substantial losses: in particular, it suffered a net loss of about €2.7 billion in 2008; and a further loss of about €800 million in the first three quarters of 2009. Tangible book value per share fell from €57.40 as at the 2007 year end to €28.70 at the 2008 year end and to €19.40 as at the end of the third quarter of 2009. The losses suffered by HSH Nordbank had the effect (i) that it ceased to pay dividends to its shareholders (including the Shareholder Entities) and (ii) that it was forced to seek an injection of new capital.

(5) A first recapitalisation of HSH Nordbank took place in August 2008. Three of the four Limited Partnerships participated: subscribing a total of about €400 million for new shares. A second recapitalisation took place in June 2009. The other main shareholders - the City of Hamburg and the

State of Schleswig-Holstein - subscribed a further €3 billion and provided an asset guarantee up to €10 billion. None of the Shareholder Entities participated in the second recapitalisation, Their failure to do so had the effect that their equity stake was diluted to 9.19% (of which 7.31% is held by the four Limited Partnerships). The second recapitalisation is the subject of an investigation by the European Commission: there is, it seems, a question whether or not that recapitalisation constituted "state aid" contrary to the applicable European Union Competition Law.

(6) There was a failure by the Limited Partnerships (and the Companies) to pay sums due on 30 January 2009 under the Loan Facility Agreements; and failures to pay further sums due under those agreements on various dates thereafter. It is common ground that there was default. Following acceleration of the amounts due under each of the term loans by notices dated 8 September 2009, the position (on the presentation of the winding-up petitions) was that the Limited Partnerships (and the Companies) owed to the Lenders an aggregate sum of €264 million or thereabouts.

(7) On 12 November 2009 – the day before the hearing of the petitions before Justice Foster – the Companies and the Shareholder Entities issued proceedings against the Lenders in the Commercial Court in London. In those proceedings the claimants sought a declaration that the Lenders "were/are estopped from seeking to recover or enforce payment under the facility agreements or to accelerate as they purported to do by way of notices dated 8 September 2009". On 20 January 2010 – the day before the Chapter 11 proceedings were commenced in Delaware - the Companies' London solicitors informed the Petitioner that particulars of claim would not be served in the Commercial Court proceedings. The challenge (by way of estoppel) has now been abandoned.

7. On 23 September 2009 HSH Cayman Associates Ltd was incorporated as an exempt company under the laws of the Cayman Islands. On 24 September 2009 (or 30 September 2009 in the case of HSH Cayman I GP Ltd) HSH Cayman

Associates Ltd was appointed sole director of each of the Companies in the place of the existing directors. On 30 October 2009 each of the Companies (acting by its newly appointed director, HSH Cayman Associates Ltd) executed an Amended and Restated Limited Partnership Agreement for the purpose of enabling the appointment of an additional or substituted general partner to each Limited Partnership. On the same day each of the Companies (again acting by HSH Cayman Associates Ltd) executed a Notice of Amendment purporting to appoint JCF HSH (DE) GP LP as an additional general partner of the corresponding Limited Partnership.

8. JCF HSH (DE) GP LP is a limited partnership formed under the laws of the State of Delaware. Its general partner is JCF HSH (DE) GP LLC, a Delaware corporation. Save where it is necessary to distinguish between them, I will refer to the limited partnership and its general partner as "JCF". Those are, of course, the initials of Mr J Christopher Flowers. Mr Flowers is the Managing Member of JCF HSH (DE) GP LLC. He is also the sole director of HSH Cayman Associates Ltd. As I have said, the Shareholder Entities were advised by J C Flowers & Co at the time of the acquisition of their shares in HSH Nordbank. Mr Flowers was the signatory, on behalf of each of the Companies and JCF, of the Amended and Restated Limited Partnership Agreements and the Notices of Amendment (together "the post-petition amending documents").

9. The Lenders do not accept the validity of the appointments purportedly effected by the post-petition amending documents. Further, the validity of those appointments was challenged by summonses issued on 2 December 2009 on behalf of the joint official liquidators appointed by Justice Foster. The effect (or purported effect) of the post-petition amending documents was described in a skeleton argument lodged on behalf of the liquidators in support of their summonses. It is said that the documents were executed (i) in order to enable JCF to seek to hold itself out as being solely entitled to deal with the assets of the Limited Partnerships ("the LP Assets") to the exclusion of the Companies; and, or

in the alternative, (ii) to place the LP Assets out of the reach of the Companies by requiring the consent of JCF to any disposal of the LP Assets. The object of JCF and Mr Flowers on behalf of the Shareholder Entities was, it is said, to prevent the Companies from exercising and enforcing their interests in the LP Assets by selling those assets to defray the liabilities of the Limited Partnerships for which the Companies became liable, as general partners, under the law of Alberta.

10. On 3 December 2009 Justice Anderson granted injunctions restraining JCF from dealing with the LP Assets (wherever situated) without the consent of the joint official liquidators which Justice Foster had appointed on 13 November 2009. Those injunctions were, in effect, replaced by undertakings given on behalf of JCF HSH (DE) GP LP on 17 December 2009 when – following the order of this Court on 9 December 2009 setting aside the winding up orders made by Justice Foster – provisional liquidators were appointed by Justice Andrew Jones. It was not suggested that those undertakings did not continue in force when those provisional liquidators were appointed joint official liquidators by that judge on 12 February 2010.

