Beluga Chartering GmbH (in liquidation) and others *v* Beluga Projects (Singapore) Pte Ltd (in liquidation) and another(deugro (Singapore) Pte Ltd, non-party)
[2014] SGCA 14

Case Number	: Civil Appeal No 45 of 2013
Decision Date	: 26 February 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; V K Rajah JA; Judith Prakash J
Counsel Name(s)	: Sim Kwan Kiat and Ang Siok Chen (Rajah & Tann LLP) for the appellants; Goh Yeow Kiang Victor (liquidator-in-person) for the first respondent; Beverly Wee, Christopher Eng and Pruetihipunthu Tris Xavier (Official Receiver's Office) for the second respondent; Bala Chandran s/o A Kandiah (Mallal & Namazie) for the non-party; Professor Yeo Tiong Min SC as amicus curiae.
Parties	: Beluga Chartering GmbH (in liquidation) and others — Beluga Projects (Singapore) Pte Ltd (in liquidation) and another(deugro (Singapore) Pte Ltd, non-party)

Insolvency Law

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 2 SLR 1035.]

26 February 2014

Sundaresh Menon CJ (delivering the grounds of decision of the court):

1 This was an appeal against parts of the decision of the learned Judicial Commissioner ("the Judge") in Summons No 3435 of 2012 ("SUM 3435/2012"). The first appellant, a company incorporated in Germany, went into liquidation. It had certain assets in Singapore though the Judge found that it did not carry on business here. The central issue was whether its Singapore assets were to be remitted to the liquidators in Germany or whether they should be held to satisfy the claims of creditors in Singapore. The answer to this depended in large part on whether s 377(3)(*c*) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") applies to a foreign company that is in liquidation, even where it is not registered under s 368 of the Act and has not established a place of business or carried on business here. Section 377(3)(*c*) establishes a scheme for any local assets to be applied first to satisfy debts and liabilities incurred in Singapore before any residual amount is remitted to the foreign liquidator. The Judge held that s 377(3)(*c*) applied to the first appellant and ordered that the company's assets be applied towards the payment of a judgment debt incurred in Singapore. The Judge's decision is reported as *Beluga Chartering GmbH (in liquidation) v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (Deugro (Singapore) Pte Ltd, non-party)* [2013] 2 SLR 1035 ("the GD")

2 After hearing the parties and the *amicus curiae* Professor Yeo Tiong Min *SC* ("Prof Yeo"), we allowed the appeal and held that s 377(3)(*c*) did not apply to a foreign company such as the first appellant, which was not registered under the Act and did not carry on business or have a place of business here. We ordered that its assets in Singapore be remitted to its liquidators in Germany. We now give the reasons for our decision.

Background facts

3 The facts are comprehensively set out in the GD, and we summarise only the material background facts to the extent they help in providing the context for the legal issues discussed in these grounds.

The parties to the dispute

4 The first appellant, Beluga Chartering GmbH (in liquidation) ("Beluga Chartering"), is a company incorporated under the laws of Germany. It was the ship chartering arm of the Beluga group of companies ("the Beluga Group"). Mr Chee Yoh Chuang and Mr Abuthahir Abdul Gafoor, who are the Singapore liquidators of Beluga Chartering, are the second and third appellants (see further at [12] below). We refer to them in these grounds as "the Singapore Liquidators".

5 The respondents, Beluga Projects (Singapore) Pte Ltd ("Beluga Singapore") and Beluga Chartering Asia Pte Ltd ("Beluga Asia") (hereafter referred to collectively as "the Singapore Subsidiaries"), are companies incorporated in Singapore and are wholly owned subsidiaries of Beluga Chartering.

6 Beluga Singapore acted as Beluga Chartering's exclusive mercantile agent for Southeast Asia and Western Australia. Beluga Asia acted as Beluga Chartering's exclusive shipping agent. Beluga Chartering financed the setting up and operations of the Singapore Subsidiaries.

7 The non-party, deugro (Singapore) Pte Ltd ("deugro Singapore"), is a company incorporated in Singapore. deugro Singapore owed Beluga Chartering $1,587,294.31 ("the deugro Debt"). Part of this sum was for work done by the Singapore Subsidiaries on behalf of Beluga Chartering. The deugro Debt is Beluga Chartering's only asset in Singapore. [note: 1] Beluga Chartering in turn owed deugro Singapore €502,600 ("the deugro Liability"). This debt arose out of a contractual obligation owed by Beluga Chartering to deugro Danmark A/S ("deugro Denmark") to perform five voyages from Vietnam to Scotland pursuant to a booking note dated 5 January 2011. Beluga Chartering was unable to perform four of the five voyages as a result of which deugro Denmark claimed to have suffered damages amounting to €502,600. Upon Beluga Chartering informing deugro Denmark that it was unable to fulfil its remaining obligations due to pending insolvency proceedings, deugro Denmark invoiced Beluga Chartering for this amount and subsequently assigned this debt to deugro Singapore. [note: 2]

The winding up proceedings

8 On 16 March 2011, the Insolvency Court of the Bremen District Court placed Beluga Chartering into liquidation. Mr Edgar Grönda ("the German Liquidator") was subsequently appointed as Beluga Chartering's permanent insolvency administrator. [note: 3]

9 On 31 March 2011, the Singapore Subsidiaries filed a writ of summons in Suit No 227 of 2011 seeking a sum of $1,415,631.21 for agency work performed for Beluga Chartering. Judgment in default was entered against Beluga Chartering on 20 April 2011.

10 The Singapore Subsidiaries obtained an injunction against Beluga Chartering on 1 April 2011 prohibiting Beluga Chartering from dealing with or disposing of its assets in Singapore up to the value of $1,415,631.21. The injunction was still in effect when we heard this appeal.

