IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. 14 of 1999
Grand Court Cause No. 86 of 1996

IN THE MATTER OF BANK AND CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) Ltd. (In Liquidation)

AND IN THE MATTER OF THE BANKS AND TRUST COMPANIES LAW 1989

AND IN THE MATTER OF THE COMPANIES LAW (REVISED)

BETWEEN:

ECKHARDT MARINE GmbH **Appellant**

- and -

IAN A.N. WIGHT
ROBERT E. AXFORD
MICHAEL W. MACKEY **Respondents**

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Rt. Honourable Mr. Justice T. Georges, Justice of Appeal
The Honourable Mr. Justice I. Rowe, Justice of Appeal

Mr. Thomas Lowe and Mrs. Linda DaCosta instructed by Myers & Alberga for the appellant, and Miss Sarah Dobbyn instructed by Hunter & Hunter for the respondents.

April 26th 2000; August 17th 2000

JUDGMENT

ROWE, J.A.

On January 14th 1992 the Grand Court of the Cayman Islands ordered that Bank of Credit and Commerce International (Overseas) Ltd. ("BCCI(O)") be wound up and the respondents were appointed official liquidators. The appellant alleges that BCCI(O) was indebted to it in the sum of TK 83,38,611.78 at the time of the liquidation and that it was

entitled to prove its debt in the liquidation in the Cayman Islands for that sum. The respondents as official liquidators refused the proof of debt.

The appellant claims that pursuant to an agreement between itself and one S.L. Steel Ltd. for the sale of a motor vessel at a price of US $2,275,602.00, BCCI(O) through its Bangladesh branch agreed to provide a guarantee of performance. The appellant says that the purchaser of the vessel failed to perform its contract and demand was made on BCCI(O) on July 21st 1991 for payment on the guarantee. Payment was not made and in about February 1992 the appellant commenced proceedings in Bangladesh against BCCI(O) for the amount of the guarantee, then TK 83 together with interest and costs. That action has not proceeded to judgment.

Following the collapse of BCCI(O), the government of Bangladesh closed BCCI(O) on July 6th 1991 and pursuant to section 77 of the Bangladesh Banking Companies Ordinance 1991, appointed an observer to oversee the local operation. Then, on August 19th 1992, the Bangladesh Bank pursuant to the Banking Ordinance imposed the BCCI(O) reconstruction scheme ("the Scheme"). The Scheme established the "Eastern Bank Limited" ("the Bank") and by clause 6 of the Scheme, the entire business, assets, cash, and liabilities of BCCI(O) were vested in the Bank. Clause 7 of the Scheme provided that all suits, appeals, and legal proceedings pending against BCCI(O) on the establishment of the Bank "shall be deemed to be suits, appeals, and other legal proceedings pending by or against the Bank". As a consequence of this Scheme, the appellant substituted the Bank as the defendant in the Bangladesh proceedings.

The respondents wrote an open letter to creditors of BCCI(O), a copy of which was received by the appellant on March 28th 1993, in which creditors were advised that the branches of BCCI(O) in Bangladesh had reopened under the name of Eastern Bank Limited pursuant to a reconstruction scheme without the approval of the respondents, and creditors were advised to contact Eastern Bank and the address was provided. The letter contained these statements:

> "As a creditor of BCCI (Overseas) you are still entitled to file your proof of debt form with the official liquidators in the Cayman Islands but any potential dividend will take into consideration any funds received from Eastern Bank Limited. Once you have confirmed that your claim has been satisfied by the Eastern Bank, please advise us in writing so that your claim can be adjusted."

A letter was written by the respondents to the appellant on July 1st 1993. It stated that the Bank was responsible for all recorded and unrecorded liabilities of BCCI(O) except inter-branch balances and contingent liabilities owing to non-residents. The respondents advised the appellant that the indications were that the appellant's claim should be satisfied by Eastern Bank:

> "as the liability was not contingent at the date of there (sic) structuring as demand was made in July 1991. The liability is also not to a non-resident as the beneficiary is Unistar, a company operating in Chittagong, Bangladesh."