The judge's approach

11. The judge reminded himself, at paragraph 3 of his judgment of 12 February 2010, that a winding up order was a discretionary remedy; but that, nevertheless, it was "well established as a matter of Cayman Islands law that an unpaid creditor in respect of an undisputed debt is entitled to expect the Court to exercise its discretion in his favour by making a winding up order in the absence of some exceptional circumstances or special reasons". He found support for that proposition - which, as he observed at paragraph 11 of the judgment, was not in dispute between the parties – in passages which he cited from decisions of the High Court of England and Wales: *In re Camburn Products Ltd* [1980] 1 WLR 86, 93F-94A and *In re Lummus Agricultural Services Ltd* [1999] BCC 953, 955.

12. It was with that approach in mind that the judge addressed the case advanced on behalf of the Companies: "that the Court should exercise its discretion by adjourning the petitions or staying all further proceedings in favour of proceedings which were commenced on 21st January 2010 by the Limited Partnerships under Chapter 11 of the US Bankruptcy Code in the Bankruptcy Court of the District of Delaware". He summarised that case (at paragraph 13 of his judgment):

> "Counsel put the argument down to two basic heads. First he contends that putting the companies under the control of official liquidators is not a commercially sensible course of action, by which he means that it would not be in the commercial interests of either the companies or lenders. The petitioner, which is representing the collective view of all the lenders, disagrees with this proposition and I am being asked, in effect, to substitute the Court's own view of what ought to be in their interests. Second, Counsel contends that in substance, the liquidation process would be a liquidation of the limited partnerships rather than the companies. Liquidating the general partner is said to be a form of "backdoor process" for liquidating the limited partnerships and should therefore lead me to the conclusion that this Court should defer to Chapter 11 proceedings commenced by the limited partnerships."

13. The judge then turned to analyse the reasons why it was said that there were exceptional circumstances or special reasons which should lead the Court to adjourn or stay the petitions in the present case. He identified four matters: (i) that the Companies were said to be "balance sheet solvent"; (ii) that a sale by an official liquidator would be destructive of intrinsic value; (iii) that the current management was best placed to retain value in the HSH Nordbank shares; and (iv) that compromise was the best and inevitable result.

14. In addressing the first of those matters the judge observed, correctly, that the concept of "balance sheet solvency" was not referred to or defined in the Companies Law (2009 Revision); but that, in this jurisdiction, a company could be said to be "balance sheet solvent" if the realisable value of its assets was greater than the amount of its liabilities, taking into account a due allowance for

its prospective and contingent liabilities. He pointed out, again correctly, that the existence of "balance sheet solvency" was of no relevance, under the Companies Law, for the purpose of determining whether the Court had jurisdiction to make a winding up order: the question, for that purpose, was whether the company was able to pay its debts. As he put it (at paragraph 14 of his judgment):

> "If a company fails to pay what is presently due and owing to the petitioning creditor, the Court has jurisdiction to make a winding-up order and it is no defence for the company to prove the realisable value of its assets is now greater than the amount of its liabilities or will become so at some future date. The only relevance of balance sheet solvency is that it may influence the expressed views of creditors and it may justify the Court in having some regard to the views of shareholders, but the weight to be attributed to their views must still be slight."

15. The judge examined the valuation evidence. He concluded (at paragraph 20 of his judgment) that:

> "First, it seems to me that all four of the companies are probably balance sheet insolvent in that the realisable value of their assets is currently *less* than the amount of their liabilities. Second, I think that I am bound to recognise that there is at least a possibility that the companies will become balance sheet solvent at some point in the future, if and when HSH Nordbank returns to profitability."

16. The judge went on to consider the relevance of those conclusions to the discretion which he had to exercise. He said this (*ibid*):

> "I am bound to have regard to the wishes of the creditors and, in my judgment, what matters is the Lenders' view of this evidence, rather than mine. I am supported in this conclusion by *Re Falcon R. J. Developments Limited* (1987) 3 BCC 146. This was a case in which the English High Court was called upon to decide whether, if a voluntary winding-up had commenced before the hearing of a petition, a compulsory order should be made if supported by independent creditors with the largest stake in the outcome, and if so, what weight should be given to the opposing views of directors and others associated with the company. Vinelott J. said (at page 155):
>
> > "I can see no reason why the views of the majority as to what is in their best interest

> should not prevail. There is no reason why the Court should impose on them its own view as to what is in their best interests. That is a commercial decision."
>
> I endorse this statement of principle. It is not for me to tell the Lenders what is or is not in their commercial interest. I am entitled to assume that they have given consideration to the companies' valuation evidence."

17. After setting out the collective view of the Lenders as expressed in the affidavit sworn on their behalf, the judge observed:

> "Even if I thought that the companies were balance sheet solvent that would not be an exceptional circumstance or special reason for refusing to make an immediate winding-up order."

