J. Smellie

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO: 389/92

4-4-97

BETWEEN:

(1) INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED (In Liquidation)

(2) FINANCE AND INVESTMENT INTERNATIONAL LIMITED

PLAINTIFFS

AND

(1) SHAIKH KAMAL ADHAM

(2) FAISAL SAUD AL FULAIJ

(3) GHAITH RASHAD PHARAON

(4) PHARAOH HOLDINGS LIMITED

(5) LHASA INVESTMENTS LIMITED

(7) CONCORDE INTERNATIONAL TRADING S.A.

DEFENDANTS

BEFORE MURPHY J. IN CHAMBERS

February 18, March 18 & 19, 1997

APPEARANCES: L. Cohen Q.C. and H. Moses for plaintiffs

REASONS FOR DECISION

1. INTRODUCTION

On two previous occasions within the past year I have assessed damages for conspiracy under the various heads of damage established at trial before Schofield J. There is now before me an assessment of another head of damage, namely the amount of the "actual increased deficit of ICIC from the date when it would probably have been suspended from operating until its actual closure in 1991". Liability for this head of damage is of course already established, so that the sole task of the Court is to quantify the damages falling under that head.

On 18 February 1997 the matter first came before me. I adjourned the assessment directing , amongst other things, that there be a preliminary consideration of the propriety of the plaintiffs' methodology in calculating damages.

The material findings of Schofield J. were as follows:

a. ICIC was licensed to carry on business as a category B bank (that is , one which could carry on banking business throughout the world except that it could not accept deposits from Cayman Islands residents);

b. ICIC was required by the Inspector of Banks to submit to him annually its audited financial statements within three months of the end of the accounting period to which they related;

c. Pharaon, Pharaoh, and Lhasa had conspired with the officers and managers of ICIC to defraud ICIC by falsifying its accounting records and statements in the period 1977 to 1991;

d. As part of the conspiracy, the 1977 audited financial statements for ICIC (that is, for the year ended 30 June 1977) were falsified in relation to the acquisition of Attock Oil Company;

e. If ICIC's financial statements had not been falsified for the year 1977, they would have contained a note drawing attention to the commitment to acquire Attock Oil Company and the size of that commitment ;

f. In the words of Schofield J.: "Had FIIL's commitment to purchase the Attock Oil Company shares been reflected in the financial statements, having regard to the evidence I have heard from Jefferson and Ms. Hargrove, I am satisfied that there would have been some regulatory response. The likely regulatory response would have been to try to work through the problems but would have ultimately led to the

suspension of the bank's licence until the situation had been resolved. If it were not resolved the licence would have been revoked." (I note that Schofield J. did not make any determination of the date when ICIC's licence would have been suspended.); and

g. Pharaon, Pharaoh and Lhasa were responsible for the "actual increased deficit of ICIC from the date when it would probably have been suspended from operating until its actual closure in 1991".

At page 132 of his Judgment, Schofield J. directed:

> "The Court having determined that Pharaon, Pharaoh and Lhasa are liable under this head of damage it is now for the plaintiffs to attempt to quantify the actual increased deficit from the date that ICIC would probably have been suspended from operating until its actual closure in 1991."

Therefore the questions for determination by me are:

a. What would have been the likely date of suspension of ICIC's banking licence if its 1977 accounts had not been falsified ?
b. What would the deficit of ICIC have been at that date?
c. What was the deficit of ICIC at its closure in July 1991?

The damage under this head would be the increase in the deficit (if any) between those dates.

In these Reasons, "ICIC" refers to the first plaintiff, "FIIL" refers to the second plaintiff, "Pharaon" refers to the third defendant, "Pharoah" refers to the fourth defendant and "Lhasa" refers to the fifth defendant. None of these defendants appeared on this assessment.

On 24 October 1996 this Court ordered Lhasa to be wound up.
These proceedings are stayed against Lhasa by virtue of the provisions of section 100 of the Companies Law.

Pharaoh has played no part whatsoever in these proceedings. A receiver was appointed over all of its assets and undertaking by the Supreme Court of the Commonwealth of the Bahamas (the Court of its country of incorporation) in 1992.

The plaintiffs' evidence most directly relevant to this assessment took the form of affidavit evidence (supplemented by viva voce evidence) of Carmen Genovese. Mr. Genovese has given evidence on prior assessments in this action. He is a Canadian chartered insolvency practitioner and trustee in bankruptcy employed by the Canadian firm of Deloitte & Touche. He has been assisting the liquidators of ICIC in the conduct of this liquidation since July 1991. It would appear that he functions primarily as a forensic accountant. His credentials in accountancy generally and insolvency in particular are unquestioned.

On this assessment I have also had regard to other material placed before me by counsel for the plaintiffs including some of the evidence given at trial and a large amount of material previously filed with the Court in the ongoing BCCI-related liquidations.

The general background to the BCCI /ICIC liquidations is set out in more detail in earlier decisions of this Court, and in particular in liquidators' reports filed with the Court, on the basis of which Orders of this Court have been made. A useful recent recitation of the background to BCCI is found in the Reasons of the Vice-Chancellor in an application for directions in cause No. 007615 of 1991 in the High Court of Justice, Chancery Division, Companies Court, in a Judgment handed down on 6 August 1996.

2. THE OPENING DEFICIT POSITION

As indicated, Schofield J. did not identify the date upon which he felt ICIC would probably have been suspended from operating. As that fact is necessary to this assessment, that inquiry will fall to me. Of course, there can be no direct and conclusive evidence of the date when that event might have happened. It is a matter of some guesswork, but I must do the best I can on the evidence available. It is possible to do that on the balance of probabilities.

The evidence that would assist on that factual issue is the evidence at trial, and I must revisit some of it.

