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Cause No. 286 of 1991

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IN THE MATTER OF INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LTD

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

AND
IN THE MATTER OF THE COMPANIES LAW (REVISED)

For the petitioner: Mr. Robert Denman
For the provisional liquidators: Mr. Nigel Clifford
For a creditor: Ms. Julianna O'Connor-Conolly

JUDGMENT

Yesterday I made an order that International Credit and Investment Company (Overseas) Ltd, which I shall hereafter refer to as "ICIC (Overseas"), be wound up and tht Ian Wight, Robert Axford and Michael Mackey be appointed official liquidators of the company. The winding up petition was not opposed and its result was really inevitable. The fortunes of the company are deeply involved with those of the insolvent corporate group which has achieved worldwide notoriety under the generic name of "BCCI". Its auditors have alleged serious fraud effecting its fundamental financial viability and to the extent that it is possible to obtain a picture of its financial state from its books and records it lacks the liquidity to carry on a banking business and meet its liabilities as they fall due. Moreover, the company has had its Banking and Trust Licences revoked and therefore cannot legally carry on the business for which it was formed. It was proved to my satisfaction that the company was unable to pay its debts and that it was just and equitable that it be wound up.

The appointments of the liquidators were also unopposed but a point of importance arose in relation to those appointments. The persons concerned are also the liquidators of Bank of Credit and Commerce International (Overseas) Ltd (which I will refer to as "BCCI Overseas") and Credit and Finance Corporation ("CFC"). Both these

companies are members of the BCCI group incorporated in the Cayman Islands and there is the prospect of substantial claims and counterclaims between BCCI Overseas in particular and ICIC Overseas.

The liquidators, as office holders in both ICIC Overseas and BCCI Overseas are in a difficult position in considering the merits of potential claims by each company against the other under the terms of a proposed agreement to which I shall refer in a moment. There are serious conflict of interest questions in view, and it is the duty of this court to address them now.

The obvious solution of appointing different individuals as liquidators is faced with serious obstacles. The winding up petition was adjourned until yesterday from 14th January, after previous hearings on 3rd September and 16th December 1991. The court accepted the Provisional Liquidators' view that a winding up order at that stage might adversely effect the discussions which were being carried on between representatives of the BCCI Group and representatives of the majority shareholders of BCCI Holdings (Luxembourg) SA ("BCCI Holdings"). These negotiations have now been concluded and have resulted in a number of draft proposed agreements being initialled on 20th February 1992. Among these is the draft of a proposed agreement to which ICIC (Overseas) would be a party, the intended effect of which is to improve and accelerate the return to creditors of the ICIC Group including the creditors of ICIC (Overseas). The provisional Liquidators of the company have concluded that in all the circumstances this agreement represents the best option available for creditors and recommend it to the court for approval. That recommendation will be considered at another time. It suffices now to say that if they are right the advantages which they envisage will be jeopardised unless that consideration takes place within the next few weeks. There are tight deadlines provided for in the prospective arrangements which will otherwise almost certainly prove impossible to meet.

It is for this reason that the petitioner submitted that the present

provisional liquidators, Mr. Wight and Mr. Axford, together with Mr. Mackey who, like them, is an official liquidator or BCCI (Overseas) and CFC and already well acquainted with this whole very complex matter, should be appointed as official liquidators of ICIC (Overseas) in spite of the very real prospect of a conflict of interest arising.

Fortunately there is guidance to be had from three recent English cases. The first is Re Esal (Commodities) Ltd (1988) BCC p475. In his judgment in the Court of Appeal Dillon LJ referred to the common practice, where the parent company of a group goes into liquidation, of representatives of the liquidator's firm being appointed as directors of the subsidiaries or, alternatively the subsidiaries being put into liquidation with liquidators from that firm. In that connection he said this -

> "Of course there are possible conflicts of interest. It is unnecessary to go into them in detail, but one of the more obvious is that in an insolvency situation the subsidiary will have its own creditors whose claims will have to be met. Sometimes the creditors will include the parent company or subsidiary next up the line. Sometimes the interest of the parent company or subsidiary next up the line will merely be an interest as shareholder which ranks behind the creditors of the subsidiary. But these sort of potential conflicts do not in practice give rise to any serious difficulty because they are well known to the experienced insolvency practitioners."