18. Turning to the second of the matters advanced on behalf of the Companies - that a sale by an official liquidator would be destructive of intrinsic value - the judge accepted, as "self-evidently true", the proposition that "the intrinsic value of the Companies' shares which could be realised in an IPO, assuming that HSH Nordbank is restored to profitability and its recapitalisation is not unwound by order of the European Commission, is potentially far greater than the amount which could be realised from the sale of the shares in today's market". As he observed (at paragraph 21 of his judgment): "the sale of an illiquid minority interest is always bound to realise less than the intrinsic value which would be realised through the mechanism of an IPO or a takeover bid". But he pointed out that "the proposition that a winding up order made in respect of these Companies will be destructive of potential intrinsic value in 3 or 4 years' time is quite different from the proposition that it will be destructive of actual market value today". He went on, at paragraph 23 of his judgment, to say this:

> "There is no authority for the proposition that the Court can properly exercise its discretion by refusing to make a winding-up order in respect of an admittedly insolvent company, on a petition supported by *all* of its creditors, at the request of its shareholders merely because they believe that the value of its

> assets may increase sufficiently at some point in the future, such that they will recover at least part of their investment. The authorities point to exactly the opposite conclusion. The possibility that a company's sole main asset may increase in value in the next three or four years as a result of extraneous factors (in this case an improved financial performance on the part of HSH Nordbank and improved market conditions) is not an exceptional circumstance or special reason which justifies refusing a winding-up order and staying proceedings on a petition against the wishes of a majority or, as in this case, all of its creditors."

19. The judge rejected three other arguments on behalf of the Companies in support of the proposition that a sale by an official liquidator would be destructive of intrinsic value: (i) that the consent of HSH Nordbank (required under the articles of association) to transfers of its shares pursuant to such a sale might be withheld; (ii) that the Companies might cease to be represented on the supervisory board of HSH Nordbank (because winding-up orders made in respect of the Companies might give rise to the automatic dissolution of the Limited Partnerships under the law of Alberta); and (iii) that the marketability of the HSH shares might be adversely affected by the European Commission's investigation into the question whether the question whether the second recapitalisation of HSH Nordbank was effected with the assistance of state aid in contravention of Community Competition law. In the judge's view none of those matters justified a refusal to make an immediate winding-up order.

20. The third matter advanced on behalf of the Companies was that the current management of the Companies – that is to say, management by Mr Flowers and his associates through companies and entities which he or they controlled – was best placed to retain value in the HSH Nordbank shares. Given that (i) whether the current value of the HSH Nordbank shares improved, declined or was maintained depended on the performance of HSH Nordbank and (ii) the Companies had no employees of their own, it was said that "J.C. Flowers & Co will bring to bear expertise and influence which will somehow have a positive effect and that it is implausible to think that official liquidators will have the ear of the bank's

management". The judge held that, even if that were true, it could not constitute an exceptional circumstance which would justify refusing to make a winding-up order. He said this (at paragraph 28 of his judgment):

> "The proposed official liquidators are experienced insolvency practitioners and they will be expected to engage the services of appropriately qualified and experienced professionals to advise in connection with the marketing and sale of the shares. As Vinelott J. said in *Re. Falcon R. J. Developments Limited*, "the majority of outside creditors, ... are entitled to say, faced with a choice between a compulsory winding-up and a voluntary winding-up conducted by a man chosen and put into office [by its directors], they prefer a compulsory winding-up". The point applies with even greater force in the present case. Without in any way questioning the expertise and experience of J C Flowers & Co, the creditors are entitled to say that they prefer to rely upon official liquidators, who can be expected to engage the services of a new and independent team of professional advisers."

21. The judge then turned to the fourth matter: that compromise was the best and inevitable result. He recognised (at paragraph 29 of his judgment) that "the supervised reorganisation of an entity under Chapter 11 can, and often does, produce for creditors a result which is commercially preferable to that which might be produced by a liquidation". He observed that it would have been open to the Companies to seek similar relief by presenting a petition and applying under section 104(3) of the Companies Law (2009 Revision) and Order 4, Part II of the Companies Winding-up Rules. But, as he said, that type of procedure was best suited to the situation in which there are multiple creditors and/or shareholders. In the circumstances of the present case he thought the proposal that winding-up should be stayed so that there could be a compromise was "wholly unrealistic and impractical": he could not see "how it could now serve any useful purpose . . . to force the parties into a Chapter 11 proceeding in Delaware or to impose a similar process upon them in this Court . . .".

22. In this Court, counsel for the Companies – who had not appeared before the judge – submitted that it was no part of the judge's role to express a view on the likely

outcome (or utility) of Chapter 11 proceedings in the Delaware Court. It was said that a judge in the Cayman Islands was in no position to forecast what might emerge from a supervised reconstruction before an experienced bankruptcy judge in the United States. Given that criticism it is, I think, appropriate to examine the reasoning – set out at paragraphs 30 to 37 of the judgment - which led the judge to the view that it was unrealistic to think that, in the circumstances of the present case, a compromise would emerge from Chapter 11 proceedings.

23. The judge approached the matter from the position that there were, in this case, "just two groups of parties, each acting in concert". As he said, at paragraph 30, on the one hand there was the syndicate of seven banks acting in concert through their facility agent: for all practical purposes they constituted the entire body of creditors. On the other hand, there were the four Companies, also acting in concert through their common investment adviser J C Flowers & Co. He pointed out:

> "The evidence is that these two parties have been engaged in discussions since mid-2008 when HSH Nordbank's financial difficulties first became apparent. They have been actively negotiating a restructuring agreement from January 2009 onwards. Offers and counter-offers have been put forward and rejected. The parties failed to reach agreement and the Petitioners were perfectly entitled to present their petitions when they did in September of last year. . . . The fact that the relationship between the parties has deteriorated during this period to the point at which allegations of bad faith are being asserted, reinforces the futility of a Chapter 11 proceeding."

