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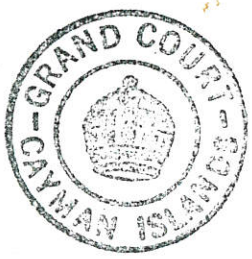

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Cause No: 652 of 2000

BEFORE: The Hon Mr. Justice Sanderson

BETWEEN: **PASHTANY TEJARATY BANK** Plaintiff

AND: **BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LTD. (In Liquidation)**
Defendant

APPEARANCES:

Mr. Eliott Simpson for the Plaintiff
Mr. Robin MacMillian for the Defendant

Hearing on 21st, 22nd, 23rd August 2002

REASONS FOR JUDGMENT

The plaintiff had approximately US$1,800,000.00 on deposit with a French branch of the Bank of Credit and Commerce International (Overseas) Ltd. (BCCI), when it went into receivership. The issue before the Court is whether the plaintiff's claim filed in the liquidation proceedings here, is time barred pursuant to the provisions of the Bankruptcy Legislation in France.

FACTS:

The plaintiff is a bank situated in Afghanistan. The defendant is the liquidator of BCCI, a bank registered in the Cayman Islands. BCCI had a branch office in Paris in which the plaintiff had deposited approximately US$1,800,000.00.

On July 22, 1991, the defendant was appointed provisional liquidator of BCCI in the Cayman Islands. On July 23, 1991, Mr. Andre Forde was appointed as provisional administrator of BCCI in France.

On July 29, 1991, Andre Forde wrote to the plaintiff. The letter stated that Maitre Carasset-Marillia had been nominated as representative of the creditors and that a declaration of claim should be addressed to her. The relevant legislation in France regarding the filing of a claim is as follows:

> ***"TRANSLATION OF ARTICLE 66 OF DECEMBER 27, 1985 DECREE RELATING TO COMPANIES COURT REORGANIZATION AND LIQUIDATION, IN ITS VERSION ENFORCEABLE IN 1992.***
>
> In the deadline of eight[1] days from the opening of the court reorganization proceedings, the creditors representative shall inform all the known creditors that they shall notify to him their claims, within the deadline of two months from the publication in the BODACC[2] of the Court order to open a reorganization proceeding.
>
> The creditors who are not resident in metropolitan France are provided with an additional deadline of two months.

The creditors representative's warning shall state the legal provisions and regulations relating to the deadline and the formalities required concerning the notification of the claim (the "declaration de créance") and the action to counter preclusion (action en relevé de forclusion").

ARTICLE 53 OF JANUARY 25, 1985 LAW RELATING TO COMPANIES' COURT REORGANIZATION AND LIQUIDATION

In the absence of notification ("declaration") within the deadline granted by the Decree adopted by the "*Conseil d'Etat*" [1], the creditors shall neither be entitled (to take part in) the distribution [2] nor to (receive) company's dividends unless if the "*Juge Commissaire*" [3] counters their preclusion if they establish that their failure was not caused by their fault.

The action to counter preclusion shall only be started within the deadline of one year from the date of the Court's order to open a reorganization procedure, or, concerning the institutions mentioned by article 143-11-4 of the "*Code du Travail*" [6]from the expiration of the deadline during which those institutions guarantee payment of the claims based on the employment contracts.

The claims that were not notified ("declarées") and were not subject to an order to counter preclusion are extinguished".

It is clear that the creditor's representative failed to comply with the notice requirements in article 66. The plaintiff was never told that it had 4 months within which to file its claim with the creditor's representative in France.

It is agreed that the 4 month time limitation in France commenced on September 1, 1991 and ended on December 30, 1991.

On September 2, 1991, the plaintiff wrote to Mr. Andre Forde, Provisional Administrator. The plaintiff identified its 3 accounts with BCCI in Paris and requested that the $1,800,000.00 be transferred to another bank. There is no evidence of any reply to that letter.

In 1992, the defendant was appointed liquidator of BCCI in the Cayman Islands and the provisional liquidator in France were appointed liquidators.