The letter ended with notification that if the appellant's claim was not satisfied by the Bank they were entitled to file their proof of debt with the official liquidators and would be subject to the hotchpot rule.

The appellant duly filed its proof of debt with the official liquidators of BCCI(O). It was rejected by letter dated December 20th 1995. In the relevant part that letter stated:

> "Your claim in the liquidation of the estate of BCCI (Overseas) as noted above is rejected. Your claim is rejected for the following reasons:
>
> > Prior to the liquidation of BCCI (Overseas), you may have been a creditor of the BCCI (Overseas) Bangladesh branch. All liabilities of the Bangladesh branch have been assumed by Eastern Bank Limited and our information indicates all claims have been satisfied. Accordingly, we consider that you have no remaining claim against BCCI (Overseas)."

Pursuant to rule 4.83(1) of the Insolvency Rules, 1986 (United Kingdom) which are applicable in the Cayman Islands, the appellant filed an originating application seeking to set aside the order of the respondents rejecting its proof of debt. As grounds therefore, the appellant stated that the allegation by the respondents that the appellant had been paid was a mistake of fact and that the decision to reject the proof of debt was wrong in law. Murphy J. dismissed the application. In his oral reasons the learned judge stated that the appellant's cause of action had been extinguished in Bangladesh as a result of the operation of Bangladesh statute law. He held further that Bangladesh was the *situs* of the debt and that on an application of the proper law test in this conflicts of law case, the

Cayman Islands Court would apply Bangladesh law by virtue of which the appellant's claim was bound to fail in the Cayman Islands. It is from this decision of Murphy J. that this appeal has been brought.

ISSUES ON APPEAL

The amended grounds of appeal filed by the appellant raises two broad points. Firstly, that there was no evidence before the learned trial judge of the law of Bangladesh and secondly that he ought to have held that upon the liquidation of BCCI(O), the appellant's debt became payable in the Cayman Islands according to the law of the Cayman Islands and therefore the Bangladesh law had no effect upon that debt. The respondent contends that the *lex situs* of the debt remained at all times in Bangladesh, irrespective of the liquidation of BCCI(O) in Cayman, with Cayman law as the *lex fori*.

THE DISCUSSION

The reasons advanced by the respondents for rejecting the appellant's proof of debt were two-fold: (a) Eastern Bank had assumed all the liabilities of BCCI(O) including the liability to the appellant and (b) the appellant's debt had been satisfied.

If liquidators in the position of the respondents decide to reject the proof of debt filed with them by a creditor in whole or in part, the liquidators are obliged under rule 4.82(2) of the Insolvency Rules to provide written reasons for that decision. The respondents in

this case complied with that rule. However, neither before Murphy J. nor before us, did the respondents advance any evidence to show that the appellant's debt had been satisfied in Bangladesh through payment of the sum claimed. To that extent therefore the second limb of the respondents' reasons for rejecting the appellant's proof of debt has been abandoned by the appellant.

The appellant did not develop its complaint that there was no evidence before Murphy J. as to Bangladesh law and directed all his submissions to his second broad ground of appeal.

Pursuant to the reconstruction scheme, the Bank assumed all the liabilities of BCCI(O) as also all suits pending against BCCI(O) which should thereafter be prosecuted against the Bank and not against BCCI(O). In the course of their submissions, counsel for both parties referred to and relied upon a number of passages from Dicey & Morris, 13th edition, volume 2. It is necessary for me to set out the relevant rules.

Rule 120 from Dicey & Morris, supra, discusses governmental acts affecting property and states that:

> "A government act affecting any private right in any moveable or immovable thing will be recognized as valid and effective in England if the act was valid and effective by the law of the country where the thing was situated (*lex situs*) at the moment when the act takes effect, and not otherwise."