24. At paragraphs 31 to 34 of his judgment the judge referred to other matters which, as he held, supported the view that there was little or no prospect of a negotiated compromise between the Lenders and the interests represented by J C Flowers & Co. At paragraph 35 he referred to "the procedures and benefits of a Chapter 11 proceeding" as those were explained in an affidavit of Mr Mark Collins, a Delaware bankruptcy lawyer retained by the Limited Partnerships. At paragraphs 36 and 37 he said this:

> "In my judgment, the fact that the Limited Partnerships and/or the Companies are entitled to treat themselves as "debtors" eligible to invoke the Chapter 11 jurisdiction by the simple mechanism of establishing bank accounts with JP Morgan Chase Bank in New York cannot, by itself, possibly constitute an extraordinary circumstance or special reason why this Court should adjourn or stay winding-up proceedings. It is, after all, open to any and every Cayman Islands company to open a bank account in New York. There must be something more. As a minimum, I would want to see this course of action supported by a substantial majority of independent creditors before I would exercise the Court's discretion in this way. In this case, it is supposed by *all* the independent creditors and the amounts owing to the related party creditors who can be expected to support their clients' case is *de minimis*.
>
> I would also expect to see some evidence from which to infer that a Chapter 11 proceeding (or some similar procedure in this or some other jurisdiction) would be likely to produce a positive result which is capable of becoming binding upon all the creditors. There is no such evidence in this case. No reorganisation plan was filed by the Limited Partnerships. No draft plan has been submitted to this Court. I appreciate that the applicable rules allow a debtor 120 days within which to formulate and file a reorganisation plan, but if these Companies (and the investors who stand behind them) were serious about putting forward another restructuring proposal rather than simply "buying more time", I would have expected them to formulate a new proposal which goes some way towards meeting the Lenders' concerns expressed during the course of negotiations which had been going on at least since January 2009. There is no basis upon which I can sensibly infer that the procedures of a Chapter 11 proceeding will lead a majority of the Lenders to change their minds. The evidence of Mr. Mark D. Collins is that the US Bankruptcy Court cannot impose a reorganisation plan unless it is approved by a majority of the independent creditors, holding at least two-thirds of the debt. … Currently the restructuring proposals put forward by the shareholder entities have been unanimously rejected."

25. The judge expressed his conclusion in these terms, at paragraph 38 of his judgment:

> "I have read and given careful consideration to a large volume of written evidence, much of which is directed at difficult

> valuation issues and points of foreign law. However, in the final analysis, this is not a complicated case. The Companies are admittedly insolvent. Having engaged in restructuring negotiations over a period of many months, the Petitioners now seek an immediate winding-up order and are supported by the whole body of independent creditors. The underlying investors (whose views are being articulated through the Companies) are 'under water' and seek to delay winding-up for as long as possible in the hope that HSH Nordbank's financial condition will be restored to such an extent that there will be an IPO in three or four years' time, in which case they should recover part of their investment. From the investors' perspective, this is the obvious strategy. It preserves the potential for upside benefit, but without any further downside risk. As a matter of law, I am bound to give greater weight to the views of the creditor. The Lenders are unanimously of the view that it will be in their commercial interest to put the companies into liquidation now. The evidence suggests that the Lenders can expect a recovery, albeit probably not a full recovery. In these circumstances, I am satisfied that the Petitioners are entitled to winding-up orders in respect of each of the Companies."

The grounds of appeal

26. The grounds of appeal were set out in a Memorandum dated 4 March 2010. They may be summarised as follows: (A) that the judge was wrong in law in that (i) his decision was inconsistent with the common law principles of comity in relation to the recognition of and assistance to be given to foreign insolvency proceedings and (ii) he wrongly concluded that the collective view of the Lenders as to what was in their best interest was determinative of whether or not winding up orders should be made and wrongly adopted too narrow an approach to whether there was a sufficient reason not to make immediate winding-up orders; and (B) that the judge's exercise of his discretion was flawed in that (i) he failed to take into account certain matters said to be material and (ii) he failed to balance fairly the various matters raised before him.

27. Section 92(d) of the Companies Law (2009 Revision) provides that a company may be wound up by the Court if it is unable to pay its debts. In deciding whether or not to make the winding-up orders sought on behalf of the Lenders, the judge

was required to exercise a discretion. The appellants recognise – both in the grounds as set out in the Memorandum of 4 March 2010 and in the oral submissions made on their behalf in this Court – that the basis upon which the exercise of a discretionary power of this nature can be challenged in an appellate court is limited by well established principles. We were referred to the statement of those principles in the speech of Lord Brandon of Oakbrook in *Abidin Daver* [1984] AC 398, 420:

> " . . . where the judge at first instance has exercised his discretion in one way or the other, the grounds on which an appellate court is entitled to interfere with the decision which he has made are of a limited character. It cannot interfere simply because its members consider they would, if themselves sitting at first instance, have reached a different conclusion. It can only interfere in three cases: (1) where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) where his decision is plainly wrong."