The plaintiffs' accountancy expert, Mr. Hammond, in his report given in evidence at the trial made the following comments:

" 8.11 The auditors' report on the financial statements of ICIC for the year ended 30th June 1977 was signed on 13th October 1977. In my opinion, the agreements relating to the acquisition of the shares of AOC by either a wholly-owned subsidiary or a substantially owned subsidiary of ICIC were a highly material post-balance sheet event. That event undoubtedly should have been noted in ICIC's financial statements to give sufficient information to enable those financial statements to give a true and fair view of the state of affairs of ICIC. Obviously, different auditors may have drafted the note in slightly different fashions. I have drafted and set out below a note of the kind which in my opinion should have been included in ICIC's audited financial statements. I regard every part of the information set out in the note essential for disclosure although the words by which it was made could vary. The note I would have drafted is as follows:-

Material post-balance sheet events

Since 30th June 1977 ICIC has acquired the entire issued share capital of FIIL for $1,000,000. FIIL is a newly incorporated company in the Cayman Islands which has not previously traded. On 5th July 1977 FIIL entered into an agreement with APL, a company listed on the London Stock Exchange to acquire 51 % of the issued shares of AOC for £2,326,620 (approximately $4,000,000). AOC is a company incorporated in England whose interests are primarily the holding of shares in companies in Pakistan operating in the oil and petroleum industry. FIIL further agreed to procure payment of inter-company indebtedness of $961,283 on completion and £424,451 (approximately $730,000) by instalments. Under the agreement FIIL has granted to APL an option whereby APL is entitled to put to FIIL its remaining shares in AOC by one or more lots over the period of five years at L1 per share for a total consideration of £2,235,380 (approximately $3,845,000). It is further contemplated by the agreement that FIIL would subscribe

for further shares in AOC when it increases its capital from £4,562,000 to £9,000,000.

8.12 If this note had appeared in ICIC's audited financial statements for the year ended 30th June 1977 the reality of what occurred would have plainly appeared on the face of those financial statements. That reality was that ICIC had made a potentially risky investment in unquoted shares (that is, not readily marketable) in a volatile industry, which was totally disproportionate to its capital base. As at 30th June 1977, ICIC's audited financial statements show shareholders' equity to be $9,526,090. The commitment it had entered into as of 5th July 1977 may be stated as follows:-

Cash for initial 51 % of shares		£ 2,326, 620
Put option on remaining 49% of shares		2,235, 380
Proposed share capital increase	*	4,438, 000
Payment of inter-company debt		424, 451
		£ 9,424,451

Translated at £ 1 = US$1.72 being the exchange rate applicable on 5th July 1977	US$16,201,055
Payment of inter-company debt	961,283
	US$17,171,338

*This was not strictly a definite commitment as at 5th July 1977 but was clearly in contemplation and was relevant to ICIC's total potential commitment.

Thus against its shareholders' equity of approximately $9,500,000 it had undertaken a total potential commitment amounting to approximately $17,200,000 at the then current exchange rates although I appreciate that some of this figure would be payable over a period of time. In my opinion this does not in any way affect the totally disproportionate nature of the potential commitment undertaken with the limited resources of ICIC at that time. Indeed it would be necessary to consider whether ICIC was insolvent in the light of this real and potential commitment.

8.13 In my opinion this was a wholly inappropriate commitment for a bank to have entered into and any auditor would have realised this. When one relates this to

the balance sheet of ICIC at 30th June 1977 one will realise that it meant applying depositors' money rather than its own free capital to a purchase of this kind. It seems to me to contravene every discernible principle of prudence applicable to corporate management as well as the more stringent criteria of capital adequacy and liquidity applicable to banks.

8.14 I believe the Inspector would have asked ICIC to divest itself of its investments in oil and petroleum activities immediately they came to his attention since these are not activities associated with sound, conservative, commercial banking which he would wish Cayman banks to follow. Rather such activities were volatile, highly susceptible to currency variations and not readily realisable in the event of Pakistan exchange control restrictions. Further, such investments were unlikely to have been authorised within ICIC's original bank licence application business plan or authorised by subsequent application in an amendment to the business plan. In these circumstances the Inspector undoubtedly would have considered measures to regularise the position. These would probably in the first instance have been to attempt to find an amicable solution but, depending on how seriously he perceived the situation, may have included sanctions against ICIC. These might have included suspension or revocation of ICIC's licence pending resolution of the situation to the Inspector's satisfaction. In my opinion the situation being described is one which would have been perceived as being serious, if not very serious."

After being taken through the 1977 accounts and the effect of the AOC acquisition (transcript pp. 823-825), the former Cayman Islands regulator, Mr. Jefferson, said in relation to the note proposed by Mr. Hammond:

> " ... first of all let me say I would have welcomed the auditors making those post balance sheet comments. They were bringing it to our attention, because it did fall, even though it was not within the June 30th balance sheet date, it did fall within the audited period, which was the three months afterwards. Being that close to the audited financial statements date of June 30th that is significant indeed, and a commitment of that nature would have raised all kinds of red flags as far as the inspector of banks office is concerned."

The plaintiffs' regulatory expert, Ms. Hargrove, in her evidence commented that:

> " Accordingly, the level of concern raised by this additional information is such that it would have necessitated some response

on the part of a regulator. Obviously, a regulator would have attempted to obtain further information but in final analysis he or she could not have allowed the situation to continue."

Mr. Jefferson, who was in fact an official within the office of the Inspector of Banks in the Cayman Islands at the relevant time, gave evidence at trial as to the suspension and revocation procedure pertaining at the time. I extract the following from his evidence:

"4.6 Our starting point would therefore be to check if there were any qualifications to the accounts by the auditors. We would then review each item in the balance sheet in conjunction with the accompanying notes. We would look at each of the assets and liabilities disclosed and consider the relationship between the two to satisfy ourselves that depositors' money, particularly where third party depositors were concerned, was being appropriately placed and not exposed to unnecessary risk. Depending on what we saw in the financial statements we may raise enquiries, either by telephone, by letter or in an arranged meeting with the auditors or officers of the bank. For example, if the notes to the financial statements disclosed that investments included investments in subsidiaries, we would require details of the subsidiaries including whether they were wholly owned or otherwise, in particular where investments accounted for a large percentage of the bank's financial resources.

4.7 If it appeared that the company was investing in subsidiaries we would need to satisfy ourselves that these represented ongoing and successful operations to ensure that the investment was a good one and its value was properly represented in the balance sheet. In such circumstances the financial statements of the subsidiary and /or consolidated accounts would be requested in order to reach a considered opinion.

...

4.10 If I knew or had reason to believe that the accounts were being falsified in any way or that the bank was guilty of serious fraudulent activities, a meeting would be called immediately to ascertain the true position of the company. This would certainly lead to the requirement by the Inspector of Banks that the company take immediate remedial steps within a fixed period of time and may, depending on the true financial position of the company, and the seriousness of the activities, lead to the suspension or revocation of the company's banking licence.