The general rule is that a sovereign state must be recognized as having power to legislate in respect of moveables situate within that state and that such legislation must be recognized by other states as valid and effectual to alter title to such moveables. Re Helbert Wagg & Co. Ltd. (1956) Ch. 323, 344-45. This principle is confined to acts of a foreign government within its own territory and is applicable to both moveables and immovables, whether tangible or intangible. Chaturbhuj Piramal v. Chunilal Oomkarmal (1933), L.R. 60 Ind. App. 211, 223 (P.C.); Dicey & Morris, para. 25-003.

Three questions must be answered to determine the application of Rule 120. First, what was the location of the property at the moment when the decree took effect? Second, did the decree purport to affect property situated at that place? Third, is the decree a part of the law of that place which the English courts can recognize? For the purpose of this discussion we can substitute Cayman Islands courts for English courts in that third question. It is conceded that a tangible thing has a legal *situs* corresponding to its physical situation, In re Russian Bank for Foreign Trade (1933) 1 Ch. 745. The *situs* of an intangible thing, such as a chose in action, is generally situate in the country where they are properly recoverable or can be enforced. Dicey & Morris, rule 112. As a general rule a debt is situate in the country where the debtor resides as that is normally the place where the creditor can enforce payment.

I have been asked to determine where the debt due to the appellant was situate immediately before the Scheme in Bangladesh took effect on August 19th 1992. Mr. Lowe in his skeleton argument and in his submissions was prepared to concede that the

lex situs of the guarantee which gave rise to the debt in the instant case might have been in Bangladesh in 1991 but contended that the situation had changed when BCCI(O) went into liquidation. Ms. Dobbyn, on the other hand submitted that the *lex situs* of the debt can only change if the debtor changes his residence from that country to another. I agree that if the *lex situs* of the debt due from BCCI(O) was situated in Bangladesh in August 1992, then the scheme of reconstruction could impact upon it. In re Russian Bank for Foreign Trade, (1933) 1 Ch. 745, Maugham J. was dealing with the effect of Russian legislation which nationalized Russian banks upon debts which had been due from the original banks. At page 766 of the report he said:

> "There is, however, a real question in dispute, and that is whether the debt to the petitioner was or was not locally situate in Russia at the date of the decrees of 1917 and 1918 above referred to. If it was locally situate in Russia, it seems to me that as the effect of the legislation the debt is no longer due by the bank as a corporation, and that the only claim of the petitioner is against the Soviet state. By the decree of December 1917, the assets and the liabilities of the bank within Soviet territory were taken over by the People's Bank, and this in my opinion destroys the original debt and a kind of statutory novation – whereby the State Bank became liable to discharge it. This legislation must be taken to be effective as regards property situate in the territory of the Soviet Republic (see Princess Paley Olga v. Weisz), in which it was held that the English Court will not inquire into the legality of acts done by a recognized foreign government against or in relation to its own subjects in respect of property situate in its own territory. It seems to me that the same principle must apply, whether the property consists of chattels or of a debt regarded in this country as having a local situation. If, then, it were to be established that the debt of the petitioner was represented by a credit to him in the Archangel branch of the bank, I should be of the opinion that the debt had ceased to exist."

Mr. Lowe described the scheme of reconstruction in Bangladesh as an endeavour to "ring-fence" the Bangladesh BCCI(O) branch, by expropriating the assets of BCCI(O), freeze out intervention from foreign liquidators, recapitalize it and then re-float it as "Eastern Bank". Whatever may have been the object of the scheme of reconstruction of BCCI(O) in Bangladesh, if the Scheme dealt only with assets which were situate in the territory of Bangladesh at the time when it took effect and did not purport to have extra-territorial effect, the court in the Cayman Islands would recognize such legislation. Mr. Lowe did not argue to the contrary. It was his submission that the reconstruction was only intended to have local effect and that the Bangladesh authorities did not contemplate assuming liabilities on behalf of other branches of BCCI(O). He further submitted that the effect of the reconstruction scheme was to deprive creditors of BCCI(O) of their choses in action against BCCI(O) and by its terms the Scheme appears to cover the liabilities owed to the appellant by BCCI(O). It is true that in Re BCCI, (1992) B.C.L.C. 570, at page 577, Sir Nicholas Browne-Wilkinson V-C deplored ring-fencing schemes which he thought would be doomed to failure when he said:

> "As I understand it, if a winding up goes forward, the assets of BCCI world-wide will be applicable for the creditors of BCCI world-wide. The attempt to put a ring fence around either the assets or the creditors to be found in any one jurisdiction is, at least under English law, as I understand it, not correct, and destined to failure."