28. Notwithstanding that grounds of appeal were set out in the Memorandum of 4 March 2009 under the four heads to which I have referred, it is, I think, not unfair to observe that, in the oral submissions made on behalf of the appellants in this Court, the emphasis was on the first of those heads. It was said that, on a true analysis, the decision for the judge on the hearing of the winding-up petitions in January 2010 was whether to exercise a case management power to adjourn until after the hearing of the Chapter 11 proceedings in Delaware; and that comity required that that case management power should be exercised in a way that was helpful and supportive of the Delaware Court. Four matters were identified which, it was said, might have an adverse impact on the ability of the Delaware Court to bring the Chapter 11 proceedings to a satisfactory conclusion. Those matters were:

(1) That the making of winding-up orders in respect of the Companies would give rise to an issue as to the validity of the appointment of JCF as an additional general partner of the Limited Partnerships; and to an issue whether the Limited Partnerships had properly entered into the Chapter 11 proceedings in the Delaware Court.

(2) That the making of winding-up orders in respect of the Companies would give rise to the question whether the joint official liquidators or JCF, severally or jointly, were the persons to speak on behalf of the Limited Partnerships in the Chapter 11 proceedings.

(3) That there would be a "real dispute" as to whether a consequence of the making of winding-up orders in respect of the Companies was that the Limited Partnerships were automatically dissolved.

(4) That, if the making of winding up orders in respect of the companies did give rise to the automatic dissolution of the Limited Partnerships, there would be a question (under German law) whether the rights of the Limited Partnerships to appoint a member of the supervisory board of HSH Nordbank and to exercise certain pre-emption rights over HSH Nordbank shares would be lost.

It was submitted on behalf of the Companies that, in order to avoid the possibility that those matters (or any of them) might have an adverse impact on the Chapter 11 proceedings (in that the need to resolve issues which might arise on the making of winding-up orders by the Cayman Islands Court would make the task of the Delaware Court more difficult), comity should have led the judge to adjourn the hearing of the winding-up petitions.

Comity in relation to the recognition of and assistance to be given to foreign insolvency proceedings

29. Although, as I have said, it was submitted to the judge (at paragraph 113 of the skeleton argument dated 13 January 2010 prepared on behalf of the Companies) that "the proper course as a matter of pragmatism and comity is for the Cayman Court to let the Chapter 11 process unfold, unhindered", there is no indication in

his judgment that arguments based on "comity" were developed before him in the form that they were advanced in this Court. It seems clear that they were not. In particular, it seems clear that the judge was not taken to the numerous authorities – *In re Bank of Credit and Commerce International SA* [1992] BCLC 570; *Banque Indosuez v Ferromet Resources Inc* [1993] BCLC 112; *Barclays Bank plc v Homan and others* [1993] BCLC 680; *In re Babcock & Wilcox Canada Ltd* (2000) 18 CBR (4th) 157; *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2006] UKPC 26; [2007] 1 AC 508; *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 - on which counsel for the Companies relied in this Court.

30. I hope that I will not be thought lacking in respect for the careful arguments which were advanced by counsel if I say that I found those authorities of limited assistance in the context of the present case. The issues to which the courts were addressing their minds in those cases have little, if any, relevance to the circumstances in the present case.

31. One of the issues addressed in the authorities to which we were referred was how to ensure that the worldwide assets of a multinational company (or group of companies) are fairly distributed amongst the creditors worldwide: Sir Nicholas Browne-Wilkinson, Vice Chancellor, clearly had that issue in mind when making the observations that he did in *In re Bank of Credit and Commerce International SA* (*ibid,* 577*a-c*). In *HIH Casualty and General Insurance Ltd,* an appeal before the House of Lords from the Court of Appeal of England and Wales, Lord Hoffmann referred (at paragraph [30] in his judgment) to "the principle of (modified) universalism" which, as he said, had been "the golden thread running through English cross border insolvency law since the 18th century". He explained that that principle required that "English courts should, so far as is consistent with justice and UK public policy, co-operate with 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". The power of the English court, at common law, to direct remittal of the assets of a company in liquidation within its jurisdiction to a foreign jurisdiction (being the place of the principal liquidation) for distribution in accordance with the law of that foreign jurisdiction is founded on that principle.

32. That principle has no direct application to the circumstances of the present case. The Companies have no assets other than their respective interests as general partners in the Limited Partnerships: for practical purposes, the assets of the Companies comprise their rights to statutory indemnities (under the law of Alberta) out of the assets of the Limited Partnerships sufficient to cover (so far as possible) their liabilities for the debts of the Limited Partnerships. The only relevant assets (the shares in HSH Nordbank) are the assets of the Limited Partnerships. The Companies are interested in those assets only to the extent that they may be available to meet the debts owed to the Lenders. The Lenders are, themselves, creditors of the Limited Partnerships in respect of those debts. The liquidation of the Companies will not alter the identity or priority of the creditors entitled to be paid out of the only relevant assets. There can be no suggestion that those assets will be distributed in the liquidation of the Companies in some manner which differs from the manner in which they would be distributed in insolvency proceedings relating to the Limited Partnerships.

33. A related, but different, issue addressed in the authorities to which we were referred is what recognition or assistance should be given to the liquidator appointed in the jurisdiction of the principal liquidation. That issue was considered by the Privy Council in the *Cambridge Gas Transportation* case. As Lord Hoffmann pointed out when delivering the judgment of the Board (at paragraph [20]): ". . . the underlying principle of universality . . . is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England". And such

recognition "carries with it the active assistance of the court". He went on (at paragraph [22]) to explain that:

> "At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which formed no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable a foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

34. That issue does not arise in the present case. The Companies are not in liquidation (or in any other form of insolvency proceeding) in Delaware. Neither the Delaware Court, nor any officer appointed by the Delaware Court, is concerned to obtain recognition or assistance from the Cayman Islands Court for the purpose of getting in, dealing with or distributing any assets of the Companies. The Delaware Court is concerned with the assets of the Limited Partnerships. There is nothing to suggest that the Delaware Court needs, or seeks, recognition or assistance from the Cayman Islands Court in that context.