11 On 2 September 2011, a winding up order was made against Beluga Asia and the Official Receiver was appointed as the liquidator. [note: 4] On 13 January 2012, a winding up order was made against Beluga Singapore. Mr Sim Guan Seng and Mr Goh Yeow Kiang Victor ("Mr Goh") of Baker Tilly

TFW LLP were appointed as the liquidators. [note: 5]

12 On 17 January 2012, Beluga Shipping GmbH & Co KG Ms "Beluga Persuasion", a German creditor of Beluga Chartering, filed Companies Winding Up No 5 of 2012 ("CWU 5/2012") in the Singapore High Court for a winding up order against Beluga Chartering on the grounds that Beluga Chartering was unable to pay its debts and that it was just and equitable for Beluga Chartering to be wound up as the Singapore Subsidiaries would otherwise be paid in preference to the other creditors of the company. On 17 February 2012, the High Court made an order winding up Beluga Chartering and appointed the Singapore Liquidators.

13 deugro Singapore agreed to pay the Singapore Liquidators the sum of US$849,647.42 in full settlement of deugro Singapore's liability to Beluga Chartering ("the deugro Asset"). It then took the position that the settlement put an end to issues of set-off and mutuality of the deugro Debt and the deugro Liability.

The summons for determination of questions

14 The Singapore Liquidators subsequently filed SUM 3435/2012 pursuant to s 273(3) of the Act for the determination of the following questions of law ("the Questions"):

(1) Whether the provisions of Part X of the Companies Act (Cap. 50) ("Part X"), in particular section 350(2) of the Companies Act (Cap. 50), apply to [Beluga Chartering] and its joint and several liquidators in Singapore without exception or modification, such that the joint and several liquidators are required to comply with Part X in carrying out their duties as liquidators of [Beluga Chartering].

(2) Subject to the determination of issue (1), whether the joint and several liquidators of [Beluga Chartering] in Singapore have the power, under Part X or general law, and are at liberty to repatriate [Beluga Chartering's] assets in Singapore to [Beluga Chartering's] German Insolvency Administrator (or elsewhere as directed by the German Insolvency Administrator or his authorised representatives), to be administered in accordance with German law, notwithstanding the existence of unsatisfied judgment debts against [Beluga Chartering] incurred in Singapore.

15 The application was filed to ascertain whether the Singapore Liquidators were entitled to remit the deugro Asset to the seat of the principal liquidation in Germany, to be dealt with in accordance with German insolvency law. The Singapore Subsidiaries opposed the application. Mr Goh (who appeared in person) attended on behalf of Beluga Asia and the Official Receiver represented Beluga Singapore. Mr Goh aligned himself fully with the Official Receiver's submissions both below and before us on appeal and we do not differentiate between the respondents in these grounds. deugro Singapore took no position on the application.

The decision below

16 The Judge first considered whether s 377(3)(*c*) applied to Beluga Chartering. Section 377(3)(*c*) imposes obligations on a Singapore liquidator to realise and recover assets in Singapore and pay any debts and satisfy any liabilities incurred here by the foreign company before remitting the net recovery to the foreign liquidator. This framework, which preserves assets in Singapore for the purpose of meeting claims here, was referred to as "the ring-fencing provision". The Judge concluded (at [103] of the GD) that s 377(3)(*c*) did apply to Beluga Chartering and his reasoning is more fully discussed below.

17 As s 377(3)(*c*) was found to apply to Beluga Chartering, the Singapore Liquidators would have to apply its assets in Singapore first to meet liabilities here unless the court had a common law power to disapply that statutory provision (at [175] of the GD). The Judge discussed the English case law on the scope of the common law ancillary liquidation doctrine and concluded that under that doctrine he did have a discretion to disapply aspects of the statutory insolvency regime and, in effect, to order the remission of assets to the liquidator in the home jurisdiction of the company notwithstanding s 377(3)(*c*) (at [219] of the GD).

18 The Judge then analysed the facts in some detail to decide how he should exercise his discretion. He held that Beluga Chartering was not carrying on business in Singapore (at [307] of the GD) but observed that it "came as close as a foreign company [could] to doing so without actually doing so" (at [314] of the GD). Although the Judge accepted that the usual course in the case of a foreign company which did not carry on business in Singapore would be to exercise the discretion by disapplying the ring-fencing provision (at [313] of the GD), he found that the Singapore Subsidiaries would suffer real prejudice and declined to do so (at [322]–[323] of GD). The effect of the Judge's decision was that the Singapore Liquidators were obliged to pay the judgment debt owed to the Singapore Subsidiaries before remitting any remaining proceeds to the German Liquidator.

The issues before this court

19 The contentions of the parties centred primarily on a single issue of statutory interpretation: whether s 377(3)(*c*) applied to a foreign company that was not registered under s 368 of the Act and which neither had a place of business nor carried on business in Singapore.

20 If s 377(3)(*c*) applied, the issue that followed would be whether the courts had a discretion to disapply the ring-fencing provision; if s 377(3)(*c*) did not apply, the court would then have to consider whether there was any common law discretion to ring-fence the assets for the satisfaction of debts incurred locally before ordering the remittal of the assets to the liquidators conducting the principal winding up. We overturned the Judge's decision because we were satisfied that s 377(3)(*c*) did not apply to Beluga Chartering. We therefore determined only the latter question.

The first issue: Did s 377(3)(*c*) apply to Beluga Chartering?

Was the application of s 377(3)(c) excluded by s 350(2)?

21 Beluga Chartering was wound up in Singapore under s 351(1). This provision is found in Division 5 of Part X of the Act. Section 350(2) provides as follows:

> **Provisions of Division cumulative**
>
> (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.*
>
> [emphasis added]

22 Section 350(2) has two limbs:

> (a) the first limb makes it clear that the provisions of Division 5 of Part X of the Act are in addition to provisions contained elsewhere that concern the winding up of companies; and

(b) the second limb imports all those powers that are available to the court or a liquidator when winding up a company into the scheme that governs the winding up of an unregistered company.

