RBG Resources plc (in liquidation) v Credit Lyonnais
[2005] SGHC 204

Case Number : CWU 60/2002, SIC 1204/2005, 1753/2005

Decision Date : 28 October 2005

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Quek Mong Hua and Matthew Saw (Lee and Lee) for RBG; Lawrence Teh and Loh Jen Wei (Rodyk and Davidson) for CL; V Coomaraswamy and Kenneth Choo (Shook Lin and Bok) for West LB; Moey Weng Foo (Insolvency and Public Trustee's Office) for official receiver

Parties : RBG Resources plc (in liquidation) — Credit Lyonnais

Companies – Winding up – Liquidation of foreign company not registered in Singapore – Creditor of company applying to admit proof of debt against Singapore liquidation estate of company – Whether creditor entitled to be paid before moneys remitted to foreign liquidation estate – Section 377(3)(c) Companies Act (Cap 50, 1994 Rev Ed)

28 October 2005 *Judgment reserved.*

Woo Bih Li J:

1 RBG Resources plc (in liquidation) ("RBG") is a company incorporated in England. It was placed in liquidation in England on 12 June 2002. On 7 August 2002, the English liquidators filed a petition being Companies Winding Up No 60 of 2002 ("CWU 60/2002") in the High Court of Singapore to seek, *inter alia,* an order to wind up RBG. On 8 and 13 August 2002, I appointed Singapore provisional liquidators of RBG and gave them powers to seize, source, and sell metal goods in various warehouses in Singapore and to place the proceeds of sale in a US dollar account pending the determination of various claims to the metal goods. Eventually the metal goods were surveyed and sold, and their sale proceeds placed in a US dollar account.

2 In the meantime, an interpleader action was filed by Fujitrans (Singapore) Pte Ltd ("Fujitrans") as both RBG and various parties were claiming metal goods stored in warehouses operated by Fujitrans. Such metal goods were part of those which were the subject of the powers given to the provisional liquidators. On 6 September 2002, I ordered RBG to commence a fresh action as plaintiff and to name the other claimants as defendants. On 4 October 2002, RBG commenced Suit No 1175 of 2002 ("the RBG action") as plaintiff and named seven claimants as defendants.

3 On 7 October 2002, I made an order to wind up RBG in Singapore and appointed Singapore liquidators.

4 Before the commencement of the trial of the RBG action in January 2004, the Singapore liquidators of RBG reached a settlement with five of the defendants, *ie*, Banque Cantonale Vaudoise ("BCV"), Westdeutsche Landesbank Girozentrale ("West LB"), ING Bank NV ("ING"), ING Belgique ("BBL"), and GMAC Commercial Finance plc ("GMAC"). One of the defendants, BNP Paribas (Swisse) SA, had earlier withdrawn its Defence and did not participate in the settlement or the trial. Credit Lyonnais ("CL") was the remaining defendant. CL was claiming the following metal goods ("the CL Claimed Metal"):

(a) copper cathodes;

(b) tin ingots;

(c) cut nickel cathodes; and

(d) uncut nickel cathodes or nickel plates.

5 On 7 January 2004, I made an order in the RBG action that in respect of the sale proceeds of the CL Claimed Metal, and subject to the outcome of the RBG action between RBG and CL, RBG was to pay three of the defendants, who had been claiming the same type of metal goods, the sums payable pursuant to their respective settlement agreements.

6 In respect of the metal goods which CL were not claiming ("the Non-CL Claimed Metal"), I also made the following order on 7 January 2004 in the RBG action:

1. Subject to clause 2 herein, the gross sale proceeds of [the Non-CL Claimed Metal] are to be divided amongst [RBG, BCV, WestLB, ING, BBL and GMAC]as follows:

a. To [RBG] – the sum of US$3,315,416.35.

b. To [BCV] – the sum of US$760,490.65.

c. To [WestLB] – nil.

d. To [ING] – the sum of US$211,247.40.

e. To [BBL] – the sum of US$593,779.33.

f. To [GMAC] – the sum of US$261,682.00.

2. [RBG (in liquidation), BCV, WestLB, ING and BBL] are each to receive their respective share of the said gross sale proceeds as provided in clause 1 herein after adding the interest earned and deducting the expenses of the survey and sale of the said metal cargoes …

7 On 12 January 2004, I made an order in CWU 60/2002 that:

…

2. The Singapore Liquidators of [RBG] be authorised [*sic*] make the following payments pursuant to the terms of the Order(2) dated 7 January 2004 in Suit No. 1175 of 2002/F:-

a. To [RBG] – the sum of US$3,034,270.02.

b. To [BCV] – the sum of US$722,201.31.

c. To [ING] – the sum of US$200,611.48.

d. To [BBL] – the sum of US$551,697.98.

e. To [GMAC] – the sum of US$261,682.00.

such payments being inclusive of interest …

3. The Singapore Liquidators be at liberty to transmit the sum of US$2,784,270.02 to the English Liquidation Estate upon the Liquidators' undertaking to retain a sum of US$250,000 from the sum of US$3,034,270.02 in clause 2(a) above to meet the costs and expenses in the Singapore Liquidation.

8 On 11 June 2004, I gave my decision on the dispute between RBG and CL in the RBG action. I decided, *inter alia*, that the CL Claimed Metal was owned by RBG save for one drum of nickel identified as "519-W127". CL's appeal to the Court of Appeal was dismissed on 24 January 2005.