35. It has been said that comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws": *Hilton v Guyot* (1895) 159 US 113, 164, in the United States Supreme Court, cited by Lord Justice Leggatt in the Court of Appeal of England and Wales in *Barclays Bank plc v Homan and others* [1993] BCLC 680, 706*a-b*. That definition of comity has been adopted in the Supreme Court of Canada: see the citation from the judgment of Justice La Forest in *Morguard Investments Ltd v De Savoye* (1990) 76 DLR (4th) 256 (SCC), 269 at paragraph 5 in the judgement of Justice Farley in *In re Babcock & Wilcox Canada Ltd* (2000) 18 CBR (4th) 157, 160.

36. The application to the Canadian courts in *In re Babcock & Wilcox Canada Ltd* was for a stay of proceedings under section 18.6 of the Companies' Creditors Arrangement Act ("the CCAA"). The application followed a temporary restraining order made in Chapter 11 proceedings by the United States Bankruptcy Court. The United States Court had sought the assistance of the Canadian courts in carrying out that order. As Justice Farley pointed out, at paragraph 4 of his judgment, before the enactment in 1997 of the amendments incorporated in section 18.6 of the CCAA, "Canadian courts essentially would rely on the evolving common law principles of comity which permitted the Canadian court to recognise and enforce in Canada the judicial acts of other jurisdictions". That led him to the view (expressed at paragraph 15 of his judgment) that the company's application "should be reviewed in the light of (i) the doctrine of comity as analyzed in *Morguard* [and other cases to which he referred]; (ii) inherent jurisdiction; (iii) the aspect of the liberal interpretation of the CCAA generally; and (iv) the assistance and codification of the of the 1997 Amendments". After reviewing those matters, he concluded (at paragraph 21 of his judgment) that he should grant the stay sought. Amongst the factors which led him to that view, were these: (i) that the recognition of comity and co-operation between the Courts of various jurisdictions was to be encouraged and (ii) that respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless "in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada".

37. *In re Babcock & Wilcocks Canada Limited* provides an example of the willingness of the Canadian Courts, acting with regard to comity, to provide assistance to the United States Bankruptcy Court seized of Chapter 11 proceedings. But, save at that level of generality, the position in the present case is not comparable. The Delaware Court has issued no restraining order in relation to the assets of the Companies; or in relation to the assets of the Limited

Partnerships. Indeed, the Delaware Court is not concerned with the assets of the Companies; and there are no assets of the Limited Partnerships within the jurisdiction of the Cayman Islands Courts. Nevertheless, for my part, I would think it appropriate to approach the present appeal with the two factors identified by Justice Farley in mind: that the recognition of comity and co-operation between the Courts of various jurisdictions is to be encouraged and that respect should be accorded to the overall thrust of relevant foreign bankruptcy and insolvency legislation.

Did comity require the adjournment or stay of the winding up petitions in the present case?

38. Nevertheless, I am not persuaded that comity required the adjournment or stay of the winding up petitions in the present case. In particular, I am not persuaded that failure to adjourn the hearing of the winding-up petitions is likely to have the effect of making the task of the Delaware Court, in the context of the Chapter 11 proceedings, more difficult than it would otherwise be.

39. It is important to keep in mind that the appellants do not submit in this Court that the judge ought to have dismissed the winding-up petitions. It is not open to serious dispute – and it was, I think, accepted in this Court on behalf of the appellants - that, unless the Chapter 11 proceedings lead to a position in which the Lenders agree to (or are obliged to accept) some arrangement or compromise under which they are no longer entitled to demand immediate payment of the debts due to them under the Facility Loan Agreements, there is no basis upon which winding-up orders in respect of the Companies can ultimately be refused in this jurisdiction. Adjournment of the petitions until the end of June 2010 must be seen as a temporary expedient: an adjournment would give time in which to progress the Chapter 11 proceedings in the hope that, in the light of the progress (if any) which had been made, the appellants would be in a better position to persuade the Cayman Islands Court that there was some real prospect that the

Chapter 11 proceedings would lead to a position in which the Lenders were no longer entitled to demand immediate payment of the debts.

40. It is important to keep in mind, also, that – while the Chapter 11 proceedings are in progress – orders for the winding-up of the Companies will not lead to the realisation of the assets of the Limited Partnerships: in particular, winding-up orders will not lead to the sale of the shares in HSH Nordbank. That is because the winding–up of the Companies will not have the effect, without more, of depriving the Limited Partnerships (and the Shareholder Entities advised by J C Flowers & Co) of the protection of the Chapter 11 proceedings.

41. Nevertheless, it is said (in that context) that the making of winding-up orders in respect of the Companies would give rise to an issue as to the validity of the appointment of JCF as an additional general partner of the Limited Partnerships; and so to an issue whether the Limited Partnerships (acting by JCF) had properly entered into the Chapter 11 proceedings. The basis of that submission is, I think, that it has been contended on behalf of the joint official liquidators appointed by Justice Foster, in the skeleton argument prepared in support of the summonses issued on 2 December 2009 (to which I have already referred), that the post-petition amending documents were void by reason of section 99 of the Companies Law (2009 Revision). In short, the contention was that the post-petition amending documents had the effect of alienating (or, at the least, imposing a fetter upon) property rights enjoyed by the Companies as general partners of the Limited Partnerships.