Although the appellant complains that the legal proceedings instituted by it in Bangladesh are proceeding at a snail's pace and stated without any supporting evidence that the Bank

was unwilling to make payments to creditors. We are unable to draw any adverse inference from what I have been told by the appellant and from an examination of the record that the appellant would suffer any adverse consequence from the Scheme although characterized as a "ring fence". On the evidence, no one has so far attempted to prevent the appellant from prosecuting its legal case against Eastern Bank in Bangladesh.

The appellant says that the effect of the winding up order of BCCI(O) in the Cayman Islands is to terminate the company's beneficial interest in its property and to impress it with a trust to be applied for the purposes of the liquidation. They submit that from the moment of the winding up order, control of BCCI(O)'s assets as well as liabilities world-wide vested in the liquidators in the Cayman Islands and therefore by Cayman law, the Bangladesh law which came into effect on August 19th 1992 could not have any effect on its assets or liabilities. This submission is not confined to the debt due from BCCI(O) to the appellant but to all creditors who were similarly situated and who could prove in the liquidation.

Rule 157 of Dicey & Morris, deals with the effect of an English winding up order. There it is stated in subsection (1) that the winding up of a company under the Insolvency Act 1986 impresses the property of the company with a trust for its application in the course of the winding up for the benefit of the persons interested in the winding up and in subsection (2) it is stated that the winding up of a company under the Insolvency Act 1986 is governed by English law.

The Court of Appeal in In Re Oriental Inland Steam Company ex parte Scinde Railway Company, (1874) L.R. 9 Ch. App. 557, at page 559, held that:

> "The English Act of Parliament has enacted that in the case of a winding-up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company; and, being so, it has ceased to be liable to be seized by the execution creditors of the company."

In that case the Court held that the mere existence of a judgment in Bombay where the property of the company was situated did not amount to a charge against the property and that the winding up order took priority over the judgment debt so that money obtained by the judgment creditor after the winding up order had been made from assets which formerly was the sole property of the company had to be brought into hotchpot by that judgment creditor when he proved in the liquidation.

Lord Diplock in his speech, with which the other Law Lords agreed, in Ayerst v. C. & K. (Construction) Ltd., (1976) A.C. 167, at page 181, underscored the trust relationship which comes into being upon a winding up and the meaning of "beneficial ownership" in the context of such a winding-up order. He said:

> "So when those words [beneficial owner] were repeated in the Finance Act 1954 not only was there a consistent line of judicial authority that upon going into

> liquidation a company ceases to be "beneficial owner" of its assets as that expression has been used as a term of legal art since 1874 ..."

In 1987 Millett J. stated the rule to be that a winding up in the country of incorporation is impressed with the statutory trusts which are imposed on all the company's assets wherever situate, within and beyond the jurisdiction. In In re International Tin Council, (1986) 1 Ch. 419, at page 446.

As was said in the Oriental Inland Steam Co. case, supra, the trust relationship is impressed upon the property of a company in liquidation at the time of the making of the winding up order, to prevent the company's assets from being torn to pieces by creditors who can attack them where they can be found. In my view this trust principle is a just and equitable one and is clearly applicable in this case.