23 The Questions required the Judge to consider whether s 377(3)(*c*), which is found in Division 2 of Part XI, could apply to the winding up of an unregistered company under Division 5 of Part X. In this regard, the respondents relied on both limbs of s 350(2) to contend that a liquidator may exercise any power or do any act that may arise from provisions found in other parts of the Act or even in other laws.

24 The Judge held that the word "companies", which is found twice in conjunction with the words "winding up" in s 350(2), must be read generically to mean any corporate "legal person" in both instances and is not confined to "a company incorporated pursuant to the [Act]" as provided in the general definition in s 4(1) of the Act (at [107] of the GD). The Judge traced the legislative history of s 350(2) and observed that s 350(2) was originally derived from s 404 of the United Kingdom Companies Act 1948 (c 38) (UK) ("the UK 1948 Act"), which provided as follows:

> **404**. The provisions of this Part of this Act with respect to unregistered companies shall be in addition to and not in restriction of any provisions hereinbefore in this Act contained with respect to winding up companies by the court, and the court or 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 formed and registered under this Act …

25 The second limb of this provision referred to powers that "might be exercised or done by [the Court] or [liquidator] in winding up companies *formed and registered under this Act*" [emphasis added]. On the other hand, the reference to provisions "with respect to the winding up of *companies*" in the first limb did not expressly limit the meaning of companies to companies incorporated under the UK 1948 Act. The Judge therefore thought that the word "companies" in the first limb should be construed generically to mean corporate "legal persons" (at [109]–[110] of the GD).

26 Section 404 was later adopted as the model for s 314(2) of the Companies Act 1961 (No 6839 of 1961) (Vic) of the State of Victoria ("the Victorian 1961 Act"). At that time, the reference to "companies *formed and registered under this Act*" under the second limb was replaced with the unqualified word "companies" (at [111] of the GD). The Judge concluded that it must have been intended that the meaning of the second use of the word "companies" in s 314(2) should be assimilated with the first use of that word, and the word "companies" should therefore be taken as a consistent generic reference to corporate "legal persons" (at [112]–[113] of the GD).

27 Section 350(2) of the Act is identical to s 314(2) of the Victorian 1961 Act, and the Judge concluded that Parliament had intended s 350(2) to have the same scope as s 314(2) of the Victorian 1961 Act (at [114] of the GD). Accordingly, when s 377(3)(*c*) – a power applicable to the winding up of a corporate legal person – was read together with s 350(2), s 377(3)(*c*) could apply to a winding up instituted under Division 5 of Part X. The Judge further held that on any interpretation of the word "companies", s 350(2) would not prevent provisions which fell outside its scope from applying to a liquidation under Division 5 of Part X. The first limb of s 350(2) was phrased in the negative and in effect provided that any provision that was found outside Division 5 and related to the winding up of companies could apply to the winding up of an unregistered company. At the same time, it did not positively exclude the application of any other provision that might independently apply (at [116]–[117] of the GD).

28 The High Court had previously reached a different conclusion on the meaning of the word

"companies" in s 350(2) in *RBG Resources plc (in liquidation) v Credit Lyonnais* [2006] 1 SLR(R) 240 ("*RBG Resources*"). Woo Bih Li J disagreed with the submission that the word "companies" in the first limb should refer to all companies, whether or not incorporated in Singapore. He held (at [34]) that both uses of the word "companies" should be given the same meaning, namely, locally incorporated companies.

29 In our judgment, the word "companies" in s 350(2) should be read in accordance with the definition of "company" in s 4(1), that is, "a company incorporated pursuant to [the Act]". We prefer the interpretation that was applied by Woo J in *RBG Resources* to that which the Judge applied in the proceedings below.

30 The first limb of s 404 of the UK 1948 Act (see above at [24]) provided that the provisions in the Division did not restrict the application of "any provisions hereinbefore in this Act contained with respect to winding up companies by the court". The preceding provisions in the UK 1948 Act in Part V with respect to winding up concerned only companies that were registered in England or Scotland. We therefore doubt that the use of the word "companies" in the first limb of s 404 was originally intended to refer more generally to corporate "legal persons" rather than to "companies formed and registered under the [UK 1948 Act]". The essential purpose of the second limb of the provision was simply to confer on the court or liquidator of an unregistered company any powers that could have been exercised in the winding up of a company incorporated under the UK 1948 Act. There is nothing to suggest from this that when the second limb was amended to make reference only to "companies" in s 314(2) of the Victorian 1961 Act and s 350(2) of the Act, a broader meaning must have been intended.

31 If s 350(2) were read strictly, it may be argued that as the provisions of Division 2 of Part XI concern foreign companies that are not incorporated under the Act, s 377(3)(*c*) could not be imported pursuant to the second limb of s 350(2) so as to apply to the winding up of unregistered companies under Division 5 of Part X. But as the first limb of s 350(2) does not positively exclude the operation of provisions that might otherwise apply, we turn to consider the position as to whether s 377(3)(*c*) could apply on any independent basis to the winding up of Beluga Chartering.

Does s 377(3)(c) apply to a company that does not have a place of business or carry on business in Singapore?

32 Section 377(3) is found in Division 2 of Part XI of the Act and states as follows:

> **Cesser of business in Singapore**
>
> **377.** …
>
> (3) A liquidator of a foreign company appointed for Singapore by the Court or a person exercising the powers and functions of such a liquidator —
>
> > (*a*) shall, before any distribution of the foreign company's assets is made, by advertisement in a newspaper circulating generally in each country where the foreign company had been carrying on business prior to the liquidation if no liquidator has been appointed for that place, invite all creditors to make their claims against the foreign company within a reasonable time prior to the distribution;
> >
> > (*b*) subject to subsection (7), shall not, without obtaining an order of the Court, pay out any creditor to the exclusion of any other creditor of the foreign company; and

(*c*) 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.