4.11 Our enquiries therefore went beyond the bare figures of the accounts. If specific concerns were raised by the accounts we would discuss these

with the auditors or with officers of the bank and require further information to be given about the bank until such time that we were happy with the information supplied to us and satisfied that the bank was in good financial shape and should be allowed to carry on banking business. It was my practice to call a meeting with the auditors of individual companies after receiving the financial statements if the financial statements were qualified, did not reflect a healthy financial position or were unusually late. The practice of calling regular, annual meetings with the auditors and/or officers of a bank was starting to become more widespread by the end of my period in office.

5. Revocation of a banking licence

5.1 As I have said, a bank's licence is not subject to renewal and, once granted, continues until it is surrendered, suspended or revoked. There therefore needs to be a change in the bank's circumstances after the submission of its business plan or new information which comes to the attention of the Inspector of Banks, for a bank's licence to be suspended or revoked.

5.2 Suspension is the first course of disciplinary action and almost always preceeds a recommendation for revocation. The suspension of a licence may be recommended when, for example, the submission of audited financial statements is unduly delayed (due to the fault of the bank rather than the auditors) or where a review of the financial statements show that the capital base is being eaten into by losses. In such cases, a bank may be given a period of time in which to rectify the situation, with the licence being suspended in the meantime. In the case of persistent default or serious breach of the regulations a revocation would be recommended.

5.3 If the Inspector of Banks is of the opinion that a licensee is carrying on its business contrary to the public interest or contrary to the interest of depositors or creditors or that it is in contravention of the applicable laws and the matter or matters which give rise to concern are not capable of being remedied he will make a recommendation to the Governor in Council for that bank's licence to be revoked.

5.4 In May/June, 1978 whilst Acting Inspector, I made a recommendation that the licence of a certain bank ... be revoked. I made my recommendation to the Governor in Council after discussions with the bank's lawyers and auditors, who shared my concerns. The revocation was issued within a week to 10 days. In my experience, such recommendations are almost always acted upon by the Governor in Council. I can recall only one case in which the Governor in Council did not follow such a recommendation of the Inspector of Banks ... ."

Mr. Jefferson added in re - examination:

"... the first course of action you would take if there were

> concerns as a result of a review of the financial statements or otherwise, would probably request a meeting of the owners or the management, accompanied maybe by their auditors, and they would come in and sit with you and answer whatever queries you may have. Hopefully during that meeting you could resolve some of the concerns you had. Subsequent to that you would probably follow it up in writing, and if you were not satisfied with the action taken, depending on the gravity of the situation, then the next less severe course of action would be requesting a suspension of the licence".

I have also examined the relevant correspondence in the trial exhibits, to the extent that this documentation furnishes any indication of how regulators might have reacted.

I agree with the submissions of plaintiffs' counsel that there is every reason to believe that if the 1977 accounts had been submitted with such a note as suggested by Mr. Hammond within three months of June 30 1977, prompt action would inevitably have been taken by the Inspector. Those accounts were signed by the auditors on 13 October 1977. The Inspectors' file for this period was missing or destroyed and the only file available to ICIC was that of its then attorneys. From that file it appears that on 21 November, 1977 the Inspector wrote to ICIC stating that he did not appear to have received the annual audited accounts for the year ended 30 June 1977 "which should have been submitted within three months of the financial year end ". The Inspector carried on to ask for them to be submitted within the next thirty days. The next letter on file is on 6 April 1978. It deals with a different subject - requesting particulars of the officers of ICIC - and does not mention accounts still being outstanding. Given the diary system operated by the Inspector, of which Mr. Jefferson testified, there is every reason to conclude that the 1977 accounts were

dispatched properly to the Inspector after the receipt of the 21 November 1977 letter, that is, by the end of 1977.

I am convinced that a reasonable inference to draw is that the licence would have been suspended by no later than the end of the second quarter of 1978.

Mr. Genovese has furnished evidence of ICIC's deficit position as at June 30 1978, June 30 1979 and June 30 1980. In assessing the value of ICIC for those years, Mr. Genovese relied on the existing financial statements but made certain assumptions in regard to the value of particular assets and liabilities for those years. For example, one assumption was that the "balances due from external banks" were paid as reported, but "balances due from associated companies" and all loans were valued at nil. In evidence before me Mr. Genovese made some corrections to the asset entry 'Due from Associated Banks". The result of his calculations discloses a net deficit for ICIC as at June 30 1978 of $37, 161,458. This is based upon total assets of $53,087,089 and total liabilities of $90,248,547. (All figures used in these Reasons are stated in US dollars). It is to be noted that his calculations disclosed a deficit as at June 30 1979 of $45,042,644; and as at June 30 1980, of $40,634,960.

I mention in passing that in his Reasons Schofield J. seems to have assumed that the deficit would increase in the years following 1977. Mr. Genovese's evidence indicates that this does not appear to have been the case between 1979 and 1980.

In any case, for present purposes, the "opening deficit" for ICIC should be regarded as $37,161,458.

3. THE CLOSING DEFICIT POSITION

By far the more difficult part of this assessment is identifying the appropriate methodology by which to calculate the deficit as at the closure of ICIC in July 1991. As will become apparent, I intend to do nothing more at this stage than to identify what I regard as the appropriate methodology.

In the case of a going concern, the ascertainment of the net equity or deficit position is not particularly difficult. Even in the case of a liquidation it is easy to state that the net deficit should be measured by use of a formula such as the following:

$$D = P + O + C - A$$

where

D = the net deficit

P = the total debts proved in the liquidation

O = the total monetary value of other obligations falling to be discharged by the liquidators, apart from those comprised within P or C

C = the total costs of the liquidation

A = the total sum realised or to be realised from the assets.

I agree with counsel's submission that the difficulty in quantifying the deficit of ICIC is not in stating the formula in principle but in grappling with the problems of a complex liquidation which is continuing. Much of the complexity of the liquidation and the task now being undertaken arises from the conspiracy itself - the accounting records of ICIC have been falsified and its affairs were improperly mingled with those of the various BCCI entities.

In his affidavit evidence, Mr. Genovese outlines how a deficit would be calculated in normal circumstances. On the asset side, for example, he would have regard to actual recovery in ascertaining the true realisable value of the asset. In the case of a claim against the company that had been determined after closure, either by compromise or a judgment of the court, he would have to ensure that the liabilities were adjusted to reflect the liability under the compromise or the judgment.