9 On 7 March 2005, RBG applied in Summons in Chambers No 1204 of 2005 ("SIC 1204/2005") in CWU 60/2002 for the following orders:

…

2. That the Liquidators of [RBG] be authorised to make the following payments pursuant to the terms of the Order of Court (2) dated 7 January 2004 in Suit No. 1175 of 2002/F:-

(a) to RBG – the sum of US$8,425.732 and interest thereon up to the date of payment;

(b) to [WestLB] – the sum of US$439,428 and interest thereon up to the date of payment;

(c) to [BBL] – the sum of US$390,503 and interest thereon up to the date of payment; and

(d) to GMAC – the sum of US$1,657,326 and interest thereon up to the date of payment.

3. The Liquidators be at liberty to:-

(a) transmit the sum of US$10,456,023 and interest thereon up to the date of payment to the English Liquidation Estate, or elsewhere as directed by the English Liquidators, upon the Liquidators' undertaking to retain a sum of US$480,000 to meet the costs and expenses in the Singapore Liquidation; and

(b) transmit the balance of the retained sum of US$480,000, if any, after paying all the costs and expenses in the Singapore Liquidation, to the English Liquidation Estate, or elsewhere as directed by the English Liquidators.

I will refer to the second prayer as "the Payment Application" and the third prayer as "the Transmission Application".

10 On or about 23 March 2005, CL submitted a Proof of Debt to the Singapore liquidators of RBG.

11 On 28 March 2005, at the hearing of SIC 1204/2005, CL objected to the Transmission Application. Accordingly, I granted an order in terms of the Payment Application only and adjourned the Transmission Application.

12 On 5 April 2005, CL applied in SIC No 1753 of 2005 for the following orders:

1. That the decision of the Singapore Liquidators of RBG, not to admit the Proof of Debt

dated 23 March 2005 submitted on behalf of Credit Lyonnais and/or to forward the same to the English liquidators of RBG be reversed.

2. That the said Proof of Debt be admitted wholly as proof of the claim of Credit Lyonnais against the Singapore liquidation estate of RBG.

3. That the Singapore Liquidators of RBG shall pay the sum of US$8,578,379.18 and interest thereon in satisfaction of the liability incurred by RBG to Credit Lyonnais before paying or remitting the amount or amounts recovered from the property or assets of RBG in Singapore to the English liquidators of RBG.

4. That the costs of this application shall stand and rank as part of Credit Lyonnais' claim and be paid out of the Singapore liquidation estate of RBG in the manner aforesaid.

I will refer to this as "the PD Application".

13 In essence, CL wanted its debt to be paid from the Singapore liquidation estate of RBG before moneys were transmitted to the English liquidation estate. CL relied on s 377(3)(*c*) which is under Part XI, Division 2 ("Part XI Div 2"), of the Companies Act (Cap 50, 1994 Rev Ed) ("the Act"). The Singapore liquidators of RBG and a creditor of RBG, West LB, opposed that application and wanted the Singapore liquidators to be allowed to pay the balance of the moneys they were holding to the English liquidation estate of RBG and for CL to file its Proof of Debt with the English liquidators. The Singapore liquidators and West LB asserted that s 377(3)(*c*) did not apply.

14 I should mention that CL had objected to West LB's participation in arguments. However, as West LB had been served with SIC 1204/2005 and had indicated its wish to be heard, I allowed such participation in view of r 17(1) of the Companies (Winding Up) Rules (Cap 50, R 1, 1990 Rev Ed) which states:

> Subject to any order to the contrary, every petition, notice of motion and summons shall be served upon every person against whom any order or other relief is sought but the Court may at any time direct that service be effected or notice of proceedings be given to any person who may be affected by the order or other relief sought and may at any time direct the manner in which such service is to be effected or such notice given; and any person so served or notified shall be entitled to be heard.

However, I indicated to West LB that it was not to reiterate the arguments of the Singapore liquidators. Also, as the Singapore liquidators would ordinarily already represent the interests of unsecured creditors, unless such interests were in conflict with those of the Singapore liquidators, I also cautioned West LB that if it still wanted to present its own arguments, it might not be granted costs even if its arguments succeeded. Furthermore, if such arguments did not succeed, it might be made liable for part of CL's costs.

15 It is important to bear in mind that Part XI Div 2 applies only to certain companies. Various provisions of the Act are relevant in construing s 377(3)(*c*).

16 Section 365 states:

> This Division applies to a foreign company which, before it establishes a place of business or commences to carry on business in Singapore, complies with section 368 and is registered under this Division.

17 A "foreign company" is defined in s 4 as:

(a) a company, corporation, society, association or other body incorporated outside Singapore; or

(b) an unincorporated society, association or other body which under the law of its place of origin may sue or be sued, or hold property in the name of the secretary or other officer of the body or association duly appointed for that purpose and which does not have its head office or principal place of business in Singapore.

18 Section 368(1) provides that:

Every foreign company shall, before it establishes a place of business or commences to carry on business in Singapore, lodge with the Registrar for registration [various documents are then listed] …

19 Section 377(3)(c) itself states:

A liquidator of a foreign company appointed for Singapore by the Court or a person exercising the powers and functions of such a liquidator —

shall, unless otherwise ordered by the Court, only recover and realise the assets of the foreign company in Singapore and shall, subject to paragraph (*b*) and subsection (7), pay the net amount so recovered and realised to the liquidator of that foreign company for the place where it was formed or incorporated after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company.