On May 14, 1992, the plaintiff wrote to the English Liquidators for BCCI (S.A), an affiliated bank, enclosing a proof of claim for the money deposited at the Paris Branch of BCCI (Overseas). The letter indicates that the proof of claim had already been filed in France on February 24, 1992, but there is no other evidence to support that statement. The English liquidators for BCCI (S.A) replied in writing to the plaintiff on June 4, 1992 indicating that the proof of claim had been forwarded to the liquidator of BCCI (Overseas) in Grand Cayman. The proof of claim form seems to have been returned by the liquidator in Grand Cayman, to the plaintiff on June 11, 1992 with the advice that it required:

1. A resolution of the Board of Directors of the plaintiff authorising the signatures on a proof of debt;
2. Documentation to support the plaintiff's claim; and
3. The proof of debt he filed for BCCI (Overseas) and not BCCI S.A.

Thereafter the plaintiff dealt with the liquidator of BCCI in Grand Cayman.

On October 7, 1992, the defendant acknowledged receipt of the Proof of Debt form and indicated it was being processed.

On November 2, 1992, the defendant wrote to the plaintiff, stating:

> *"We are in receipt of your letter dated 22nd October 1992.*
>
> *Based upon a review of our files it appears that we have not received a Proof of Debt form claiming Deal No. 00068787 on BCCI Paris in the amount of FRF. 11 million.*
>
> *Please submit a completed form to register your claim. A blank form has been attached for your convenience.*
>
> *In addition, we note your claim relates to a claim at a branch of Bank of Credit and Commerce International (Overseas) Ltd. It may be that you would prefer to claim against this branch and you may therefore wish to contact the branch directly with respect of your claim. The address of the branch officials is:*
>
> *Maitre Carrassett-Marillier*
> *36, rue des Bourdonnais*
> *75001 Paris*
> *France*
>
> *Kindly contact the writer if you have any questions."*

On December 12, 1992, the plaintiff filed a proof of debt with Maitre Carasset-Marillia and also refiled a proof of debt with the liquidator in the Cayman Islands.

In June 1995, the French liquidator advised the plaintiff that its claim could not be approved because it was filed out of time. The plaintiff continued to deal with the

liquidator in Grand Cayman. On April 9, 1997, the defendant wrote to the plaintiff advising that claimants of the French branch were eligible to be paid dividends from the Cayman estate.

The admission of fact contained in that letter of 9 April, 1997 is not in dispute before me, notwithstanding the "ring fencing" the assets of the French branch from the BCCI estate.

Further correspondence was exchanged between the plaintiff and defendant. In September 2000, the defendant's attorneys advised the plaintiff that its claim in the Cayman Islands liquidation was extinguished by virtue of the French Bankruptcy Legislation that I have quoted above.

It is agreed by all parties that the plaintiff's claim against the estate in the Cayman Islands is not time barred. The defendant argues that, because this is a deposit or contract that was made in France and to be performed in France, it is entitled to rely, in the proceedings here, on the limitation period imposed by the French legislation.

ISSUES:

The plaintiff submits that the limitation argument should fail for the following 4 reasons:

1. In international insolvency cases the courts will apply their own domestic rules of procedure and domestic substantive law in the liquidation proceedings commenced in their own jurisdiction.

2. Alternatively, foreign limitation periods are considered matters of procedure. That procedural matters are governed by domestic rules and not foreign rules and therefore, foreign limitations will not apply here.

3. Alternatively, the French limitation period is a matter of French Bankruptcy Law, with no effect outside the French liquidation proceedings.

4. In the further alternative, the French Limitation period, as a matter of French law (according to the opinions of French lawyers), is procedural only and not substantive in nature and therefore does not apply here.

The plaintiff submits that, if it is successful on either points 1 or 2 then it is not necessary to examine and consider the Affidavits of the French lawyers to determine as a fact what French law is regarding points 3 and 4.

Counsel have told me they were unable to locate a reported case where a court has had to determine whether a foreign limitation period for filing a proof of claim

in a bankruptcy or liquidation in that jurisdiction, is a bar to a claim in the domestic jurisdiction.