33 Division 2 of Part XI is titled "*Division 2 — Foreign companies*" and the first provision immediately following the heading is s 365, which states:

Foreign companies to which this Division applies

365. 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.

34 Section 368, which is referred to in s 365, imposes an *obligation* on a foreign company to register "*before* it establishes a place of business or commences to carry on business in Singapore" [emphasis added]. The term "foreign company" is generally defined in s 4(1) of the Act 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.

In these grounds, we use the term "foreign company" generally to refer to any company that satisfies the definition under s 4(1) and "non-registrable foreign company" to refer to a company that is not under the obligation to comply with s 368.

The Judge's reasoning

35 The Judge reasoned that the wording of s 377(3), which enjoins a liquidator of a foreign company to do certain acts or imposes limits on the exercise of his powers, is broad enough to apply to any foreign company whether or not it was registered under s 368 (at [119] of the GD). This was incompatible with s 365 being interpreted as setting a condition precedent for the application of the provisions in Division 5, including s 377 (at [121] of the GD). The Judge accordingly undertook a meticulous analysis of the legislative history of s 365 and concluded that the section no longer operated as a condition precedent to the application of Division 2 of Part XI of the Act:

(a) The predecessor provision of s 365 of the Act, s 329 of the Companies Act (Cap 50, 1967 Rev Ed) ("the 1967 Act"), was in substance identical to s 344 of the Victorian 1961 Act, which was the first provision of Division 3 of Part XI of the Victorian 1961 Act concerning foreign companies which had a place of business or which carried on business within the state. Section 329 stated:

Foreign companies to which this Division applies

329. This Division applies to a foreign company only if it has a place of business or is carrying on business in Singapore.

The word "*only*" in s 329 made it clear that the section established a condition precedent to the application of all the provisions of Division 2 of Part XI of the 1967 Act. The provisions in that Division therefore applied *only* to foreign companies that satisfied the requirements of s 329 (at [134] of the GD).

(b) In 1984, s 332 of the 1967 Act, which imposed a requirement for a foreign company to register *within one month after* establishing a place of business or commencing to carry on business in Singapore, was amended by the Companies (Amendment) Act 1984 (Act 15 of 1984). Section 332 after the amendment obliged a foreign company to register *before* it established a place of business or commenced carrying on business in Singapore (at [136] of the GD). However, s 329 was not amended and continued to operate as a condition precedent to the application of the provisions of Division 2. But the obligation to register before commencing business was contained in s 332, which was placed in a Division that would only apply to a company under s 329 if it had established a place of business or commenced carrying on business here. This created a logical difficulty that prevented s 332 from operating as intended (at [137] of the GD).

(c) In 1986, the Companies (Amendment) Bill (No 9 of 1986) ("the 1986 Bill") was introduced to amend s 329, which had by then been renumbered as s 365. Section 332 was also renumbered as s 368. Clause 62 of the 1986 Bill, as originally drafted, amended s 365 to read as follows:

> **Foreign companies to which this Division applies**
>
> **365**. This Division applies to a foreign company which intends to have a place of business or to carry on business in Singapore.

The reformulated s 365 omitted the word "only" and because of this omission, the Judge thought it was no longer intended to operate as a condition precedent (at [138]–[140] of the GD).

(d) After the second reading of the 1986 Bill, it was referred to a Select Committee, which rephrased the language of s 365 to its present form. This was explained by the then Minister for Finance, Dr Richard Hu Tsu Tau ("Dr Hu") (see the *Report of the Select Committee on the Companies (Amendment) Bill (Bill No 9/86)* (Parl 5 of 1987, 12 March 1987) ("the Select Committee Report") in the following terms at p D 69:

> The purpose of this amendment is to better reflect the intention of the section by incorporating in it the concepts that appear in section 368 of the Act. There is at present a logical inconsistency between the existing section 365 and section 368 in that the latter section applies to a foreign company before it establishes a place of business or commences to carry on business here while existing section 365 states that the Division applies only if a foreign company has a place of business or is carrying on business in Singapore.

The amended 1986 Bill was passed by the Companies (Amendment) Act 1987 (Act 13 of 1987) ("the 1987 Amendment Act"). Section 365, as reworded, was meant to address the logical inconsistency between ss 365 and 368. But, in addition, the Judge thought that its effect was that s 365 would no longer operate as a condition precedent (at [143] of the GD).

(e) Because of the omission of the word "only", s 365 no longer prescribed that Division 2 of Part XI shall apply to the class of foreign companies specified and to no others; it merely described one of the classes of foreign companies to which Division 2 applies (at [145] of the GD). This interpretation was consistent with the drafting convention of the Act, which imposed condition precedents by using the word "only" (at [146] of the GD). The Judge thought that it

could not have been the legislative intent to create "circularity, loopholes and underinclusiveness" by creating another inapt condition precedent (at [147] of the GD).

The relationship between s 365 and s 377

36 We were unable to agree with the Judge's analysis and his conclusion. The Judge placed considerable emphasis on the deletion of the word "only" in s 365 by the 1987 Amendment Act. In our judgment, that deletion was a slender and ultimately inadequate thread from which to hang the Judge's conclusion that s 365 was thereafter no longer intended to operate as a condition precedent for the application of the provisions in Division 2.

37 Prior to the amendments made in 1987, s 365 unequivocally stated that Division 2 of Part XI applied *only* to a defined category of foreign companies – foreign companies that had a place of business or were carrying on business in Singapore. This much was recognised by the Judge (see [35(a)] above).