20 It was common ground that RBG is a foreign company but was not registered under Part XI Div 2. Whether RBG had established a place of business or had commenced to carry on business in Singapore prior to my order winding up RBG and appointing Singapore liquidators was in dispute. With a view to minimising costs and expenses, the parties agreed to various issues being determined by me first based on the assumption that RBG had established a place of business in Singapore or carried on business in Singapore. If I were to rule in favour of CL, then that assumption might have to be tested by further affidavits and perhaps cross-examination as well. The issues are stated in the following terms:

On the assumption that RBG had established a place of business in Singapore or carried on business in Singapore (which assumption is not admitted as a matter of fact by the Singapore Liquidators), and based on the agreed fact that RBG was not registered under Part XI Division 2 of the Companies Act:-

Issue 1:- On the further assumption that Credit Lyonnais' claims for breach of contract (as set out in their Proof of Debt submitted to the Singapore liquidators) are liabilities incurred in Singapore by RBG to Credit Lyonnais:-

(a) Does Section 377(3)(c) of the Companies Act apply to RBG and its Singapore liquidators?

(b) If the answer to Q(1)(a) is "No", can and should the principle in Section 377(3)(c) of the Companies Act, i.e. of paying the net amount recovered and realised to the liquidator of the foreign company for the place where it was formed or incorporated after paying any

debts and satisfying any liabilities incurred in Singapore by the foreign company, nevertheless apply to RBG and its Singapore liquidators?

Issue 2:- If the answer to either Q(1)(a) or Q(1)(b) is "Yes", are Credit Lyonnais' claims for breach of contract (as set out in their Proof of Debt submitted to the Singapore liquidators) liabilities incurred in Singapore by RBG to Credit Lyonnais for the purpose of Section 377(3)(c) of the Companies Act and/or the principle therein?

Issue 3:- If the answer to Q(1)(a) or Q(1)(b) or Q2 is "No", on the facts and circumstances of this case, in particular the fraud and/or the previous dealings with the Singapore liquidation estate of RBG, can and should the Court order that Credit Lyonnais' Proof of Debt be admitted against the Singapore liquidation estate of RBG?

21 There is one other point I should mention. In *Tohru Motobayashi v Official Receiver* [2000] 4 SLR 529 ("*Tohru Motobayashi*"), Okura & Co, Ltd ("Okura Japan"), a company incorporated in Japan, was registered as a foreign company under the Act. Okura Japan was carrying on business at its branch in Singapore ("Okura Singapore"). On 21 August 1998, a trustee in bankruptcy ("the Trustee") of Okura Japan was appointed by the Tokyo District Court. A winding up order was made in respect of Okura Singapore on 4 December 1998 and a Singapore liquidator was appointed. On 6 May 1999, the Trustee wrote to the Singapore liquidator to apply to the Singapore court for certain orders. The Singapore liquidator did so seeking, *inter alia*, an order directing the Singapore liquidator to remit all assets recovered and realised for Okura Singapore to the Trustee in Japan, after paying off certain preferred creditors as set out in s 328 of the Act. The High Court which heard the application ordered that the Singapore liquidator be allowed to pursue foreign debts but made no order on the relief sought. The Trustee asked the Singapore liquidator to appeal against the decision but the Singapore liquidator did not do so. The Trustee then commenced fresh proceedings on 11 February 2000 seeking substantially the same relief as had been sought in the earlier application by the Singapore liquidator. The High Court dismissed the Trustee's application on the ground that the Trustee was barred from initiating the fresh application by reason of cause of action estoppel. The Trustee's appeal to the Court of Appeal succeeded. The Court of Appeal was of the view that as the Singapore liquidator and the Trustee were clearly not the same parties, the only question was whether there was any privity of interest between them. It held that the initial agreement of the Singapore liquidator to co-operate with the Trustee did not render him privy to the Trustee. Consequently, there was no privity of interest between them and the Trustee was not precluded from making a fresh application. The Court of Appeal also decided that the Singapore liquidator must pay the debts and liabilities incurred in Singapore, after paying the preferred creditors listed in s 328, before paying the net amount to the Trustee.

22 In the case before me, it seemed that the Singapore liquidators of RBG had been liaising with the English liquidators and that the Singapore liquidators' position represented the position of the English liquidators as well. However, as counsel for the Singapore liquidators had not yet stated that he was also representing the English liquidators or that the English liquidators had agreed to be bound by my decision, I asked counsel to check what the position of the English liquidators was. I wanted to avoid a situation in which there would effectively be a second bite at the cherry should the Singapore liquidators and West LB fail in their arguments before me. If they were to fail and the English liquidators were not bound by my decision, *Tohru Motoyabashi* suggests that the English liquidators could file a fresh transmission application to be determined by perhaps a different judge of the High Court. In my view, that should be avoided, if possible.

23 Subsequently, counsel for the Singapore liquidators informed me that he was instructed to represent the English liquidators as well and they were taking the same position as the Singapore

liquidators. If the situation was otherwise, it might have been necessary for me to direct that both the Transmission and the PD Applications be served on the English liquidators with a notice that if they did not turn up or were not represented at the subsequent hearing or hearings of the applications, they would nevertheless be bound by my decision. Happily, it was unnecessary for me to resort to such a step.

24 I would add that a representative from the Official Receiver also appeared before me to make a submission which I shall come to later.

Issue 1(a) – Does s 377(3)(*c*) of the Companies Act apply to RBG and its Singapore liquidators?

25 It is quite clear that s 377(3)(*c*) does not apply as RBG was not registered under Part XI Div 2. Hence, CL conceded that s 377(3)(*c*) does not apply to RBG and its Singapore liquidators. However, CL argued that the principle in s 377(3)(*c*) should nevertheless apply. This brought into play Issue 1(b).

Issue 1(b) – If the answer to Issue (1)(a) is "No", can and should the principle in Section 377(3)(*c*) of the Companies Act, *ie*, of paying the net amount recovered and realised to the liquidator of the foreign company for the place where it was formed or incorporated after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company, nevertheless apply to RBG and its Singapore liquidators?