The defendant submits that neither of the plaintiff's arguments 1 and 2 are correct. It further argues that, since this was a contract made in France and to be performed in France, it is governed by French law. It says that their experts reports on French law prove that the claim is time barred and extinguished. It submits that under French law all of the rights of the claimant have been lost and not just the remedy of a lawsuit. Accordingly, it argues that under English conflict of law rules the defendant is entitled to rely on the limitation.

ANALYSIS:

In support of its first argument the plaintiff relied on the judgement of Wynn-Parry in *Re Suidair International Airway Ltd.* [1951] 1 Ch D. 165. In that case an English creditor sued Suidair International Airways, a South African company with an office in England. The debt was not disputed. Approximately one month later, on December 31, 1949, a South African creditor presented a petition in South Africa to wind up Suidair there. On January 14, 1950, the English creditor obtained judgment in default of defence in England. On January 31, 1950, the creditor issued two writ of *fieri facias* and seized Suidair's goods in England. On February 14, 1950 a final winding-up order was made in South Africa and on February 24, the South African liquidator claimed the goods seized in England.

On March 28, 1950 another English creditor presented a winding up petition in England.

Section 325 (1) of the English Companies Act 1948, provided:

> "Where a creditor has issued execution against the goods or lands of a company...and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution...against the liquidator in the winding–up of the company unless he has completed the execution ... before the commencement of the winding-up: Provided that ...(c) the rights conferred by this subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit."

The Court was, therefore, concerned with whether it should use Sec. 325 (1) of the English Companies Act, set aside the rights of the liquidator. The Liquidator of Suidair argued that, since the company was South African and had been wound up in South Africa before the presentation of the winding up petition in England, the English Court should observe the rules that apply in South Africa. According to those rules, the execution would be void and the goods would be available to all the creditors, as assets of the company.

Wynn-Parry analyzed the problem and reached the following conclusion (at pages 172-174):

> "It is urged that, whatever be the view under English law, and even assuming that I were against Mr. Mackinnon on the first point, as I am, yet, in view of

that evidence, I ought to refuse to exercise my discretion in favour of the applicants, thus giving effect to the South African law. On principle, I can see nothing whateversoever to recommend that proposition; but the matter does not stand entirely without authority.

In *In re English, Scottish and Australian Chartered Bank* (18), Vaughan Williams, J., in his judgement said:" ... in construing the statute, one must bear in mind the principles upon which liquidations are conducted, in different countries and in different courts, of one concern. 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". It appears to me that that must be the common sense of the matter, and that that passage enunciates a principle which, so far as I know, has never been doubted.

Then it is said that all that that passage refers to is questions of procedure; that s. 325 concerns a question of substantive law; and that therefore the passage, when properly regarded, is not any obstacle to the adoption by the court of the argument put forward on behalf of the liquidator.

To that I would make two answers: first, I do not read Vaughan Williams, J., as confining himself to what, on a narrow view, may be said to be matters of procedure. I think that he intended his observations and the statement of the principle to apply to the decision of all questions arising in the ancillary liquidation. Secondly, even if that passage could be read otherwise, I should be prepared for myself to say that I can see no sound reason for distinguishing between matters of procedure viewed in that narrow sense and matters of substantive right. It appears to

> me that the simple principle is that this court sits to administer the assets of a South African company which are within its jurisdiction, and for that purpose administers, and administers only, relevant English law; that is, primarily, the law as stated in the Companies Act, 1948, looked at in the light, where necessary, of the authorities. If that principle be adhered to, no confusion will result. If it is departed from, then for myself I cannot see how any other result would follow than the utmost possible confusion. Who could lay down as a clear and exhaustive proposition where the court was to draw the line in any particular case between administering the English law and the law of the main liquidation?
>
> For those reasons, I am of the opinion that this application succeeds."