38 When s 365 was reworded by the 1986 Bill and subsequently further revised by the Select Committee, not the faintest indication was given to suggest that the amendment had been driven by anything other than the very specific objective of resolving the logical anomaly caused by the change in the required sequence of registration under s 332 in 1984. The Explanatory Statement to cl 62 of the 1986 Bill stated that the amendment to s 365 "*clarifies* the operation of Division 2 of Part XI" [emphasis added], with no mention at all of any legislative intent to significantly expand its reach and operation. Similarly, it is clear from Dr Hu's statements in the Select Committee Report that the only reason for the change was to ensure that s 365 would be read consistently with s 368. In keeping with this, the words "before it establishes a place of business or commences to carry on business in Singapore" in s 365 were lifted directly from s 368(1), and s 365 further makes reference to compliance with s 368 and registration under Division 2.

39 As Dr Hu explained, the limited purpose of amending s 365 was simply to incorporate the concepts found in s 368 into the former section by tying both provisions together. There was therefore no legislative material to support the Judge's interpretation that the word "only" in s 365 was deliberately deleted in order to alter the character of that section as a condition precedent such that Division 2 would thereafter apply to any foreign company, including one that was incorporated outside Singapore and had no presence or place of business here. The Judge's interpretation of s 365 effected a substantial expansion of the ambit of Division 2. We considered it implausible that Parliament would have effected such an important change through a side wind without any discussion.

40 We sympathise with the Judge in respect of the difficulties he faced in construing s 365 in accordance with its literal terms. On the one hand, as the Judge noted, s 365 is titled "Foreign companies *to which this Division applies*" [emphasis added]. It also contains the words "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". These words identify the characteristics of the foreign companies to which Division 2 applies and by inference, exclude other classes of foreign companies.

41 On the other hand, as the Judge quite correctly pointed out (at [122]–[124] of the GD), an interpretation that s 365 operates as a condition precedent for the application of the rest of the provisions in Division 2 would create an apparent circularity and defeat the legislative purpose of the whole of Division 2. This is because the obligation to register under s 368 is itself found in Division 2 and would *prima facie* apply only to foreign companies that already meet the requirements of the

condition precedent in s 365. The condition precedent in s 365, on the other hand, is triggered only after the foreign company has complied with s 368 and is registered under Division 2. This seems to give rise to the untenable situation that a foreign company is under no obligation to comply with s 368 until it has complied with the requirement to register under s 368.

42 The matter of the relationship between ss 365 and 368 had arisen in *RBG Resources*. That case concerned the liquidation of a company incorporated in England, RBG Resources plc ("RBG"). A winding up order was made both in England and in Singapore, and a creditor sought an order for RBG's debts in Singapore to be paid from the company's Singapore assets before the assets were paid to the English liquidation estate for distribution. It was common ground that RBG was not registered under Division 2 of Part XI, and the creditor conceded that for this reason s 377(3)(*c*) did not apply to RBG (at [25]). Although the relationship between ss 365 and 368 was not the subject of detailed argument, Woo J observed (at [31]) that the obligation under s 368 was to lodge documents for registration prior to establishing a place of business or commencing business here. Woo J thought that a company that failed to do so would be committing a continuing offence under the Act. However, he also thought (at [31]) that if a foreign company was not registered under the Act at the time it went into liquidation, then by virtue of s 365, none of the provisions in Division 2 of Part XI of the Act, including s 377(3)(*c*), would apply to it.

43 The Judge recognised that apart from the analytical circularity between ss 365 and 368, the interpretation placed on s 365 in *RBG Resources* also created an unanticipated practical loophole in s 365. If a company that ought to have registered but did not register could escape the application of the provisions of Division 2, it would mean that the very companies that were intended to fall under the scope of s 368 could evade their obligations by deliberately refraining from registering (at [124] of the GD). Section 365 therefore would appear to be underinclusive, and this would severely undermine Parliament's purpose in regulating companies that have some degree of connection with Singapore.

44 Much as this might seem reasonable, we did not consider that the court could deal with the potential underinclusiveness of the section by resorting to the opposite extreme and concluding that Parliament must therefore have intended an overinclusive scope instead.

45 We turn to the Judge's observation that in as much as Parliament amended s 365 precisely for the purpose of solving the problem created by an inapt condition precedent, it could not then have intended to replace this by yet another inapt condition precedent (at [147] of the GD). Our difficulty with this was that it presumed Parliament was aware that the reworded s 365 could be read to give rise to yet another difficulty of a similar kind as that which it had set out to cure. But there was no basis for this presumption. If this was indeed the case, as Prof Yeo observed, it would seem counterintuitive for the Select Committee to have made the conscious effort to specify a condition in s 365 that was referable to the requirement of registration in s 368. The same result could instead have been achieved by simply providing in clear and unmistakable terms that Division 2 of Part XI applied to all foreign companies.

46 Additionally, we were concerned that the wide interpretation that the Judge placed on s 365 would give rise to problems of extraterritoriality. Indeed, this would have represented a significant policy shift that Parliament must have been aware of had it intended to extend the scope of Division 2 of Part XI. The Judge was of the view that "[i]nsolvency law [held] the key to addressing this over inclusiveness" (at [149] of the GD). He observed that the court had the discretion to decide whether a winding up order should be issued against a foreign company and the discretion to disapply substantive aspects of Singapore's insolvency law in appropriate circumstances (at [150]–[151] of the GD). However, there are other problems that arise from the Judge's interpretation.