26 The Act is silent as to what a Singapore liquidator of a non-registered foreign company should do. The issue in *Tohru Motoyabashi* ([21] *supra*) was whether debts and liabilities incurred in Singapore had to be paid first, in addition to the payment of preferred creditors, before paying the net amount to the liquidator in the principal jurisdiction. Okara Singapore was registered in Singapore, unlike RBG. Hence the issue there was different from those before me. The uncertainty which might arise under s 377(3)(*c*) was already anticipated by Mr Lee Eng Beng in his learned article on *Tohru Motoyabashi* in the Singapore Academy of Law Annual Review on Insolvency Law ((2000) SAL Ann Rev 201). Mr Lee said at 203–205:

> Secondly, it should be noted that s 377(3)(c) applies only to foreign companies, that is, a foreign corporation which establishes a place of business or carries on business in Singapore and is registered under s 368 of the Companies Act as a foreign company. A foreign corporation does not necessarily have to be registered as a foreign company merely because it carries out certain acts in Singapore, including, *inter alia*, the holding of property, the investment of funds, the conduct of isolated transactions, the maintenance of a bank account, the creation of evidence of a debt or a charge on property, or being a party to any legal or arbitration proceedings. Such acts do not *per se* amount to the carrying on of business in Singapore (see s 366(2) of the Companies Act). It is therefore conceivable that there may be a liquidation of an unregistered foreign corporation in Singapore involving substantial assets as well as debts and liabilities incurred in Singapore. However, in the event of such liquidation, no priority would be conferred by s 377(3)(c) in respect of the debts and liabilities incurred in Singapore by that foreign corporation. Instead, the court will have to apply the common law in relation to the conduct of an ancillary winding up in conjunction with the conduct of a principal winding up in the place of incorporation of the foreign corporation. Unfortunately, the common law in this respect apparently takes a position which is divergent from s 377(3)(c), that is, that all creditors wherever situated should be treated equally and that the court in an ancillary winding up should generally direct the ancillary liquidator to transmit funds to the principal liquidators in order to achieve a *pari passu* distribution to worldwide creditors (see *Re Bank of Credit and Commence*

International SA (No 10) [1997] Ch 213 and the authorities discussed therein).

This creates a potentially serious problem. If the Singapore courts apply the common law in relation to the ancillary winding up of foreign corporations, there will be a sharp distinction between the position in the liquidation of a foreign company and that in the liquidation of an unregistered foreign corporation. It seems difficult to justify such a distinction as a matter of policy. On the other hand, it is equally difficult to contend that, in relation to the ancillary winding up of a foreign corporation, the Singapore courts should decline to follow the common law position and instead exercise their inherent jurisdiction to direct the Singapore liquidator, by analogy with s 377(3)(c), that the debts and liabilities incurred in Singapore should receive priority over other debts and liabilities of the unregistered foreign corporation in so far as the distribution of Singapore assets is concerned.

…

Lastly, it is respectfully suggested that, in light of the decision in *Tohru Motobayashi*, the legislature should seriously consider removing the 'ring-fencing' effect of s 377(3)(c). Put simply, the provision in its current form is retrogressive and out of line with international-accepted standards of a fair and equitable cross-border insolvency regime (see, for example, the *UNCITRAL Model Law on Cross-Border Insolvency (1977)* and Part III of the World Bank Consultation Draft on *Effective Insolvency Systems: Principles and Guidelines* (October 2000)).

27 CL stressed that under ss 365 and 368, a foreign company which desires to establish a place of business or to carry on business in Singapore must lodge the requisite documents for registration *before* it establishes a place of business or commences to carry on business in Singapore. It submitted that Part XI Div 2 does not apply to:

(a) a foreign company who lodges the requisite documents after it establishes a place of business or after it commences to carry on business in Singapore; and

(b) a foreign company which fails to lodge the requisite documents for registration even though it goes on to establish a place of business or carries on business in Singapore.

28 CL submitted that this would result in an anomaly as demonstrated in the following illustration. Foreign Company A establishes a place of business in Singapore on 19 September 2005 and lodges the requisite documents one day later on 20 September 2005. Foreign Company B intends to establish a place of business in Singapore on 19 September 2005 but delays two days in its implementation resulting in the establishment of the place of business on 22 September 2005. Nevertheless, like Foreign Company A, it lodges its documents for registration on 20 September 2005. Part XI Div 2 will not apply to Foreign Company A but it applies to Foreign Company B.

29 CL submitted that this was all the more anomalous bearing in mind that under s 409A of the Act, the court may grant an injunction requiring any person who has failed to comply with the Act to so comply. CL submitted that there should not be such an anomaly. Part XI Div 2 should also apply to Foreign Company A. Parliament did not intend for every foreign company which failed to register in Singapore before it established a place of business or commenced carrying on business in Singapore to escape regulation under Part XI Div 2.

30 I agree that Parliament did not intend for foreign companies who should have registered under Part XI Div 2 to escape regulation thereunder but my conclusion is different from that advocated by CL. Let me explain.

31 The requirement for a foreign company to lodge documents for registration applies to every foreign company which establishes a place of business or commences to carry on business in Singapore. The requirement is that the lodgement is to be done before it establishes a place of business in Singapore or before it commences to carry on business in Singapore. If it does not comply with this requirement, it commits an offence under the Act. This does not mean that it is henceforth absolved from the requirement to lodge documents for registration. It is a continuing offence. The foreign company that has failed to lodge its documents for registration must still do so even though this is after the statutory deadline. I agree with the submission of the liquidators that once a foreign company is registered, the other provisions in Part XI Div 2, including s 377, kick in. If, however, it fails to be registered in Singapore before it goes into liquidation, then the other provisions, including s 377, do not kick in. In my view, that is what ss 368 and 365 mean.