As to the ICIC accounting records generally, Mr. Genovese deposes in his eighth affidavit that :

> " Although I have had regard to the accounting records and financial statements of ICIC, I have placed more reliance on the information which has become available after ICIC's closure in July 1991 in order to establish both the existence and the amount of assets and liabilities. As a result of investigations by the Liquidators over the last five years since July 1991, most of the realisable assets have been identified by the Liquidators and the existence, nature and quantum of many of them has actually been determined either by compromise or by judgments. In addition, the value of the debts proved in the liquidation of ICIC to date has been determined as a result of the process of verifying and admitting claims."

In the unusual circumstances of this BCCI-related liquidation, Mr. Genovese in ascertaining the closing deficit has taken into full account the various "compromise agreements" which have had the effect of compromising claims and cross-claims within the BCCI/ICIC group, as well as those involving other creditors and debtors. The two major series of claims which potentially would have had a massive effect on the size of the deficit of ICIC are these:

a. **Claims and cross-claims as between ICIC (and the remainder of the ICIC group) on the one hand and the various entities within the BCCI group on the other, including most importantly BCCI SA and BCCI Overseas.**
b. **Claims and cross-claims involving the Majority Shareholders being the holders of the majority of the issued capital of BCCI Holdings as more particularly defined in an Agreement made on 14 May 1996 between (inter alia) the Government of the Emirate of Abu Dhabi, the BCCI companies and ICIC companies.**

I will touch on these somewhat later.

The claims and cross-claims which Mr. Genovese had in mind in the first category arose from matters which were either wholly unrecorded in the respective books of ICIC and the various entities in the BCCI group, or recorded in various ways which were wholly false and/or misleading. Very clear examples of both of these categories

are found in the Reasons of Schofield J. These involved sham loans, migrating loans and "non-recourse lending" which had the effect of falsifying the accounts.

The portion of Schofield J's. Reasons dealing with this "net deficit" claim speaks in terms of the closing position as at July 5 1991. It is clear that in the context of this liquidation, that cannot be strictly accurate. As Mr. Genovese deposes in his ninth affidavit:

> " 9.7 On a liquidation basis, it is absolutely clear that <u>all</u> post balance sheet events would require an adjustment to be made to the balance sheet. The reason is that on this basis, what one is trying to measure is what will be (or actually is) realised. ....[R]ealisable value is... the only [basis] which matters when one considers the purpose of the present exercise."

Given the nature of the exercise, I accept that the closing deficit must be the deficit that will exist at the end of the liquidation. In argument, counsel agreed with me that what we are really trying to discover is what that position <u>will be</u>, based on a realistic estimate of realisations. In that sense it is not appropriate to attempt a "snapshot" of the position as at July 5 1991 without any regard to post balance sheet events.

<u>3A. THE "COMPROMISE AGREEMENTS"</u>

In argument, counsel for the plaintiffs urged me to give full effect to the "compromise agreements" and not to ignore some or all of them, nor to pick and choose parts of them. By "compromise agreements" counsel has in mind the BCCI Pooling Agreement of 10 November 1994, the Supplemental ICIC

Pooling Agreement of 14 May 1996, the so-called "Abu Dhabi" or Majority Shareholder Agreement of 16 May 1996, the Cost and Recovery Sharing Agreement between the ICIC liquidators and other liquidators, as well as several other more specific settlement agreements with other persons or entities. It is significant to note that these agreements have been approved by courts in the jurisdictions primarily involved in this world-wide liquidation, including this Court.

I will attempt a brief summary of the main compromise agreements, bearing in mind that this Court has already received and considered on other occasions a vast amount of material explaining their nature and underlying purposes. They are described in some detail in other judgments of this Court.

In essence the BCCI Pooling Agreement provides that the proceeds of assets recovered by the various liquidators in the global liquidation will be transmitted to the pool. The creditors of those entities which join in the pool will all receive (subject to some exceptions) the same dividend from the pool in respect of their admitted claims. The various BCCI entities release each other from their claims and cross-claims. The reason for this cooperative approach to the global liquidation is set forth in the evidence of Genovese. The result of the falsification of the accounting records of ICIC (as well as the companies within the BCCI group) and the consequent co-mingling of their affairs, is that it would have been impracticable without undue delay and expense (and may even have been impossible) to determine as

between the various companies and the two groups what property was the property of one rather than the other, or to determine what amounts, if any, were due from the one to the other. It was essential for the claims and cross-claims to be determined either by agreement between the respective parties or by determination of a court.

The ICIC Pooling Agreement is a supplement to the earlier BCCI Pooling Agreement, and brings the ICIC entities into the pool with similar rights and obligations. It was also a requirement of the Majority Shareholder Agreement that the pooling arrangements be extended to ICIC. Under the ICIC Pooling Agreement the proceeds of assets recovered by the ICIC and BCCI entities are to be transmitted to a central pool in the same way as is already envisaged for the principal BCCI companies. Subject to some exceptions, the unsecured creditors of the ICIC companies, as well as the creditors of other entities which join in the pool, will all receive the same rate of dividend from the pool in respect of their admitted claims. All of the principal BCCI and ICIC companies which are parties to the agreement will exchange deeds of covenant not to sue. As counsel for BCCI put it to the Chief Justice in submissions in respect of the approval of the Majority Shareholder Agreement:

> " The ICIC Pooling Agreement avoids so far as possible difficulties, disputes, delay and expense arising from the co-mingling of the affairs of the principal BCCI and ICIC companies. In particular, the principal BCCI and ICIC companies will benefit from the release of potential claims against one another which otherwise may result from any attempt to separate the assets of one from the other.... The ICIC Pooling Agreement represents the most (and possibly only) practicable

> and efficient way in which the liquidations of the companies and branches of the principal BCCI and ICIC companies can be carried out in the light of the way the affairs of those groups were conducted."

In a nutshell, there is a mutual release of claims and obligations, correlative to the obligation to pool assets.

It is important to observe that this is not a consolidated liquidation worldwide. The liquidators of the individual BCCI/ICIC entities retain control over the process of determining the liabilities of each entity. There is in that sense no "pooling" of creditor claims. The pooling agreements do not contemplate that. Nonetheless, as will be seen, the plaintiffs take the position on this assessment that the appropriate methodology is to attribute to ICIC the entire global deficit of the BCCI/ICIC entities, having regard to the totality of assets and the totality of the liabilities of the entire BCCI empire .