In re Arrows Ltd (1991) BCC 121, Hoffmann J in the Chancery Division refused an application for the discharge of provisional liquidators in circumstances where it was not in dispute that a conflict of interest could arise from the appointment of the same firm as receivers of other companies. The following passage from his judgment is directly in point in the present case -

> "Given the circumstances of this company, it seems to me that the course taken by the property holding companies was, if I may say so with respect, eminently sensible. In fact, it is very difficult to see how the necessary process of investigation could have been efficiently conducted if there were separate firms representing all, or worse still some of

> the receivership companies, and another firm representing the provisional liquidators. It is by no means uncommon in the case of the insolvency of a substantial group of companies for cross claims and conflicts of interest to arise between companies within the group. That does not usually deflect the court from appointing a single firm of insolvency practitioners in the first instance to deal with the whole insolvency of the group, leaving the question of potential conflict of interests to be dealt with if and when it arises. In my view, that would be the proper course to adopt in this case."

Hoffmann J adopted a similar approach in Re Maxwell Communications Corporation PLC as recently as 20th December 1991. It had there been argued that on the ground of a prospective conflict of interest (albeit only a distant possibility in that case) an additional administrator of the company should be appointed. The following passage appears in his judgment -

> "The disadvantage of appointing an additional administrator... is the further expense and delay which is caused by having to have cooperation between two different firms of accountants and in this case by having to introduce a new firm which has no previous knowledge of the circumstances of this company to join [the firm] who have a head start in the matter.
>
> There are other ways of dealing with a potential conflict of interest. One of them is to leave the matter to be dealt with if and when it arises. It seems to me that any provision which I make to deal with it today could equally be made at some future date... If such a conflict should surface there should be no difficulty for the administrators if they find themselves faced with difficulty in the matter, in securing the appointment of the necessary independent persons by the court..."

In an ideal world these conflicts should be avoided. In the real world the court has to perform a balancing act. Of great weight in adopting the approach of relying on applications by the persons concerned is the courts view of their experience and integrity. Fortunately in this case there is no problem at all about that. Mr. Wight and Mr. Axford are chartered accountants and partners in the Cayman Islands firm of Deloitte Ross Tohmatsu, and each has substantial previous experience in liquidation matters. Mr. Mackey is also a chartered accountant and a partner in the Canadian firm of Deloitte and Touche. He has extensive experience on insolvency work in

Canada. Moreover, this court has seen at first hand, and often, the work which this team has been able to produce since the start of this unfortunate affair and is glad to take this opportunity of acknowledging its high quality. The court has for the same reason been able to form a view about the size and complexity of the task with which they are faced and recognises the difficulties in the path of any person coming new to the matter in mastering it within the severe time constraints to which I have referred.

I therefore concluded that the best course was to make the appointments of the three liquidators in accordance with the submissions of the petitioner. However, I am of the view that this court is likely to benefit from the presence of an independent amicus curiae at the hearing of the application by the official liquidators for directions that they be authorised to execute and implement the draft agreement initialled on 20th February. That matter, and in particular the selection of the person best suited to perform that function should be the subject of separate consideration in Chambers.

The application for directions itself will be adjourned to be heard immediately after the conclusion of the application by the official liquidators of BCCI Overseas and CFC for approval of their agreements with the majority shareholders. The date on which that will take place will be ascertained later this morning.

Two other directors were sought on behalf of the liquidators. They were minded to recommend that a copy their report dated 24th April be sent to all known creditors of ICIC Overseas, with the exception, of course, of those with "no correspondence" status, together with a circular informing them of the latest position with regard, in particular, to the hearing of the application for approval of the ICIC agreement. I accept that recommendation and so direct. It is important that everything is done that can be done to notify creditors of what is going on, and in the case of ICIC there are not huge numbers involved.

I also direct that one suitable advertisement to that end be placed in a leading publication in London and in the Middle East, and in the Caymanian Compass. I am content to leave the format to the liquidators and their advisers.

G.E. Harre

Judge

30th April, 1992

CAYMAN ISLANDS - GRAND COURT -