32 As an illustration, I refer to s 367 of the Act. It states:

> Subject to and in accordance with any written law, a foreign company registered under this Division shall have power to hold immovable property in Singapore.

In my view, a foreign company which is registered late under Part XI Div 2 will still have the power to hold immovable property in Singapore from the date of its registration. Likewise, should the court grant an injunction to compel the documents to be filed, the rest of the provisions in Part XI Div 2 will apply upon registration of the foreign company. It will be truly anomalous if the other provisions in Part XI Div 2 do not apply to a foreign company after it is registered just because it was registered late. However, as I have said, the position is different if the foreign company is not registered at all.

33 CL also submitted that the court has no power to wind up foreign companies under Part XI Div 2 because Part XI does not deal with the winding up of companies generally. The relevant part is Part X and the relevant division thereof is Division 5 ("Part X Div 5"). Under Part X Div 5, ss 350 and 351 state:

> **350**.—(1) For the purposes of this Division, unregistered company includes a foreign company and any partnership, association or company consisting of more than 5 members but does not include a company incorporated under this Act or under any corresponding previous written law.
>
> (2) This Division shall be in addition to, and not in derogation of, any provisions contained in this or any other written law with respect to the winding up of companies by the Court and the Court or the liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies.
>
> **351**.—(1) Subject to this Division, any unregistered company may be wound up under this Part, which Part shall apply to an unregistered company with the following adaptations:
>
> …

As can be seen, the definition of "unregistered company" includes a foreign company, whether it is registered in Singapore or not. Hence, to avoid confusion, I have referred to a foreign company which is not registered in Singapore as a non-registered foreign company.

34 CL submitted that the reference in the first limb of s 350(2) to the other provisions in the Act with respect to the winding up of "companies" in the plural is a reference to all companies, whether incorporated in Singapore or not, even though the definition of "company" in s 4 of the Act means a

company incorporated pursuant to the Act or any corresponding previous written law. I do not accept this submission. The second limb of s 350(2) states that "the liquidator may exercise any powers … in the case of unregistered companies which might be exercised … by it or him in winding up companies". Here, the reference to "companies" in the plural is clearly to locally incorporated companies in contrast to unregistered companies. I do not see why "companies" in the first limb of s 350(2) should be interpreted differently from "companies" in the second limb.

35 I also do not accept CL's submission that "the court should exercise its powers under s 350(2) in a manner analogous to the mode of winding up in s 377(3)(*c*)" where the non-registered foreign company ought to, but failed to register in Singapore. If that were so, then s 377(3)(*c*) should not have been inserted under Part XI Div 2 but under Part X Div 5.

36 In addition, CL itself had submitted that Part XI Div 2 does not deal generally with the winding up of companies. I agree with that submission. Accordingly, Part XI Div 2 does not come within the meaning of "any provisions contained in this … law with respect to the winding up of companies by the Court" in the first limb of s 350(2).

37 I also note that Mr Lee did not suggest in his article ([26] *supra*) that s 350(2) incorporates s 377(3) or applies the principle in s 377(3) to non-registered foreign companies.

38 A third point raised by CL was that it was erroneous to speak of the common law in relation to the interpretation of a provision in the Act. CL also stressed that cases involving different legislation should not be relied upon. Presumably what CL meant was that I should not give any weight to *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 ("*BCCI (No 10)*") because that case involved the consideration of legislation different from the Act. I cite the following propositions from that case as stated in 246:

> (1) Where a foreign company is in liquidation in its country of incorporation, a winding up order made in England will normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation. (2) The winding up in England will be ancillary in the sense that it will not be within the power of the English liquidators to get in and realise all the assets of the company worldwide. They will necessarily have to concentrate on getting in and realising the English assets. (3) Since in order to achieve a pari passu distribution between all the company's creditors it will be necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool, the winding up in England will be ancillary in the sense, also, that it will be the liquidators in the principal liquidation who will be best placed to declare the dividend and to distribute the assets in the pool accordingly. (4) None the less, the ancillary character of an English winding up does not relieve an English court of the obligation to apply English law, including English insolvency law, to the restoration of any issue arising in the winding up which is brought before the court. It may be, of course, that English conflicts of law rules will lead to the application of some foreign law principle in order to resolve a particular issue.

39 In my view, the English Insolvency Rules which were considered there came into play in respect of proposition No 4. The first three propositions are still generally applicable subject to the application of Singapore insolvency legislation in the case before me. Indeed the scheme envisaged under s 377(3)(*c*) is implicit acknowledgment of the first three propositions. It is because of these propositions that legislative qualifications had to be introduced. Section 377(3)(*c*) still provides for the net amount to be paid to the liquidator of the principal liquidation. I would add that the PD Application is also implicit recognition of the first three propositions, subject to Singapore insolvency legislation.

40 A fourth point made by CL was that s 377(3)(*c*) was part of a move which was initially intended to provide for reciprocal protection of creditors in Singapore and Malaysia dealing with companies operating in those countries. For this point, CL relied on the legislative history of s 377(3)(*c*) as set out in *Tohru Motobayashi* ([21] *supra*).