I mention in passing the Costs and Recovery Sharing Agreement. ICIC and the other pooling entities have agreed to cooperate with one another in relation to projects, called "global projects," in which more than one company appears to have an interest, on the following main terms . Subject to pooling, the ICIC group will share in 2.5 percent of the proceeds realised on all worldwide projects designated as global projects; and, subject to pooling, the ICIC group will finance 2.5 percent of costs incurred on global projects. The allocation amongst the ICIC and BCCI groups was agreed in negotiations between the BCCI and ICIC liquidators. The practical effect is that the ICIC liquidators have funds with which to conduct the

liquidation. For accounting purposes only (and for that matter in the material filed for use on this assessment), ICIC has been given its 2.5 percent of the proceeds of certain global recoveries. However, such "assets" are misleading insofar as all ICIC assets are ultimately subject to the overriding pooling arrangements. As Mr. Genovese put it in evidence "only after consideration of the pooling obligations is it possible to see what assets are available to apply towards the deficit of ICIC".

The Abu Dhabi Agreement (or Majority Shareholder Agreement, as it is often known) is of great significance to the ICIC liquidation. It has been described in considerable detail in other proceedings before this Court, and I will only attempt a brief capsule summary here.

Under the Agreement the Government of Abu Dhabi paid $1.8 billion to the global liquidation ; of this amount $1.55 billion was paid directly to the global liquidators and $250 million was paid to an escrow agent for payment to the global liquidators after a twenty four to thirty six month period. The principal BCCI and ICIC companies gave releases and covenants not to sue in relation to all claims (other than claims to recover debts arising in the ordinary course of business) they may have had against the Government of Abu Dhabi, the Majority Shareholders of BCCI Holdings and certain other related persons as defined in the Agreement. The Government of Abu Dhabi, the Majority Shareholders and related persons gave releases and covenants not to sue in relation to claims they may have had against the principal ICIC companies (other than claims arising in the ordinary course of business).

The Majority Shareholder Agreement is infinitely more complex in its provisions than this sketch would suggest. However, the compromise details I have set forth indicate the importance of the agreement to the liquidations generally.

Other implications of the Abu Dhabi Agreement include the execution by the global liquidators of the ICIC Supplemental Pooling Agreement, and certain claims and debts arising in the ordinary course of banking business owed to the Majority Shareholders being admitted in the relevant liquidations to the value of at least 1.25 billion as ordinary unsubordinated claims.

I also mention several other ancillary compromise arrangements which have expedited matters in the global liquidation. Simply put, they are compromises involving money payment and releases. They fall into the category of the so-called "global recoveries". Examples are the settlement with Sheikh Khalid Bin Mahfouz and related entities, settlements relating to US assets, and the Adham settlement with the US.

It will be seen that the main compromises involve mutual releases, and compromises of claims including in some cases money payments. They also involve the pooling of assets with a view to the payment of pari passu dividends to the bulk of the creditors who prove in the individual liquidations.

I accept the submissions of plaintiffs' counsel, and the accounting evidence of Mr. Genovese, to the effect that to ignore the compromises entirely or in part would be

wholly artificial and quite wrong in principal. The claims and cross-claims, such as they were, fell to be taken into account as components of the deficit. They have been disposed of by these agreements. They can only be quantified by reference to the whole of these agreements rather than part of them, and not by pretending that the compromised claims and cross-claims still exist.

I regard that approach as relatively uncontroversial in a liquidation context . I accept the evidence of generally accepted accounting principles put before me by Mr. Genovese. Mr. Genovese has approached the exercise by attempting to determine what the deficit of ICIC actually was rather than what it appeared to be on 5 July 1991. It was important in his view to consider all events and information dating from after 5 July 1991.

Mr. Genovese, in evidence, distinguished between the liquidation approach, and financial statements that would normally be prepared on what is known as a "going concern" basis. On the going concern basis, financial statements are normally prepared using the historic cost convention which reflects the depreciated acquisition costs of the assets. In the absence of the going concern assumption, however, the historic cost convention is replaced in importance by the net realisable value of the assets. The estimate of net realisable value will of course change over time to reflect changes in circumstance and information related to the assets. I adopt, as does Mr. Genovese, the accounting principle that "assets and liabilities should be adjusted for events occurring after the balance sheet date that provide additional evidence to assist with the estimation of amounts relating to conditions existing at the balance sheet date

or that indicate that the going concern assumption....is not appropriate". On a liquidation basis, it is clear that all post balance sheet events would require an adjustment to be made to the balance sheet. The reason is that on this basis, what one is trying to measure is what will be (or actually is) realised.

Mr. Genovese adopted International Accounting Standard IAS 1 (1994). I note that one of the policies included therein is the following: "Transactions and other events should be accounted for and presented in accordance with their substance and financial reality and not merely with their legal form."

I have also derived assistance from International Accounting Standard IAS 10 (1994) dealing with contingencies and events occurring after the balance sheet date.

On the basis of the evidence of accounting practices and standards, I accept that the methodology of calculation of the 1991 deficit position should take into account the compromise agreements. They should be given their full effect, but no more.

On this branch of the argument, counsel called in aid certain authorities which support the proposition that where assessment of damages is difficult, particularly due to the actions of wrongdoers, it is acceptable to resolve any uncertainties against the wrongdoers. The argument has been somewhat refined in the present context. Here, it is argued, the compromises were necessitated by the difficulty of ascertainment and quantification of these claims and cross-claims - themselves the result of the conspiracy. As it was put in written submissions: "The effects of the co-

mingling were therefore a result of the conspiracy which was essential to resolve in the liquidation of ICIC. The perfectly sensible and reasonable way in which it has been resolved (i.e. compromise of mutual claims coupled with pooling) gives the means by which the deficit of ICIC can be quantified". In oral submissions counsel alluded to the "difficulties historically made by these defendants."

On another related assessment, involving the expenses of the liquidation, I considered authorities such as Chaplin v Hicks [1911] 2 K. B. 786 (C.A.) and Biggin v Permanite [1951] 1 K.B. 422 which addressed situations where damages could not be assessed with certainty.

On this assessment counsel cited the ancient authority Armory v Delamirie (1772) 93 ER 664. There a chimney sweep's boy found a jewel and took it to a jeweller to value it. The jeweller's apprentice removed the stones and returned the empty sockets in which they had been mounted. The Court held that the strongest possible inferences should be drawn against the party who refused to produce the object and thus make accurate ascertainment of its value impossible. The much quoted principle is as follows: "And the Chief Justice directed the jury that unless the Defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages; which they accordingly did."