The decision in *Re Suidair International Airways Ltd.* was the subject of commentary by Philip St J Smart in Cross-Border Insolvency, 2nd edition 1998 (at pages 380 and 381) where he states:-

> "However, the 'simple principle" of Wynn-Parry J is perhaps too simple. Even accepting that in an English winding up the court applies English domestic law, his Lordship's comment confuses the nature of an ancillary winding up. If a winding up is ancillary it should not follow the course of an ordinary, full-scale winding up. An ancillary winding up is 'carefully limited in effect'. [18] The objective of an *ancillary* winding up is, having secured the company's assets in England, to remit those assets to the foreign liquidator, enabling the court of the main liquidation to deal with all the assets and the creditors. An ancillary winding up is not primarily a device by which assets in England may be gathered in and distributed in accordance with English domestic law: that, obviously, would be in no way ancillary to the main liquidation. [19] Rather, if a winding up is directed by the English court to be ancillary to the main liquidation abroad, the English court will be seeking to avoid

> distributing property according to English law, leaving the matter as far as possible to the court conducting the main liquidations.[20]
>
> Thus, it is not suggested that the decision upon the facts of *Re Suidair International Airways Ltd.* is incorrect. However, instead of conducting a full-scale winding up, an ancillary winding up may be employed to institute proceedings of a limited scope, which prevent both unfairness to English judgment creditors as well as the increased costs which flow from two concurrent sets of proceedings. It must be noted, however, that speaking of the decision in *Re Suidair International Airways Ltd.* in the context of section 426 of the Insolvency Act 1986, Sir Peter Millett has stated that 'it should not be assumed that the outcome would be the same today.'[4]

In the present case it could not be said that the liquidation proceedings in the Cayman Islands are subsidiary. The bank in liquidation is a Caymanian company registered here and I think it fair to say that the main or primary liquidation is here. It had branches around the world and liquidators were appointed in other Countries who, with the assistance of the Court's of those Countries would realise assets within those jurisdictions.

I was told that the liquidation proceedings in France were "ring fenced". That is, the assets realized in France would be made available to the creditors in France and not to the creditors generally.

It may be that the French liquidation would not be regarded as ancillary but neither could it be considered the main liquidation. That must be here.

The issue of which country's insolvency rules should apply was more recently considered in *Re Bank of Credit and Commerce International (SA)* (No 10) [1997] Ch 213. (This case involved the liquidation of a bank which is related to or a subsidiary of the bank in these proceedings.), BCCI (S.A) was incorporated in Luxembourg and operated branches in 75 countries, including the United Kingdom. It went into liquidation in Luxembourg. Ten days latter a winding up order was made by the English Court under the Insolvency Act 1986.

Pursuant to section 4.90 of the English Insolvency Rules, a creditor who was also a debtor was permitted to set-off his debt from the sum owed to him and claim the balance in the liquidation. Luxembourg insolvency law disallowed set-off for a debtor who was simultaneously owed money by an insolvent. This meant that an English creditor of BCCI (S.A) who was also a debtor to BCCI (S.A.) would receive a higher percentage payout than a non English creditor and debtor claiming in the Luxembourg proceedings. The court had to consider whether section 4.90 of the English Insolvency Rules should apply to the English creditors, where no similar provision was available in the Luxembourg liquidation. After reviewing the authorities (including Suidair (supra)), Sir Richard Scott V.-C said (at page 246):

> "This line of authority establishes, in my opinion, at least the following propositions. (1) Where a foreign company is in liquidation in its country of incorporation, a winding up order made in England will normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation. (2) The winding up in England will be

> ancillary in the sense that it will not be within the power of the English liquidators to get in and realise all the assets of the company worldwide. They will necessarily have to concentrate on getting in and realising the English assets. (3) Since in order to achieve a pari passu distribution between all the company's creditors it will be necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool, the winding up in England will be ancillary in the sense, also, that it will be the liquidators in the principal liquidation who will be best placed to declare the dividend and to distribute the assets in the pool accordingly. (4) None the less, the ancillary character of an English law winding up does not relieve an English court of the obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up which is brought before the court. It may be, of course, that English conflicts of law rules will lead to the application of some foreign law principle in order to resolve a particular issue."

Both Suidair (supra) and BCCI (S.A) (10) (supra) were cases where the English courts were dealing with "ancillary" liquidations. In both cases, the Court concluded that English insolvency rules (even to the extent they effected substantive rights) should apply to the insolvency proceedings in England.