41 Section 377(3)(*c*) was previously s 340(3)(*c*). Section 340(3)(*c*) as it originally appeared in the Companies Bill 1966 (Bill No 58 of 1966) did not have the qualifications providing for the liquidator to pay preferred creditors in Singapore first and then creditors whose debts and liabilities were incurred in Singapore before paying the net amount to the principal liquidation estate. After the Bill was referred to a Select Committee, such qualifications were introduced in s 340(3)(*c*). Also, Part XIII of the Bill was then deleted. Part XIII was entitled "Reciprocal Provisions with Malaysia". When the Bill, as amended, was presented to Parliament, the then Minister for Law & National Development, Mr E W Barker, said (*Singapore Parliamentary Debates, Official Report* (21 December 1967) at vol 26, col 1036):

> Mr Speaker, Sir, the amendments as have been made by the Select Committee, while they have gone a long way to refine the Bill, do not substantially alter the character of the Bill. One Part of the Bill, Part XIII, relating to reciprocal provisions with Malaysia, which authorises the Minister to make arrangements with Malaysia for their extension to Singapore of winding-up orders made in Malaysia and for the extension to Malaysia of winding-up orders made in Singapore, has been deleted. Deletion of this Part is considered necessary as clause 340 of the Malaysian Companies Act, with necessary modifications agreed to between Singapore and Malaysia, should meet the reciprocal requirements.

42 I note that while the Minister referred to reciprocal requirements between Singapore and Malaysia, the terms of s 340(3)(*c*), as amended and subsequently enacted, were not confined only to creditors in Singapore and Malaysia. Neither did s 340(3)(*c*) apply to all creditors in Singapore and Malaysia but to debts and liabilities incurred in Singapore. Accordingly, CL's reference to the protection of creditors in Singapore and Malaysia dealing with companies operating in those countries does not assist CL.

43 What is perhaps more significant is that when the Companies Act 1967 (No 42 of 1967) was enacted, the then s 332 provided for every foreign company to lodge documents for registration within one month after it had established a place of business or had commenced carrying on business in Singapore. However, the then s 329 merely provided for Part XI Div 2 to apply to a foreign company if it had a place of business or carried on business in Singapore, *ie*, there was no requirement of registration before Part XI Div 2 would apply. So, as it stood, the then s 340(3)(*c*) (which was also under Part XI Div 2) applied to a foreign company which had established a place of business or had commenced carrying on business in Singapore, whether it was registered in Singapore or not.

44 Subsequently, the then ss 332 and 329 were renumbered and amended. The result at present is that they have become ss 368 and 365 respectively of the Act with the following changes:

> (a) Section 368 requires every foreign company to lodge the requisite documents for registration in Singapore before it establishes a place of business or commences to carry on business in Singapore. Hence, the deadline for registration is before, instead of one month after, a place of business is established or before commencement of carrying on business in Singapore.
>
> (b) Section 365 stipulates that Part XI Div 2 applies to a foreign company which is registered in Singapore before it establishes a place of business or commences to carry on business in Singapore. Unlike the then s 329, s 365 means that Part XI Div 2 does not apply to a

non-registered foreign company even if it has established a place of business or has commenced carrying on business in Singapore.

45 The amendment in s 368 was introduced first and then the amendments to s 365 were made. The explanatory statement for the latter stated that it was to clarify the operation of Part XI Div 2.

46 There was no substantive amendment to s 340(3)(*c*) which was renumbered as s 377(3)(*c*). So, was s 377(3)(*c*) inadvertently left under Part XI Div 2 when s 365 was amended to introduce the requirement of and deadline for registration? CL did not suggest such an error. Even if there was such an error, I am of the view that it is for Parliament to rectify it. Notwithstanding Mr Lee's article in 2000 ([26] *supra*), s 377(3)(*c*) remains as it is and where it is.

47 As I have mentioned, an argument was raised regarding the point that the deadline for registration is now before the establishment of a place of business or before business is commenced in Singapore. I have dealt with that argument and I do not propose to repeat what I have said.

48 Accordingly, my answer for Issue 1(b) is that the ring-fencing principle under s 377(3)(*c*) does not apply to RBG and its Singapore liquidators. This makes Issue 2 academic. However, I will deal with it for completeness.

Issue 2 – If the answer to either Issue (1)(a) or Issue (1)(b) is "Yes", are Credit Lyonnais' claims for breach of contract (as set out in their Proof of Debt submitted to the Singapore liquidators) liabilities incurred in Singapore by RBG to Credit Lyonnais for the purpose of s 377(3)(*c*) of the Companies Act and/or the principle therein?

49 CL's claim against RBG arose from CL's purchases of metal goods from RBG. According to CL's submission, each purchase contract contained terms as to the following:

(a) description of the quantity, type and grade of the metal that was purchased;

(b) price of the goods;

(c) payment details in relation to the price;

(d) delivery date on which delivery documentation was to be delivered by RBG to CL;

(e) delivery details indicating the place in London where delivery was to be made;

(f) settlement details in relation to the mode by which the price was to be paid or settled;

(g) transfer of title and risks, indicating that title and risk in the goods were to pass from RBG to CL upon receipt of delivery documentation by CL and payment to RBG; and

(h) delivery documentation, in that delivery documentation would be any form of documentation determined by CL to give title to the underlying goods.

50 The delivery documentation comprised warehouse receipts issued on the letterhead of Fujitrans in respect of metal allegedly stored in warehouses operated in Singapore by Fujitrans. In the RBG action, I had decided that CL had not acquired title to the metal goods from such warehouse receipts as no title in the metal goods had been transferred to CL. This was because the metal goods had not been ascertained by appropriation to CL's contracts.