42. We have not heard argument in support of that contention; and, in any event, it would not be appropriate to determine the point on this appeal. But two observations are pertinent. First, the grounds of challenge to the validity of the post-petitioning amending documents are not limited to the point under section 99. As the liquidators' skeleton argument makes clear, the amendments purportedly made by those documents are said to constitute a clear breach of the Loan Facility Agreements; and to constitute actionable tortious conduct under the

laws of the Cayman Islands. Second, whether or not winding-up orders have been made in respect of the Companies, the post-petition amending documents remain potentially vulnerable to attack under section 99 of the Companies Law. That is because the section applies to "any disposition of the company's property . . . made after the commencement of the winding-up". If winding-up orders on the present petitions were to be made in the future, the commencement of winding-up – and the operation of section 99 – would date from 8 September 2009 (when the petitions were presented): that is to say, the operation of the section would predate the post-petition amending documents.

43. The true position, therefore, is that the winding-up orders made on 12 February 2010 do not, of themselves, give rise to an issue as to the validity of the post-petition amending documents: the issue exists independently of those winding-up orders. And there is no reason to think that the issue will not be raised in the Chapter 11 proceedings before the Delaware Court by the Lenders, whether or not the existing winding-up orders stand.

44. Further, it is said that the making of winding-up orders in respect of the Companies would give rise to the question whether the joint official liquidators or JCF, severally or jointly, were the persons to speak on behalf of the Limited Partnerships in the Chapter 11 proceedings. But that is to state only one element of the real question. The real question is (i) whether there are two general partners of each Limited Partnership (the corresponding Company and JCF); (ii) if so, what is the position if the two general partners seek to advance conflicting contentions on behalf of the Limited Partnership; and (iii) who is to speak for the Company (Mr Flowers, as sole director of HSH Cayman Associates Limited, or the joint official liquidators). The first of those elements arises because the validity of the post-petition amending documents is in issue: as I have explained, the validity of the documents is in issue whether or not the existing winding-up orders stand. The second element arises if the post-petitioning amending documents are valid: if they are valid (as the appellants content) the second

element would arise whether or not the existing winding-up orders stand. The third element does turn on the existence of the winding-up orders; but it is inconceivable, as it seems to me, that, if the winding up orders had not been made on 12 February 2010 (and the hearings adjourned) Mr Flowers (and HSH Cayman Associates Limited) would have been allowed by Justice Jones to represent to the Delaware Court that he (or it) was the sole voice of the Companies in the Chapter 11 proceedings. I have no doubt that the appointment of provisional liquidators would have been continued.

45. It is clear – if I may respectfully say so – that in the events which have happened and whether or not the existing winding-up orders stand - the Delaware Court will wish to consider what weight (if any) is to be given to representations purportedly made on behalf of the Limited Partnerships (whether those representations are made by JCF, HSH Cayman Associates Limited or the joint official liquidators). It may, perhaps, take the view (in agreement with the judge in the present case) that the real protagonists are the Lenders (on the one hand) and the Shareholder Entitities (on the other hand). There is no reason to doubt that the Lenders and the Shareholder Entities will be able to make their views known in the Chapter 11 proceedings as parties in their own right. The Delaware Court may, perhaps, take the view that it is unnecessary to resolve the question who can speak for the Limited Partnerships; or who can act on behalf of the Limited Partnerships if they are to be left as debtors in possession. In that context, I note that we were told that the Court would have power to appoint trustees if it thought fit. But those are, of course, matters for the Delaware Court: they are not matters on which it would be appropriate for this Court to express any view. The question for this Court is whether the judge's refusal to adjourn the hearing of the winding-up petitions is likely to have had the effect of making the task of the Delaware Court more difficult than it would otherwise be. I am satisfied that – in relation to the matters which I have addressed in the preceding paragraphs of this section of my judgment – the judge's refusal is not likely to have had that effect.

46. I turn, therefore, to the third and fourth matters raised on behalf of the appellants: (3) that there would be a "real dispute" as to whether a consequence of the making of winding-up orders in respect of the Companies was that the Limited Partnerships were automatically dissolved; and (4) that, if so, there would be a question (under German law) whether the rights of the Limited Partnerships to appoint a member of the supervisory board of HSH Nordbank and to exercise certain pre-emption rights over HSH Nordbank shares would be lost.

47. The question whether a limited partnership established under the law of Alberta would be automatically dissolved on the making of an order for the winding- up of its general partner is, of course, a question to be determined in accordance with that law. It is the subject of conflicting expert evidence filed on behalf of the parties. Mr Sean Collins, a barrister and solicitor practising in Calgary, Alberta, (in affidavits sworn on 11 and 25 January 2010) has expressed the view that (at least, where the corporation in respect of which the winding-up order is made is the sole general partner) the order will have that effect. Mr Cameron Hughes, also a barrister and solicitor practising in Calgary, (in an affidavit sworn on 20 January 2010) has expressed the view that a winding-up order will not have that effect. But, first, each is in agreement that there is no binding authority in the law of Alberta which can be regarded as determinative of the point: and, second, neither seems to have been asked to consider the question whether, in a case where there are two general partners, an order for the winding-up of one of them will have the effect that the partnership is automatically dissolved. Further, of course, neither has considered what effect automatic dissolution would have on existing Chapter 11 proceedings.