47 The phrase "foreign company" in any provision under Division 2 could conceivably extend to every foreign company, whether or not it had any connection to Singapore. Apart from the obligation to register that is contained in s 368, and which expressly applies only to a foreign company before it establishes a place of business or commences to carry on business in Singapore, all foreign companies would be subject to a host of other regulatory obligations under Division 2 including:

(a) the obligation to have a registered office in Singapore to which all communications and notices may be addressed (s 370);

(b) the obligation to lodge particulars with the Registrar of any changes or alterations in the constitutional documents or details of the company (s 372);

(c) the obligation to lodge with the Registrar balance sheets after conducting annual general meetings (s 373); and

(d) being potentially subject to penalties for failure to comply with any provision in Division 2 (s 386).

48 Taking the Judge's reasoning to its logical conclusion, the implications of interpreting s 365 as a descriptive provision would go well beyond insolvency law. There is no rule of insolvency law that could be invoked to curtail this overreaching extraterritorial effect. This is untenable. Further, there is a general statutory presumption against extraterritoriality and there was nothing to displace this presumption here. Having regard to all these considerations, we were unable to concur with the Judge that Parliament must have intended that Division 2 of Part XI would apply to all foreign companies.

49 Although the drafting of s 365 is infelicitous, Parliament's intention may be given effect through a construction that accords with the purpose of the amendment of the section in 1987. On this reading, s 365 would operate to apply the provisions of Division 2 of Part XI to all foreign companies that have complied or *are liable to comply* with the registration requirements under s 368.

50 Section 365 extends the application of Division 2 to a foreign company "which, before it establishes a place of business or commences to carry on business in Singapore, *complies* with s 368 *and is registered* under [Division 2]" [emphasis added]. The first logical difficulty that we have alluded to above (see [41]) would be avoided if s 368 were read as applying independently of the condition precedent laid down in s 365. In other words, a company would be obliged to comply with s 368 if it comes within its terms without any requirement that s 365 must first have been satisfied. This is consistent with the principle of statutory interpretation that an absurd interpretation or one that leads to unworkable consequences that are patently contrary to Parliament's intent should be avoided.

51 But s 365 also incorporates a number of otiose references which came about as a result of the efforts of the Select Committee to closely tie the language of the section to s 368, including the reference to a foreign company "before it establishes a place of business or commences to carry on business in Singapore" and the disjunctive obligations to comply with s 368 *and* register under Division 2. Parliament's intention, as evidenced by the original version of s 365 as well as the proposed rewording of that section in the 1986 Bill prior to the amendments by the Select Committee (see above at [35(c)]–[35(d)]), was that the provisions in Division 2 should apply to companies which *intended* to establish a place of business or carry on business in Singapore and would have been liable to register under s 368 of the Act. The interpretation that would be most consistent with Parliament's purpose would be to read the references in s 365 to prior compliance with s 368 and registration under the Division as including a continuing obligation to comply with and register under s 368 as long

as a company comes within the terms of s 368. This means that a foreign company falls within the scope of s 365 if is subject to s 368 but has not complied with the registration requirements.

52 In summary, s 365 would operate as a condition precedent for the application of all provisions in Division 2 of Part XI save for s 368. It would be triggered when a foreign company:

(a) has actually been registered under s 368(1); or

(b) comes under the liability to register under s 368(1) because it intends to establish a place of business or commence carrying on business in Singapore, this being a liability that continues even after it actually does commence business or establishes a place of business here without being registered.

Did s 377(3)(c) apply to Beluga Chartering?

53 On our interpretation of s 365 above, s 377(3)(*c*) would apply to Beluga Chartering only if it was under the obligation to register under s 368. The Judge made an unequivocal factual finding (at [307] of the GD) that Beluga Chartering never carried on business in Singapore under the definition in s 366 of the Act or on any broader meaning of the term and was not obliged to register under s 368. The respondents did not appeal against this finding of fact. Counsel for the second respondent, Ms Beverly Wee ("Ms Wee"), conceded that the respondents had not appealed against the Judge's finding in this regard, but submitted that the activities of Beluga Chartering warranted a finding that Beluga Chartering was carrying on business in Singapore through a wholly owned subsidiary or proxy and had come as close as a foreign company could do so without actually doing so.

54 While we accepted that a foreign company may be carrying on business through an agent or subsidiaries within the definition in s 366 of the Act as a matter of fact or law, it was not open to us at this juncture to make a finding contrary to the Judge's holding that Beluga Chartering was not doing business in Singapore. The Judge had carefully considered the corporate structure of the Beluga Group's operations in Singapore in deciding that Beluga Chartering, the parent company, did not carry on business in Singapore (at [308]–[312] of the GD); on the facts before us, we saw no reason to come to a different conclusion. We therefore concluded that Beluga Chartering was not carrying on business in Singapore and was not obliged to register under s 368. Section 377(3)(*c*) therefore did not apply to the Singapore Liquidators of Beluga Chartering.

The second issue: Should the Singapore assets of Beluga Chartering nonetheless be ring-fenced to satisfy its local liabilities?

55 It followed from our decision on the first issue that the winding up of Beluga Chartering, an unregistered foreign company, was governed primarily by the provisions in Division 5 of Part X and the Singapore Liquidators were not subject to the obligations under s 377(3)(*c*). There is no express statutory provision dealing with the relationship between a Singapore liquidator and a foreign liquidator, and Beluga Chartering's application to remit the Singapore assets to Germany therefore had to be decided on the basis of the common law.

Does the common law ancillary liquidation doctrine apply in Singapore?