51 CL submitted that RBG's liability to it for damages was incurred in Singapore. Paragraphs 57 to 65 of its submission stated:

> 57. It must necessarily follow that where a delivery document in the form of a Fujitrans warehouse receipt is delivered to Credit Lyonnais in London and there is no corresponding physical delivery of goods to Credit Lyonnais in Singapore (because the underlying physical goods remained unascertained), there is a failure on the part of RBG to deliver physical metal goods to Credit Lyonnais in Singapore.
>
> 58. There is, therefore, a breach by RBG of not only a condition but the most fundamental term of the purchase contract – delivery of goods purchased. The breach entitles Credit Lyonnais to sue for breach of contract.
>
> 59. The issue is whether the liability of RBG to Credit Lyonnais in damages for breach of contract was incurred in Singapore.
>
> 60. Liability is incurred by the defaulting party to the innocent party at the point in time when the innocent party has an actionable claim against the defaulting party. Where the innocent party has yet to have an actionable claim against the defaulting party, one cannot say that the defaulting party has incurred a liability to the innocent party. …
>
> 61. In relation to claims in damages for breach of contract, the cause of action is constituted at the point in time when the defaulting party commits the relevant breach. …
>
> 62. …
>
> 63. It is axiomatic that the locality of the breach is determined by the place where the relevant performance was to have taken place. …
>
> 64. The locality of the breach is not determined by the place where the innocent party receives notice of the breach. …
>
> 65. In relation to Credit Lyonnais' claims, the breach of contract was the failure on the part of RBG to deliver physical goods to Credit Lyonnais in Singapore. It follows that the breach of contract was committed or occurred in Singapore. It further follows that the breach of contract constitutes a cause of action in Singapore and a right of action by Credit Lyonnais against RBG arises in Singapore. Hence, RBG has incurred liability to Credit Lyonnais in Singapore.

52 On the other hand, the liquidators submitted that RBG's breach was its failure to deliver delivery documentation to CL in England which documentation was supposed to have transferred title in certain metal goods warehoused in Singapore to CL. I agree with that submission. In my view, the fallacy in CL's submission is that it equated RBG's failure to forward adequate delivery documentation to CL in England with RBG's failure to deliver the metal goods which were warehoused in Singapore, when such delivery of metal goods was subsequently required by CL.

53 CL was not entitled to any of the metal goods in Singapore because the delivery documentation delivered to CL in England failed to do its job, *ie*, to transfer property in the metal goods to CL. If the delivery documentation had done its job, there would have been no difficulty in obtaining delivery thereof from the Singapore liquidators. The breach was in England and RBG's liability to CL was consequently incurred in England, and not in Singapore.

54 Accordingly, my answer for Issue 2 is "No".

Issue 3 – If the answer to Issue (1)(a) or Issue (1)(b) or Issue 2 is "No", on the facts and circumstances of this case, in particular the fraud and/or the previous dealings with the Singapore liquidation estate of RBG, can and should the Court order that Credit Lyonnais' Proof of Debt be admitted against the Singapore liquidation estate of RBG?

55 Although Issue 3 is framed in the above terms, the gist of what CL wanted thereunder was that it should be paid out of the Singapore liquidation estate of RBG even though the ring-fencing principle under s 377(3)(*c*) does not apply and the liability to CL was not incurred in Singapore.

56 CL's submission on Issue 3 was as follows:

> 69. Section 350(2) provides that the powers of the Court under Part X, Division 5 in winding up foreign company are in addition to and not in derogation of provisions contained in any other written law. It follows that the powers of the Court under Part X, Division 5 are in addition to any other part of the Companies Act, including its powers under the winding up of Singapore-registered companies under other Divisions of Part X and its powers under the winding up of registered companies under Part XI, Division 2.
>
> 70. Hence, the powers of the Court are not limited by the mode of winding up prescribed under Section 377(3)(c) of the Companies Act, of paying the net amount recovered and realised to the liquidator of the foreign company for the place where it was formed or incorporated after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company, and the Court may make such orders as to the ring-fencing of Singapore liquidation estates as it thinks fit in the circumstances of the case.
>
> 71. …
>
> 72. However, for the purpose of considering whether the Court can and should possibly make a ring-fencing order or a ring-fencing order different to the mode of winding up prescribed in Section 377(3)(c), Credit Lyonnais invites the Court to consider the following:
>
> > (1) RBG has, on its own admission, perpetrated a "massive international fraud". It has suggested that Credit Lyonnais is possibly, together with other parties, the innocent victims of its fraud. Where fraud is perpetrated, it would be fair and just to ring-fence the Singapore liquidation estate of the unregistered foreign company to satisfy the liabilities that RBG has incurred in the course of perpetrating its fraud and to satisfy the liabilities that RBG has incurred to parties who have a connection with Singapore or with the assets of RBG in Singapore. This protects defrauded or connected creditors and promotes confidence in Singapore as an international business centre.
> >
> > (2) Although invited by the Court, RBG has provided no information in relation to the status of the winding up of RBG in its place of incorporation, i.e. in England. It is known, however, that RBG and its controlled counterparties have been wound up in numerous jurisdictions around the world, quite probably at enormous expense. There is, therefore, a real risk that Credit Lyonnais will recover nothing if it has to prove its claim in England. If this is indeed the prospect of Credit Lyonnais' recovery in the English liquidation of RBG, Credit Lyonnais would be prejudiced in that other parties have been paid out of the Singapore liquidation estate of RBG and have been preferred over RBG.

(3) In this respect, Credit Lyonnais points to previous dealings in the Singapore liquidation estate of RBG and the fact that BCV, West LB, BBL, ING and GMAC have all been paid out of the Singapore liquidation estate of RBG. Credit Lyonnais also points to the fact that Ampa Lines has been paid out of the Singapore liquidation estate of RBG and that the Singapore liquidators of RBG have or will be paid out of the Singapore liquidation estate of RBG.