Counsel also cited American authority. In Shapiro, Bernstein & Co. v. Remington Records Inc. 265 F. 2d 263 (2nd Cir. 1959), a case concerning the damages arising

from copyright infringement, Burger J. in the US Court of Appeals dealt with the subject at page 271 as follows:

> " Commenting on Armory v Delamirie, infra, an early American authority summarized the broad base for this rule in these terms:
> "When the nature of a wrongful act is such that it not only inflicts an injury, but takes away the means of proving the nature and extent of the loss, the law will aid a recovery against the wrong-doer and supply the deficiency of proof caused by his misconduct, by making every reasonable intendment against him, and in favor of the party whom he has injured. A man who wilfully places the property of others in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own, or in any other manner, will consequently be compelled to bear all the inconveniences of the uncertainty or confusion which he had produced, even to the extent of surrendering the whole if the parts cannot be discriminated, or responding in damages for the highest value at which the property in question can reasonably be estimated."

Counsel also cited the decision of the US Supreme Court in Story Parchment Co. v Paterson Parchment Paper Co. 282 U.S. 555 (1931) for the proposition that:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making were otherwise...As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party."

It is apparent that the quantification of this head of damage cannot be achieved with absolute precision. There will be areas in which the plaintiffs' advisors must make assumptions and estimates. That will be legitimate by virtue of the principles set forth above, and particularly so in a case like this involving these wrongdoers.

However, it seems to me that to a significant extent the compromise agreements in many areas actually obviate the necessity for guesswork, particularly in respect of the claims and cross-claims that are being compromised and released. As a result I am not at all convinced that there is any particular need, in the context of the compromise agreements, and the question as to whether they should be taken into account, to have resort to these broad principles. I prefer instead to found my decision that they should be taken into account, purely on the basis of sound and accepted accounting practices and standards.

Before leaving this topic, I mention in passing that the plaintiffs also put before me evidence of an "alternative deficit calculation", which was provided by way of contrast to the methodology actually adopted by them. In formulating this alternative deficit calculation, Mr. Genovese assumed that all compromise agreements reached by the liquidators in the period post July 5 1991 had not taken place. In other words he assumed that none of the following agreements were entered into: the pooling agreements, the Majority Shareholder agreement, the agreements involving US authorities, and the settlement agreements with particular individuals. This exercise was done largely with a view to demonstrating the unreality of proceeding on this basis and the flaws inherent in that approach. Since I

have essentially agreed with plaintiffs' counsel that the compromise agreements should be given effect in their entirety, there is no useful purpose in discussing the alternative deficit calculation in any further detail.

3B. PROPRIETY OF INCLUSION OF GLOBAL DEFICIT POSITION

The methodology advanced by the plaintiffs involves attributing to ICIC the global deficit of the entire BCCI-related empire in liquidation. If they are correct, on the numbers they have put in evidence before me, the damages under this head amount to approximately US $5.1 billion.

This methodological point is essentially one of first impression. I am not aware of any authority that will assist in resolving the issue.

The plaintiffs' view of the appropriate methodology is captured in portions of the Genovese eighth affidavit as follows:

> "43...
> (c) It is the contractual rights and obligations of ICIC to account to the pool for assets recovered which exist as a result of these agreements which is something which is essential to take into account in determining the deficit of ICIC rather than the claims and cross claims which existed before the agreements.
>
> d) The practical effect of the obligation to pool recoveries can fairly be described as follows. Unless and until all of the pooling estates have no deficit, ICIC will always have a deficit. I can easily explain this by a simple example. If ICIC were to have a deficit of $1 million after all realisations and distributions by the pool, a subsequent recovery by ICIC of $1 million would not eliminate its deficit. ICIC would be required to pay in such sum into the pool reducing the global deficit of all of the pooling estates. ICIC creditors would only receive their rateable share of the $1 million recovered by the ICIC Liquidators. The size of ICIC's deficit is

accurately stated as a sum equal to the value of the obligation of the Liquidators to continue to apply recoveries to the pool until all of the pooling estates have no deficit. The total of the deficits of each of the pooling estates is therefore ICIC's true final deficit.

44. I have tested my view that the pooling estates' deficit is included within the ICIC net deficit by thinking of the matter in a slightly different way. To ensure that I am truly thinking of the deficit of ICIC, I have asked myself the question "What sum must be added to the total amount realised or to be realised which represents the assets of ICIC in order to ensure that the net deficit of ICIC is zero?" This seems to me to be another way of testing what is the true deficit of ICIC. The answer to that question must be a sufficient sum to cancel out all other obligations of ICIC. Such obligations plainly include those entered into by the Liquidators under the compromises. The sum which is to be added must therefore include the deficit of all the pooling estates if there is to be no deficit.

45. I have obviously considered very carefully whether there might be some other appropriate methods of quantifying the deficit. In particular:

(a) I have considered whether I should ignore the compromises entirely or in part. Both of these possibilities seem to me to be wholly artificial and quite wrong in principle. The claims and cross-claims, such as they were, fell to be taken into account as components of the deficit. They have been disposed of by these agreements. I can only quantify them by reference to the whole of these agreements rather than part of them or pretending that the compromised claims and cross-claims still exist. The only possible approach seems to me to be to take into account the effect of the compromises as a whole.

(b) I have considered the objective of the award of damages by Schofield J., namely to ensure that ICIC's creditors are protected from the increase of the deficit of ICIC over the long period after it ought to have ceased to trade. Without taking account of the pooling obligation and the other compromises contained in the agreements, that objective does not seem to me to be capable of being met. ...

49. As stated above (paragraph 43 (d)) the true final deficit of ICIC is the total of the deficits of each of the pooling estates, that is, of the various BCCI group and ICIC group entities who are parties to the agreements as noted in paragraph 39 above".

The result is the calculation shown in the chart "BCCI/ICCI Group Net Deficit Calculation". This approach leads to the $5.1 billion deficit which the plaintiffs maintain is the logical result of the appropriate methodology. Under this head of damage, the plaintiffs essentially claim against these defendants an amount equal to their estimation of the total global deficit of the BCCI/ICIC group.

It is proposed by the plaintiffs that as and when future recoveries are made by the receipt of money, so far as any portion of a judgment remains outstanding and unsatisfied against the defendants in this action, credit should be given to the defendants for such recoveries against the unsatisfied portion of the judgment.