48. The question whether the rights of the Limited Partnerships to appoint a member of the supervisory board of HSH Nordbank and to exercise certain pre-emption rights over HSH Nordbank shares would be lost if orders for the winding-up of the Companies were made received some consideration in the affidavit sworn on 11 January 2010 by Mr Stephan Grauke, a German lawyer practising in Frankfurt.

He explained that, under German law, an agreement between shareholders containing shareholder rights would be treated as a partnership; and that the opening of insolvency proceedings over the assets of a partner would result in automatic dissolution of the partnership, unless all parties agree on its continuation. He said that he had been advised that if winding up orders were made in respect of the Companies, the Limited Partnerships would be automatically dissolved "and that this forms part of the insolvency process". He went on: "If that is correct, I believe that on the making of a winding-up order this could be qualified as an insolvency of a shareholder"; with the consequences that he had described. His advice as the position in relation to HSH Nordbank, therefore, turns on the advice which he had, himself, received as to the effect that orders for the winding-up of the Companies would have on the Limited Partnerships.

49. Mr Flowers swore an affidavit on 20 January 2010. At paragraph 17(a) he explained that, with effect from 30 October 2009, the documents establishing the Limited Partnerships were amended to add JCF as an additional general partner, and "to make it expressly clear that the relevant limited partnership was not to be dissolved merely as a result of one of its general partners becoming subject to an insolvency procedure". At paragraph 20(a) he referred to the shareholder rights (including the right to appoint a member of the supervisory board and to exercise certain pre-emption rights over shares) given to the Shareholder Entities by "the Principle Agreement" (*sic*) relating to HSH Nordbank. At paragraph 64 he said that he had been advised "that entry into Chapter 11 by the Shareholder Entities would terminate the Principle Agreement"; but he went on to explain that ". . . negotiations are ongoing and the other shareholders of HSH Nordbank appear to be willing in principle to confirm that the Principle Agreement does not (or did not) in fact terminate upon the Chapter 11 filings being made."

50. On that evidence this Court is asked to hold that the judge's refusal to adjourn the hearing of the winding-up petitions is likely to have had the effect of making the

task of the Delaware Court more difficult than it would otherwise be. I cannot take that view.

51. First, there is nothing to suggest that the automatic dissolution of a limited partnership under the law of Alberta – if that, does, in truth, occur on the making of an order for the winding-up of a general partner – has the effect, under United States bankruptcy law, of bringing to a halt Chapter 11 proceedings, commenced before the dissolution occurs. And, given (i) the evidence of Mr Hughes (filed on behalf of the joint official liquidators and on which the Lenders may be expected to rely) that the making of an order for the winding-up order of a general partner does not result in the automatic dissolution of the limited partnership and (ii) Mr Flowers' own evidence that one of the objects of the post-petition amending documents was to make it "expressly clear" that the limited partnerships were not to be dissolved automatically on the making of an order for the winding-up of one of two general partners (and the lack of any expert evidence that that object was not achieved), it is difficult to see circumstances in which that proposition (that the automatic dissolution of the Limited Partnerships has brought the Chapter 11 proceedings to a halt) would be advanced before the Delaware Court.

52. Second, given Mr Flowers' own evidence that it was the entry into Chapter 11 proceedings which, itself, had the effect of terminating the shareholders' rights of the Shareholder Entities under the Principle Agreement, it is difficult to see circumstances in which it would be necessary for the Delaware Court to address the question whether the making of winding-up orders also had that effect. There is no reason to think that (contrary to their own interests) the Lenders would be advancing that case.

The other grounds raised in the Memorandum of 4 March 2010.

53. As I have said, the ground relied upon in oral argument before this Court was that the judge's decision was inconsistent with the common law principles of comity in relation to the recognition of and assistance to be given to foreign insolvency

proceedings. I have explained why I am satisfied that there is no substance in that ground. The other grounds raised in the memorandum of 4 March 2010 – that the judge adopted too narrow an approach to whether there was a sufficient reason not to make immediate winding-up orders and that his exercise of his discretion was flawed – were not pursued in oral argument. There is little that I need to say in relation to those grounds.

54. I would accept that, if the judge had concluded that the collective view of the Lenders as to what was in their best interest was determinative of whether or not winding up orders should be made, he would have erred in principle: the question whether winding up orders should be made was a matter for him. But I reject the contention that the judge regarded the collective view of the Lenders as determinative of that question. On a true reading of his judgment he took the view, correctly, that the collective view of the Lenders as to what was in their best interest was, indeed, determinative of the question what was in their best interest; but he recognised, again correctly, that what was in the best interest of the Lenders was not itself determinative of the further question whether winding-up orders should be made. On that question he made his own decision, after weighing the factors which he set out in his judgment. I reject the contention that that exercise – an exercise of his discretion – was flawed.

Conclusion

55. I would dismiss this appeal.

Chadwick P

Forte JA

56. I agree with the reasons and conclusion therein and have nothing to add.

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Forte JA

Conteh JA

57. I have had the benefit of reading, in draft, the detailed judgment of Chadwick P. I agree with the reasons stated therein that the appeal would be dismissed. The trial judge was correct, in the circumstances, to make the winding up Orders that he did.

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Conteh JA