In the present case I am not dealing with an ancillary liquidation. If local insolvency rules apply in ancillary liquidations then there is a compelling argument that they must apply in the primary liquidation. It must be right that the locus of the primary liquidation should apply its own rules in the proceedings there, so that all creditors are treated equally and fairly, to the extent possible and as permitted by international law.

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Mr. MacMillian (for the defendant) submitted that applying Caymanian (or English) law to the present circumstances would require that this Court consider foreign law (i.e. the French limitation) because English conflict of law rules require that, where the proper law of the contract is foreign, then this court must consider that foreign law in determining the parties' contractual rights. He said this was a contract made in France and to be performed in France and is therefore governed by French Law. He argued that, since the agreement and its breach are governed by French Law then under English conflict of law rules the court must apply French Law here. He submitted that the limitation period provided for under the French Bankruptcy legislation was substantive and not merely procedural. For that reason, also, the French provision must be applied here. He relied upon affidavit evidence from experts in French Law who assert that under French Law the rights of a plaintiff are extinguished by failure to file its claim in time.

It is common ground that the common law has generally held that, if rights are extinguished by legislation, the provision is considered substantive in nature. On the other hand if a party's remedies are merely impaired, the provision is considered procedural in nature.

The defendant's submission, therefore, necessarily requires a consideration of the plaintiff's second and forth submissions. The issues are these. Are the

bankruptcy rules which impose a time limit for the filing of a claim substantive (i.e., affecting rights) or procedural (i.e., affecting remedies)? If they are procedural in nature then it seems clear that the local rules and practice should apply. If they are substantive the question becomes should they take precedence over the local rules and practice?

What bankruptcy and insolvency legislation seeks to achieve is this:

1. The appointment of an independent person to realize the assets,
2. Payment to creditors on a fair and equal basis (recognizing certain statutory priorities of creditors), and
3. Doing so in an orderly and timely way.

Typically, every jurisdiction will have general limitation legislation containing time limits that will bar the commencement of proceedings after a prescribed period. These limitation statutes are designed to eliminate stale claims and require persons to commence their actions within the period of time recognized by the local government as being fair and reasonable to both the claimant and the defendant.

However, the time limits for filing a proof of claim in a bankruptcy or liquidation are different in nature. They are intended to ensure that all claims are made

quickly so that the entire estate can be administered in an expeditious manner. The time limits for the filing of claims are intended to achieve an expedited resolution and payment to all legitimate creditors. They are not intended to weed out stale claims or to prevent a potential plaintiff from sitting on his remedies for such long periods that it would cause potential prejudice to a defendant. In short, limitation periods for filing a claim in insolvency cases serve a very different purpose than limitation periods within which to commence an action. The former are more "procedural" in nature than the latter.

Further Mr. Simpson submitted that even traditional limitation legislation of foreign countries has always been considered by the English Courts as procedural in nature.

He refers to Cheshire & North, 11th Ed (pages 79 and 80) which states:

> "Until 1984, English law was committed to the view that statutes of limitation, if they merely specified a certain time after which rights could not be enforced by action, affected procedure and not substance.[7] This meant that limitation was governed by English law, as the *lex fori*, and any limitation provision of the applicable law was ignored. So even if an action was still maintainable under the applicable law, no action would lie in England if the English limitation period had expired.[8] Conversely, if the permissible period were longer in England than in the foreign country, the plaintiff was free to pursue his claim here within the English period even if the foreign period had expired. [9] Where, however, it could be shown that the effect of a statute of limitation of the foreign applicable law was not just to bar the plaintiff's remedy, but also

to extinguish his cause of action,[10] then the English courts would be prepared to regard the foreign rule as substantive and to be applied here. [11] In so doing, the English courts ignored any classification of the foreign rule as substantive or procedural under the foreign law.