How do the plaintiffs justify, on a legal basis, the assertion that the deficit of ICIC should be the deficit of the global liquidation? The plaintiffs argue that this "absolute obligation" is found in clause 3.1 of the Supplemental ICIC Pooling Agreement. I reproduce that clause below:

> "PART III REALISATION OF POOL PROPERTY
>
> 3.1 Subject to provision being made for the matters set out in Clause 3.2 below, each of the ICIC Overseas Liquidators, the ICIC Holdings Liquidators, the ICIC Investments Liquidators and the ICIC Apex Liquidators shall use their best endeavors to realise ICIC Overseas Property, ICIC Holdings Property, ICIC Investments Property and ICIC Apex Property respectively and convert it into cash; and shall, unless otherwise requested by the Luxembourg Liquidators and the Cayman Liquidators, forthwith transmit to the Luxembourg Liquidators and the Cayman Liquidators all proceeds of the realisation of ICIC Overseas Property, ICIC Holdings Property, ICIC Investments Property and ICIC Apex Property which are now or may hereafter be or come within their hands."

The qualifications in clause 3.2, relating to payment of costs, preferential claims, and proprietary claims, are not relevant to the issue.)

As to the provisions of clause 3.1, the plaintiffs stress the wording "which are now or may hereafter be or come within their hands". The argument is that this creates an obligation to pool "ad infinitum", to use the words of plaintiffs' counsel.

Plaintiffs argue that the obligation is to continue to apply assets to the pool until there is no further obligation to contribute. (Plaintiffs do not embrace the view that the obligation is only to continue to apply assets to the pool until there are no further assets to contribute). The plaintiffs' position is that the obligation remains in existence up to the final winding up of all BCCI / ICIC entities.

The plaintiffs maintain that they are not concerned with the liabilities of other entities, but rather with the effect of the pooling agreement. As it was put in argument, "What sum is it going to take for ICIC's balance sheet to be made whole or put in a neutral position?" Or, "What sum does it take to make the deficit nil ?"

The plaintiffs stress in argument that their methodology focuses only on the assets and liabilities of ICIC; to do otherwise "would be error". They concede that there is "no obligation to pick up the obligations of others". However, it is obvious that the effect of the application of this methodology adopted by the plaintiffs is to do exactly

that. It is tantamount to the assumption of all the liabilities of the entire global group for balance sheet purposes.

It is significant to me that one of the submissions of Mr. Michael Crystal Q.C. on behalf of the English liquidators of BCCI SA, to the Vice-Chancellor on 19 Decemb er 1994 was as follows:

> "There had been investigations, and for the reasons identified in this report the view has been taken that it is appropriate that the ICIC companies should pool its asset pooling (sic), as your Lordship appreciates, rather than liability pooling. There is not what the Americans would call substantive consolidation where you meld both the assets and liabilities. The assets come into the central pool but you make the claim against the individual company and the thesis underlying the pooling is that there is then distributed the same dividend to each creditor claiming against the company"

This is clearly not a consolidated liquidation, though the plaintiffs on this assessment would have me turn it into one <u>de facto.</u>

The extremity of the plaintiffs' position was evident in argument when plaintiffs' counsel was driven to the assertion that a liability of this magnitude would remain even if ICIC had exhausted all assets ; that is, even if ICIC could never contribute anything to the pool again . On this point, plaintiffs' counsel submitted that "the accountant's perspective is irrelevant".

Presumably another corollary of this approach adopted by the plaintiffs is that each BCCI /ICIC entity will have the same sized deficit. It amounts in effect to a joint and several obligation. I have immense difficulty with that approach because in my

view there is nothing express in any agreement obliging one of these entities to assume the liabilities of another in the way suggested by the plaintiffs here.

In response to questioning by me, plaintiffs' counsel maintained that there is nothing speculative about contributions to the pool. "They are part of a fixed obligation. All we have to do is ask, do the obligations exist?" The plaintiffs attempt to elevate the pooling obligation in clause 3.1 to the status of a guarantee of the liabilities of the other entities. In my respectful view, it is nothing of the sort.

I might not have difficulty with the methodology the plaintiffs propound if this were in fact a guarantee obligation. A guarantor is under a legal liability whether he has the assets to discharge the liability or not. Here, on my reading of clause 3.1, ICIC only has an obligation to the extent it has real assets available to pool. In other words, the liability only arises in the first place if there are assets available.

In argument, plaintiffs' counsel submitted that such a view as I have just set forth amounts to "picking and choosing", or being selective as to the application of the agreements. On the contrary, I regard the narrow issue here as being simply the proper interpretation of clause 3.1.

There is no dispute that in terms of tangible domestic assets, the ICIC liquidators are at the end of the trail. The assets included by Mr. Genovese in his material consist virtually entirely of ICIC's share of global recoveries from the so-called global projects.

There are outstanding claims against auditors and regulators, but these are not the sorts of "assets" which can properly be reflected in a balance sheet at present.

Mr. Genovese's eighth affidavit contains the following:

> "47. For the purpose of calculating the future recoveries, I have obtained information upon and quantified all the unrealised assets of the ICIC and the BCCI pooling entities in accordance with the approach which I have described above. I have not, however, taken into account claims for compensation or damages against wrongdoers which have not been paid or compromised. I have been advised by leading counsel to adopt and I have adopted the following approach. Such claims should only be considered when they produce an actual recovery, i.e. compensation has been received or has been agreed to be paid. In those cases where there has already been an actual recovery, I have included the sums recovered or to be recovered in the assets. Should there be further recoveries of this type prior to judgment, I will swear a further affidavit informing this Honourable Court of the position. ...
>
> 54. In assessing the future recoveries, I have been consistent in estimating recoveries for assets that were recorded on the books at the date of closure or that have been negotiated subsequent to the closure of the entities. The balances do not include any realisation for claims initiated against third parties for damages suffered as a result of breach of contract, fraud or other actions which would not have been recorded at the date of closure or settled since closure".

These claims have not yielded recovery to date, and , indeed, they may never result in any additional future realisations. I cannot assume the existence of assets that simply are not there from an accounting perspective . These claims have been made, but they are not reflected in the financial statements.

As the BCCI liquidators put it in their report to this Court dated 15 November 1996 (at page 6) :

> " In conjunction with the other global estates, the Liquidators are continuing to pursue actions against certain of the worldwide

> major borrower groups and against third parties who caused, or conspired to cause, loss to the banks. Although significant time and effort has been expended by the Liquidators, most notably in relation to the action against the former auditors, in the interest of conservatism no realisable amounts are reflected in the financial statements for these matters".

Quite obviously, these sorts of outstanding claims are the only conceivable source of further assets to ICIC; but at the present stage they would not be included in a balance sheet under accepted accounting practices or standards. Mr. Genovese himself would not be prepared to do that.