56 The common law ancillary liquidation doctrine was described in these terms by Vaughan Williams J in *In re English, Scottish, and Australian Chartered Bank* [1893] 3 Ch 385 ("*English, Scottish, and Australian Chartered Bank*") at 394:

> … one must bear in mind the principles upon which liquidations are conducted, in different countries and in different Courts, of one concern. One knows that where there is a liquidation of one concern the general principle is - ascertain what is the domicil of the company in liquidation; let the Court of the country of domicil act as the principal Court to govern the liquidation; and let the other Courts act as ancillary, as far as they can, to the principal liquidation. …

57 The doctrine does not mandate any single course of action and could encompass a broad range of orders that would assist the principal liquidation: see Lloyd Tamlyn, "Ancillary Winding Up" in *Cross Border Insolvency* (Richard Sheldon QC gen ed) (Bloomsbury Professional, 3rd Ed, 2012) ("*Cross Border Insolvency*") ch 7 at para 7.16.

58 We agreed with the Judge (see [41] of the GD) that the ancillary liquidation doctrine is a part of the Singapore common law and that the court has a power under this doctrine to order the local liquidator to remit assets that are gathered in locally to the principal place of liquidation. Indeed, this holding was not disputed by the parties on appeal. We were satisfied that the ancillary liquidation doctrine is historically entrenched as part of the common law in a number of jurisdictions: see *In re Commercial Bank of South Australia* (1886) 33 Ch D 174 at 178; *English, Scottish, and Australian Chartered Bank* at 394; *Re Alfred Shaw & Co Ltd ex parte Mackenzie* (1897) 8 QLJ 93 at 96; *Re National Benefit Assurance Co* [1927] 3 DLR 289. The existence of this common law doctrine was also endorsed by Sir Richard Scott V-C in *In re Bank of Credit and Commerce International SA (No 10)* [1997] 1 Ch 213 ("*Re BCCI*") and more recently by both the majority and minority of the House of Lords in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 ("*Re HIH Insurance*").

59 This doctrine was recognised as part of the law of Singapore by Murison CJ in the early Straits Settlements case of *Re Lee Wah Bank Ltd* [1926] MC 5. The case involved the question of whether the court should direct that sums owed to a bank incorporated in Hong Kong be transferred to the liquidators in Saigon or liquidators in Hong Kong. Murison CJ cited the general principle laid down by Vaughan Williams J in *English, Scottish, and Australian Chartered Bank* which we have referred to above (at [56]) and held that as the domicile of the bank was Hong Kong, the funds should be paid to the Hong Kong liquidator. Similarly, in *RBG Resources*, Woo J accepted that the common law ancillary liquidation doctrine applied in Singapore, and directed that the Singapore liquidators were at liberty to transmit the Singapore assets of RBG to the English liquidators.

60 There is thus ample authority for the proposition that the common law ancillary liquidation doctrine continues to exist alongside the statutory insolvency regime where no other statutory provision has been made. This was described by Scott V-C in *Re BCCI* (at 246C–D) as a proposition that rested on an "accretion of judicial decisions", and we saw nothing in the Act to exclude the operation of the doctrine to a non-registrable foreign company.

Does the court have the discretion to ring-fence local assets for locally incurred debts notwithstanding the ancillary liquidation doctrine?

61 The obligation of a Singapore liquidator of a foreign company (to which s 365 applies) under Division 2 of Part XI to "ring-fence" assets to pay off debts and satisfy liabilities incurred in Singapore is a purely statutory obligation under s 377(3)(*c*) and has no immediate common law counterpart. Ms Wee submitted that if we held that s 377(3)(*c*) did not apply, the respondents' fall-back position was that the court had a discretion to refuse to remit the assets of a non-registrable foreign company until its local creditors had been paid. The question for us was whether such a discretion could exist as part of the common law ancillary liquidation doctrine notwithstanding the statutory regime.

62 As Ms Wee's submission raised the relationship between the common law and the statutory

framework, we were invited to consider the contours of the ancillary liquidation doctrine and how the courts saw this issue in that context. This was examined by Scott V-C in *Re BCCI*. An application was made by the English liquidators of an insolvent bank incorporated in Luxembourg seeking directions as to whether certain provisions should be made for English creditors before transmitting the proceeds of realisation in England to the Luxembourg liquidators. The set-off rules recognised by the Luxembourg insolvency regime would have produced a very different practical effect from the application of the set-off rule under r 4.90 of the English Insolvency Rules 1986 (SI No 1925 of 1986) (UK), which permitted a self-executing offset between debts owed by and debts owed to the insolvent bank such that only the net balance would be provable in the liquidation.

63 Scott V-C accepted that the power to direct liquidators to transmit funds to the principal liquidators under the ancillary liquidation doctrine was well-established as part of the common law (at 247F–G). He also held that the court had no inherent power to disapply the provisions of an applicable statutory insolvency scheme (at 239F). After a detailed survey of the relevant line of authorities, Scott V-C set out a number of propositions of law (at 246C–F) which bear reproducing as follows:

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

64 This passage was cited by Woo J in *RBG Resources* (at [38]–[39]). Propositions (1) to (3) are generally uncontroversial, but proposition (4) appears to have been clearly set out as a statement of the law for the first time in *Re BCCI*.

65 Scott V-C concluded that r 4.90 was a substantive rule of English law and that the cases had not established the power of a court to disapply a substantive rule forming part of the English statutory insolvency scheme (at 247G–H). Even if the court had the power to disapply rule 4.90, Scott V-C would have declined to exercise his discretion to do so (at 249D–E).

66 More recently, the doctrine was considered by the House of Lords in *Re HIH Insurance*, though no clear consensus emerged as to its conceptual basis or content. *Re HIH Insurance* concerned the liquidation of a group of Australian insurance companies with assets situated in England. These assets mainly comprised reinsurance claims on policies taken out in the London market. A winding up order was made by a New South Wales court in 2001 and provisional liquidators were also appointed in England to realise the English assets. In 2005, an Australian judge sent a letter of request to the English High Court pursuant to s 426(4) of the Insolvency Act 1986 (c 45) (UK) ("UK Insolvency Act

1986") – which applies only to a country designated by the Secretary of State as a "relevant country" (which included Australia) – asking that the provisional liquidators be directed to remit the realised assets to the Australian liquidators for distribution. Sections 426(4) and 426(5) provide:

> **426 Co-operation between courts exercising jurisdiction in relation to insolvency.**
>
> …
>
> (4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> (5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.
>
> In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.