There are those who have suggested that the approach of the common law had some merits. It has been argued that it embodied the well known distinction between right and remedy;[12] like all matters referred to the *lex fori*, it was simple and convenient for an English court to apply[13] and it ensured that a debtor was protected from stale claims under very long foreign limitation periods.[14] On the other hand, the common law rule has been widely criticised. It failed to pay any regard to the classification of the foreign rule under its own law.[15] If English law regarded the foreign rule as substantive and ours as procedural, both would seem to be applicable; if the position were reversed then neither law seemed to be applicable.[16] The distinction between right and remedy is often very artificial; as Leflar has said 'a right for which the legal remedy is barred is not much of a right'.[17] Our rules of private international law refer us to a foreign proper law to determine whether a right has been created. The same system ought also to decide whether the right has, in effect, been brought to an end. Doubts have also been expressed[18] as to whether the common law really did provide significant protection against stale claims or the convenience and simplicity argued for it."

Mr. Simpson also relied upon the report of the Law Commission of England and Wales No. 114, Cmnd. 8570 which stated (at pages 3 and 4):

"(a) Introduction

2.1. For the purposes of private international law, matters are classified by our courts as pertaining either to substance or to procedure. The usual way of

drawing this distinction is by reference to the difference between right and remedy; those matters which relate to a party's rights are classified as substantive while those relating to his remedy are classified as procedural. The distinction is important because matters classified by the forum as procedural are governed by the domestic law of the country in which proceedings are instituted, i.e. by the *lex fori*, whereas matters classified by that law as substantive are governed by the law to which the court is directed by its choice of law rules, i.e. the *lex causae*. It is in this sense, namely as a method of classification which enables a court to ascertain the correctly applicable law in a private international law case, that we generally use the terms "substance" and "procedure" in this report.

(b) The general rule

2.2. English law acknowledges two ways in which a plaintiff's right to bring an action may be limited by the running of time: prescription, by virtue of which the plaintiff's title is extinguished when the relevant period expires, and limitation – whereby lapse of time renders the plaintiff's right unenforceable by action but leaves the right itself intact. [11] For the purposes of private international law, our courts have classified rules falling into the latter category (i.e. limitations) as matters of procedure. [12]

2.3. In a case involving a foreign element the courts in this country will be required to classify both our domestic statute of limitation and the corresponding provision of the *lex causae* in order to determine the applicable period of limitation. As far as English statues of limitation are concerned, subject to the exceptions mentioned below, the courts have generally accorded them a procedural classification with the result that, in accordance with the principle outline in paragraph 2.1 above, they are considered to be applicable even to a case governed by a foreign substantive law. [13] At the same time their approach towards a foreign statute of limitation has usually been to ignore [14] any classification made by the court of the relevant foreign country. Instead our courts have applied to a relevant foreign statute the English

> test of whether the plaintiff's right is extinguished or whether his remedy is merely barred. This has lead generally to a foreign statute of limitation being regarded by our courts as procedural [15] and thus inapplicable to a case otherwise governed by foreign law. However, there may well be some exceptions to this, although there is no direct authority on the point. The cases where it is thought [16] that our law would regard a statute of limitation as substantive, with the result that the *lex causae* would supply the appropriate limitation period, are those where a statute prescribes that ownership should be acquired by adverse possession, [17] expressly extinguishes the former owner's title, [18] or creates a new right and at the same time specifies that such right shall continue only for a limited period. [19]
>
> 2.4. To summaries: the present approach of our courts in general to the classification of statues of limitation, which we shall refer to as [20] "the English rule", [21] is that statutes of limitation are regarded as procedural and are, accordingly, governed by English law as the *lex fori*, irrespective of any classification accorded by a foreign court to its own statute of limitation."

Finally, both counsel relied upon the decision of the House of Lords in *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591. The plaintiffs sued in England and Germany on 2 English bills of exchange. The House of Lords concluded that the German limitation period of 3 years was not a bar to the English proceedings, which had a limitation period of 6 years. The House held that the decision of the German Court, which dismissed the proceedings there on the ground that the limitation period of 3 years prescribed by German substantive law relating to the bills of exchange had

expired, was not a decision on the merits but only a decision that the limitation period applied.

Mr. Simpson also argued that the decision in *Harris and Adams v Quine* [1869] L.R. 4 Q.B. 653 supported the proposition that foreign limitation periods were considered procedural and not substantive.