The only evidence before me of future realisations properly included in a balance sheet are those that Mr. Genovese has already included in his chart headed "BCCI/ICIC Group Net Deficit Calculation." There is no evidence of any other ICIC assets destined for the pool apart from those items expressly reflected there.

Plaintiffs' counsel submitted that "if and when there are future obligations they will be contributed to the pool". Such future obligations are purely speculative as at the time this assessment comes before me.

For that matter, it would be equally speculative to attempt to take into account future realisations by other BCCI entities as against auditors or regulators, for example, though such recoveries could only enure to the benefit of the ICIC balance sheet. Indeed, one might just as well speculate upon, or assume, a scenario in which another BCCI entity recovers through litigation enough to eradicate the entire global deficit, in which case the clause 3.1 " obligation" asserted by plaintiffs' counsel might never be triggered.

It is of significance to me that this methodology espoused by the plaintiffs, and in particular the "liability" equal to the entire global deficit of the BCCI/ICIC entities, has never before been discussed or reflected in any report or balance sheet of which I am aware in the global liquidation. The liabilities of ICIC have never been expressed in terms of anything other than its creditor claims.

The rather obvious fact remains that each liquidation has proceeded throughout as a separate liquidation, and not as part of a consolidated liquidation.

I observe in passing (for what it is worth) that one of the plaintiffs' forensic accounting experts at trial, John Brian Sheedy, gave evidence in February 1995 that the ICIC deficit was estimated to be in excess of US $100 million, though " it remains difficult to predict with any certainty the size of the ultimate deficit ". As indicated, the plaintiffs now contend that the ICIC closing deficit is equivalent to the $5.1 billion global deficit of all BCCI/ICIC entities. This notion arises for the first time on this assessment , as far as I am aware .

When I am considering the closing deficit position, I am not actually assessing damages. I am identifying the methodology that would most accurately capture the deficit position from an accountant's perspective. Once I have done that, and that deficit has been quantified, and given the findings I have made as to the deficit in 1978, the actual assessment follows as a matter of arithmetic.

Accordingly, there is no particular need for me to consider the principles set forth in the authorities cited by the plaintiffs with a view to enlarging the scope of damages as against the wrongdoers. In other words, in this context it is not a case of uncertainty or imprecision or the improper hiding of the means of assessment, which would justify presumptions being made against wrongdoers.

Plaintiffs' counsel however makes these submissions in support of his methodological approach to justify a claim that essentially amounts to an adoption of the global deficit position: " The defendants are responsible for the full amount of the loss"; "the difficulty is of their making, not the plaintiffs"; "saddle them with the responsibility of it all". Plaintiffs' counsel also suggests that we need " a reality check: does this approach work injustice? " He suggests that the answer is in the negative because the defendants caused the problem in the first place.

I respectfully reject this approach. I must confine myself to considering the closing deficit from an accountant's perspective, having regard to my interpretation of clause 3.1. It is not my function to reassess the loss but rather to give effect to the findings of Schofield J. with respect to damage. The plaintiffs are asking me to revisit liability issues in the guise of a liberal approach to damages. My function is narrower.

I cannot help but observe that Schofield J. was fully aware of the difficulties that had been caused by these wrongdoers. He knew of the post balance sheet events, in the form of the various compromise agreements. It would have been easy for him to make it clear that these defendants should be liable for the whole of the global deficit,

if that truly was his intention. Clearly it was not his intention; rather he focused solely on the movement, if any, in the ICIC deficit.

In urging me to consider the post balance sheet events, plaintiffs' counsel argued that "an exercise like this should be as close to reality as possible". I agree, insofar as the compromise arrangements should be taken into account. However, the plaintiffs' back-door attempt to attribute to ICIC the entire global deficit is based on a methodology that is purely theoretical, not real.

4. THE APPROPRIATE METHODOLOGY

Notwithstanding the very able advocacy of Mr. Cohen, I am not prepared to accept the methodology he puts forward as appropriate in this case.

Instead, I construct a methodology consisting of a number of guidelines which I set out below. These follow from what I have said above.

The methodology to quantify the ICIC deficit as at 1991 must:

1. Focus only upon the true assets and liabilities of ICIC (Overseas).
2. Exclude the liabilities of all other BCCI-related entities. For the present exercise, the assets and liabilities of these other entities are relevant only to the pooling process which in turn leads to a recovery for ICIC creditors.
3. Ignore in the ICIC balance sheet all assets that have been or will be transferred to the pool.

4. Ignore all potential assets which on the basis of accepted accounting principles and practices (as at the date the calculations are made) would be regarded as items not properly included in the balance sheet (such as, for example, the current auditor negligence claim).
5. Give full effect to the releases, compromises, pooling obligations and dividend distribution arrangements embodied in the various compromise agreements. Do not interpret clause 3.1 in the manner asserted by the plaintiffs.
6. Include as the sole assets monies transferred or expected to be transferred from the pool to ICIC (Overseas) for dividend distribution.

It may be seen that this methodology simply approximates the position ICIC's creditors will find themselves in at the conclusion of the liquidation. ICIC's liabilities are its creditor claims. It assets are the monies that are returned from the pool for distribution. The closing deficit of ICIC is the ultimate actual shortfall to creditors of ICIC.

The deficit may be calculated by estimating the final return on the dollar expected by way of dividend, and applying that to the ICIC creditor claims. It must be recognized, however, that depending on when these calculations or estimations are made, a rate of dividend may be assumed or approximated for present purposes which may not be exactly the same as the actual total dividend ultimately paid.

In view of my conclusions as to methodology, the plaintiffs will now be obliged to calculate the closing deficit position according to the guidelines I have indicated. I

direct that this be done by the filing of affidavit evidence which should set forth the basis of the calculations, with explanations and the inclusion of any assumptions necessary. Further directions may be sought when that is done.

Dated this 4th day of April, 1997.

J.D. Murphy

Judge of the Grand Court

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 389 of 1992

Pursuant to the provisions of Section 23 of The Judicature Law (1995 Revision) the above written judgment of J.D. Murphy Esq. who has ceased to be a judge of the Grand Court, was read in court by me, an acting judge of the Grand Court, on Tuesday, the 8th April, 1997.

Carlton Patterson
Judge of the Grand Court (actg)

Leave to appeal granted to the plaintiff.

Carlton Patterson
Judge of the Grand Court (actg)