There can be no doubt that on January 14th 1992 the beneficial interest in the world-wide assets of BCCI(O) was statutorily vested in the official liquidators, the respondents, in the Cayman Islands. That said, did the winding up order have the effect of changing the *lex situs* of the debts which are proved or provable in the winding up? The cases cited to us do not deal directly with this important question. In F. K. Jabbour v. Custodian of Israeli Absentee Property, [1954] 1 W.L.R. 139, Pearson J. held that it was the *lex situs*, not the proper law, which could alter the title to debts and choses in action. In that case an insurance company was held to have residence in two countries, and that the debt or chose in action was properly recoverable and therefore situated in the country where the sum payable was primarily payable, that is to say where it is required to be paid by an

express or implied provision of the contract, or if there is no such provision, where it would be payable according to the ordinary course of business. An issue which was squarely raised before Pearson J. was whether the law by which a debt or a chose in action can properly be affected, whether by discharge or modification or transfer of the right is the proper law of the contract or the *lex situs*. He held that only the *lex situs* can alter the title to debts and choses in action and continued:

> "On principle, there is the consideration that, if the action to recover a debtor chose in action is brought in the country where it is properly recoverable and therefore situated, and if there is a conflict between the *lex situs* and the proper law (the one having legislation which vests the debt or chose in action in A and the other having legislation which vests the debt or chose in action B), the court trying the action will be bound to apply its own law which is the *lex situs*."

Murphy J. in his oral reasons for judgment had stated that the applicable test was the "proper law" test in a Cayman court. It seems clear on the authorities that the correct test to determine the effect of a foreign statute on a debt or chose in action situated in the Cayman Islands is the *lex situs* and not the proper law test.

James L.J. in the In re Oriental Inland Steam Co. case drew a distinction between bankruptcies and winding up cases. He said that:

> "No doubt winding up differs from bankruptcy in this respect that in bankruptcy the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustee or assignees, whereas in a winding-up the legal estate still remains in the company."

If this was a case which concerned tangible or immovable property, it is probable that the distinction between bankruptcies and a winding-up could have been material as the owner of the legal estate could probably transfer that legal estate as well as the beneficial interest to an innocent third party who could have taken without notice. No argument was addressed to us on the difference between a winding-up and a bankruptcy and we make no determination as to its relevance in this case.

I do not accept the proposition of the respondents that although the *situs* of the proof of the debt and the distribution of any dividend under the debt will be the place of the liquidation, the *situs* of the debt itself will always be the place where the debt or obligation arose. The *situs* of the debt can move from one country to another as occurs when the debtor changes his country of residence. In a winding up situation where the property of the company is impressed with a trust from the moment of the order of winding up, I am of the view that the *situs* of the debt is the place of liquidation. In my view the respondents got it right the first time when they indicated to the appellant that it should exhaust its remedies in Bangladesh and prove for any shortfall in the liquidation with the rider that if it filed a proof of debt it would have to bring into hotchpot whatever it had obtained from the Eastern Bank.

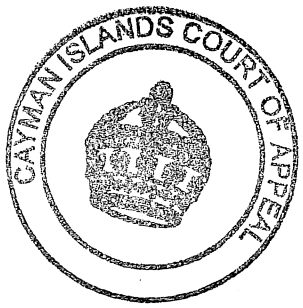
In my view under the law of the Cayman Islands, the scheme of reconstruction in Bangladesh which post-dated the order of winding up in the Cayman Islands had no effect on the assets or liabilities of BCCI(O). The assets of BCCI(O) were impressed with

the statutory trusts in the Cayman Islands. That is the place where the appellants should primarily look for the payment of their debt. BCCI(O) had no beneficial interest in its assets after January 14th 1992 and so had no ability to pay its creditors through its directors or managers. The creditors had to look to the liquidators in the Cayman Islands for payment. In my view if it were otherwise, the statutory trust would have no meaning in a case of this nature and the responsibility cast upon the liquidators in the Cayman Islands to gather in the world-wide assets of BCCI(O) and to pay the creditors world-wide who properly proved their debts, would also have absolutely no meaning.

In my judgment the appeal ought to be allowed. The decision of the respondents communicated by letter dated December 20th 1995 rejecting the proof of the appellant should be set side and the said proof should be allowed in full with costs of the appeal and in the Court below to be the appellant's to be taxed if not agreed.

ZACCA, P.

I agree.



GEORGES, J.A.

I agree.