Mr. MacMillian submitted that the House of Lords in *Black Clawson* (supra) actually relied upon expert evidence from Germany to the effect that, although the German limitation period was classified as a matter of substance, it did not actually extinguish the right but merely effected the remedy. He said therefore that the correct approach in the present case is to determine (from the affidavit evidence) if the French legislation extinguishes the right or merely affects the remedy.

In the circumstances of this case I do not accept that the only test to determine if the French limitation period is procedural or substantive is to decide whether it affects rights or remedies. Although that is often the test used in determining the effect of ordinary limitation statutes, I do not think it is necessarily the only test in interpreting bankruptcy or liquidation legislation.

Bankruptcy or insolvency legislation must be looked at from a broader perspective. It is often procedural in nature. It sets time limits within which

claimants must file their claims. It deals with various other procedural matters regarding the manner of filing and proving of claims as well as the administration of the estate. It may also deal with substantive rights, such as priority of distribution, but the time requirements for filing a claim are fundamentally procedural in nature.

From the forgoing cases and reasoning, I conclude that the following principles are applicable in this case. When the main liquidation occurs in the Cayman Islands, any claim that may properly be made in the liquidation proceedings here should be governed by the procedural rules in force in this jurisdiction and not the procedural rules in place in a foreign jurisdiction where collateral or ancillary proceedings are brought. For the purpose of this application, I do not conclude that the proceedings in France are ancillary in the sense that assets realized there will be turned over to the liquidators here. Rather, they are collateral and independent liquidation proceedings.

I reach this conclusion on the basis that the jurisdiction of the primary liquidation must, as a matter of common sense and practicality, apply the same set of procedural rules to all legitimate claims that can be made in this jurisdiction. To do otherwise would lead to differing treatment of similar creditors, confusion and unnecessary complexity in dealing with cross border insolvencies. Therefore, on the basis that the local procedural rules of insolvency should apply to all claims legitimately made within the jurisdiction of the main liquidation, the plaintiff's

application should succeed - but only if the time within which to file a claim is determined to be procedural in nature.

I have concluded that the limitation periods for filing a proof of claim both here and in France are procedural and not substantive in nature. This does not necessarily depend entirely on whether the right in France is extinguished or merely the remedy, but depends on an examination and consideration of the insolvency legislation and whether it is intended to be procedural in nature. Given that the very nature of the time limitations for filing a proof of claim are procedural in nature, then the local rules of procedure will apply and not the foreign rules.

While, English courts have traditionally viewed foreign legislation regarding conventional limitation periods as procedural in nature, the Supreme Court of Canada in *Leroy Jenson and Roger Tolofson v Kim Tolofson* [1994] 3 S.C.R. 1022 has recently taken a different approach in concluding that a foreign limitation provision may be substantive.

Nonetheless, the limitation period in the case at bar could only be described as being more concerned with procedural than substantive rights; more so than the traditional limitations cases referred to.

Accordingly, I conclude that the limitation periods in question are procedural and not substantive in nature.

If am incorrect in my conclusion, then I think it right to comment on whether, as a matter of French Law, the limitation period would be described as procedural or substantial in nature.

That determination depends upon the evidence of the French lawyers who filed affidavits in these proceedings. The plaintiff's experts were clear and unequivocal. They said it was procedural in nature. The defendant's experts were equally clear and unequivocal and came to exactly the opposite conclusion.

The burden is on the defendant to prove the foreign law since he who raised that as a defence. The plaintiff has to prove its claim and it has. The defendant who alleges foreign law as a defence must prove it.

I have carefully considered all of the reports. It is extremely difficult to determine which opinions truly represent the correct legal position under French Law. On balance, I found the arguments of the plaintiff's experts to be slightly more persuasive than the defendant's experts and accordingly, I conclude, with some difficulty, that under French Law the limitation provisions are procedural and not substantive.

However, what is clear and without any difficulty, is that the defendant has not persuaded me that, under French Law, the limitation period is substantive in nature. That is, it has clearly not met the burden of proof required.

The plaintiff's application is allowed. The defendant's decision to reject the proof of claim is reversed and the said proof of claim is admitted in full.

Finally, I am must grateful to both counsel for their thorough and clear submissions.

D. Sanderson
Judge of the Grand Court

Dated this 23 of October. 2002