(4) All of these previous dealings compromise any notion that RBG attempts to assert of that there ought to be no ring-fencing of the Singapore liquidation estate of RBG. It is not the case that the Court is faced with a perfect or pristine Singapore liquidation estate, untouched by any creditor whatsoever, ready to be remitted to the English liquidator of RBG. The previous dealings in the Singapore liquidation estate of RBG have destroyed any chance of a centralized liquidation in England and put a singular distribution of assets in England beyond reach.

(5) Even if Credit Lyonnais is unable as a matter of law to satisfy the Court that its claims arise out of liabilities incurred by RBG in Singapore, it is indisputable that Credit Lyonnais has substantial connection with Singapore and the goods in the Fujitrans warehouse. The goods that Credit Lyonnais had purchased were said to be located in Singapore and Bill Harris visited the Fujitrans warehouse on 12th March 2002 and performed a physical inspection of the goods in the warehouse with Lim Tau Hee who pointed to metal goods said to belong to Credit Lyonnais.

57 CL's submission assumed that the court has jurisdiction to disapply the first three propositions stated in *BCCI (No 10)* ([38] *supra*) which are implicitly acknowledged in s 377(3)(*c*), although subject to the qualifications therein. Mr Lee's article ([26] *supra*) also alluded to the court's inherent jurisdiction to apply s 377(3)(*c*) to a non-registered foreign company. I am of the view that there is no such jurisdiction. Any qualification of the first three propositions must be by legislation unless the first three propositions no longer apply in the first place.

58 I am reinforced in this view by the fact that the first limb of s 377(3)(*c*) states that the liquidator of a foreign company is only to recover and realise the assets of the foreign company in Singapore "unless otherwise ordered by the Court". As CL itself had stressed to me, that phrase does not apply to the second limb dealing with the payment of preferred creditors first and then the debts and liabilities incurred in Singapore before paying the net amount to the liquidator in the principal liquidation.

59 As for s 350(2), I have already stated my views thereon in the context of Issue 1(b) and I do not propose to repeat them.

60 Even if the court has the jurisdiction advocated by CL, CL's submission means, as I have intimated, that I should direct the Singapore liquidators to pay CL, as well as every other creditor in Singapore, even if the debt or liability is not incurred in Singapore. I see no reason why such creditors should be treated more favourably than those of a registered foreign company.

61 CL may have been the victim of a fraud but, if that is so, it is likely that other creditors were similarly deceived.

62 As regards the submission that CL may get nothing if it has to prove its claim in England, there are insufficient facts before me to say whether this is a real likelihood or a mere possibility. As it was, the liquidators had informed me that a claim had been filed in England against the auditors of

RBG for US$350m. In any event, the risk that CL may get nothing if it has to prove its claim in England is a risk which other unsecured creditors face if they choose not to reach a settlement with any of the liquidators of RBG. That is a factor which any claimant like CL must take into account before deciding whether to pursue its claim to the metal goods.

63 As for the assertion that other defendants in the RBG action have received some payment, this was because they were prepared to settle their claims. That option was available to CL but it chose a different path. As for Ampa Lines Pte Ltd, it was paid because it established its priority claim. As regards the assertion that the metal goods were located in Singapore, this is not a sufficient reason to allow CL to leap-frog over other unsecured creditors.

64 The Official Receiver submitted that no distinction should be drawn just because of the failure to be registered. This argument assumes that the liability to CL was incurred in Singapore, which, as I have found, is not the case. Otherwise, I accept that there is some merit in the argument that a distinction, in the context of the payment of unsecured creditors, should not be drawn solely on the basis of registration of the insolvent company.

65 The Official Receiver's second point was that it would be more cost-effective for such a matter to be decided locally even though this would still exclude a Singapore creditor of RBG whose debt is incurred outside of Singapore. I am of the view that the argument about cost-effectiveness is less persuasive. It is contrary to the principle that all unsecured creditors of an insolvent company should share *pari passu*. That principle applies where Singapore is the principal place of liquidation. I see no valid reason why it should not also apply to the liquidation of a foreign company. As I have mentioned, Mr Lee had said in his 2000 article ([26] *supra*) that ring-fencing is retrogressive and out-of-line with internationally-accepted standards of a fair and equitable cross-border insolvency regime. He reiterated this view in a subsequent paper delivered in 2003 entitled "Recent Developments in Insolvency Laws and Business Rehabilitation – National and Cross-Border Issues" (Asean Law Association Workshop VI, Paper V (December 2003)). He said (at p 295):

> The modern orthodoxy is that all assets of a foreign company should be remitted to the 'seat of liquidation' for centralised administration and distribution for the collective benefit of all creditors worldwide. Ring-fencing of assets is directly contrary to this philosophy, and will likely affect the credibility of Singapore's cross-border insolvency law. It may also lead courts in other jurisdictions to be more reluctant to give assistance to Singapore-based insolvency proceedings, in view of the less than cooperative stance taken by section 377(3)(c).

66 Also, Philip St J Smart, *Cross-Border Insolvency* (Butterworths, 1998) states at p 376:

> But it must never be thought that an ancillary winding up order creates a separate fund of assets reserved for, and to be divided up amongst, the English creditors. The ultimate objective of an ancillary winding up is to hand over the proceeds of the realisation of assets in England to the court conducting the main liquidation abroad. The desire, as far as possible, to have a single set of proceedings for distribution of assets is readily comprehensible.

67 In any event, it is for Parliament to decide whether ring-fencing should continue to apply at all and, if so, whether the distinction between registered and non-registered foreign companies should remain.

68 Consequently, my answer for Issue 3 is that the court cannot order CL's Proof of Debt to be admitted against the Singapore liquidation estate of RBG.

69 I will hear the parties on the terms of the orders I should make on the Transmission Application and the PD Application and on costs.