67 Under Australian insolvency law, the assets of an insurance company in liquidation would have to be applied first to the discharge of debts payable in Australia, and the proceeds of reinsurance policies had to be applied to discharge insurance liabilities. This differed from the position under English insolvency law.

68 The House of Lords unanimously ordered that the English assets should be remitted to Australia. However, the two leading speeches, delivered by Lord Hoffmann and Lord Scott of Foscote respectively, set out two different conceptual approaches to the common law doctrine.

69 Lord Hoffmann observed that the judicial practice of treating an English winding up of a foreign company as ancillary to the winding up by the court of its domicile was based on the principle of modified universalism (at [7]–[8]). The power to remit assets to the principal liquidator was established long before the UK Insolvency Act 1986 (at [27]) and was exercised whenever there was a foreign jurisdiction more appropriate than England to deal with all outstanding questions in the winding up; s 426 was not involved in the application before the court (at [28]). This judicial practice of ordering remittal was inconsistent with the broad proposition that creditors could not be deprived of their statutory rights under the English insolvency scheme and it followed that the court may, under the ancillary liquidation doctrine, "disapply" parts of the English statutory scheme by authorising the foreign liquidator to perform certain actions under foreign law, which may or may not be the same as English law (at [19]). Any differences in the English and foreign schemes of distribution therefore went only to discretion (at [24]). Lord Hoffmann concluded that it would not offend any principle of justice or public policy for the assets to be remitted to Australia under the common law power (at [31] and [34]). Lord Walker of Gestingthorpe agreed with Lord Hoffmann.

70 Lord Scott held that the exercise of the s 426 power to direct the remission of assets to Australia did not entail the disapplication of the English statutory insolvency scheme as s 426 was itself part of the English statutory scheme (at [59]). Lord Scott thought that the English courts had a statutory obligation to apply the English statutory scheme and had "no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme" (at [59]). The English court was not relieved of its obligation to apply English law to the resolution of any issue

arising in the winding up (at [60]), and under the common law, a remittal would be refused if there was a class of preferential creditors under the principal winding up who would not have priority under English law (at [62]). However, Lord Scott was willing to accede to the request made by the Australian courts by virtue of the court's power under s 426, which permitted remittal even in the above circumstances (at [62]).

71 Lord Neuberger of Abbotsbury thought that the existence of an inherent common law jurisdiction to remit English assets to foreign liquidators in jurisdictions that were not designated as relevant countries would "sit uneasily with the provisions of section 426(4) and (5)" as it would almost thwart the statutory purpose of having designated countries under s 426 (at [76]). However, in a subsequent extrajudicial speech, Lord Neuberger expressed the tentative view that there was "considerable attraction in the Hoffmann-Walker view" (see Lord Neuberger, "The international dimension of insolvency" (2010) 23 Insolvency Intelligence 42 at 44).

72 Lord Phillips of Worth Matravers allowed the appeal on the basis that the court had the jurisdiction under ss 426(4) and 426(5) to accede to the request of the Australian court (at [37]). He expressly declined to take a position on the issue of whether the court would have had a discretion under the common law to order remittal of assets in the circumstances of the appeal (at [44]).

73 In summary, Lord Hoffmann thought that courts did have a discretion under the common law premised on the principle of modified universalism to order assets collected locally in the ancillary liquidation to be remitted to the liquidators of the principal liquidation regardless of any statutory provision and that s 426 *extended* this. Lord Scott, on the other hand, thought that the courts, in exercising their power under the common law ancillary liquidation, had no discretion to disapply the English statutory insolvency regime or deprive creditors of any of their statutory rights.

74 The parties did not refer us to any Commonwealth case that has directly applied Lord Hoffmann's approach to the common law ancillary liquidation doctrine. Prof Yeo and counsel for Beluga Chartering, Mr Sim Kwan Kiat ("Mr Sim"), both submitted that Lord Scott's approach restated the existing common law, while Lord Hoffmann's approach represented an incremental development of the law. In keeping with this, in the decision of the English High Court in *In re Alitalia Linee Aeree Italiane SpA* [2011] 1 WLR 2049, Newey J observed (at [54]) that in the light of the division of opinion in the House of Lords, *Re HIH Insurance* could not be taken as authority for the proposition that the common law power extended to permit the court to direct remittal of assets to a foreign liquidator where the assets would be distributed other than in accordance with English law.

75 The aspirational principle of modified universalism as articulated by Lord Hoffmann has featured in a number of cases on different aspects of cross-border insolvency (see the Privy Council decision in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2007] 1 AC 508 ("*Cambridge Gas*"); the Court of Appeal decision in *Rubin and another v Eurofinance SA and others* [2011] 1 Ch 133 (reversed by the Supreme Court in *Rubin and another v Eurofinance SA and others (Picard and others intervening)* [2013] 1 AC 236) as well as in academic commentary (see Gabriel Moss QC, ""Modified universalism" and the quest for the golden thread" (2008) 21 Insolvency Intelligence 145; Philip Smart, "Cross-border insolvency cooperation" (2008) 124 LQR 554; Wee Meng Seng, "A lost opportunity towards modified universalism" (2009) 1 LMCLQ 18). This principle, as recognised by Lord Hoffmann in *Re HIH Insurance* (at [7]), is nevertheless not a legal rule.

76 The Judge's decision was premised on an acceptance of Lord Hoffmann's approach to the common law ancillary liquidation doctrine. Our holding that the ring-fencing provision found in s 377(3)(*c*) is inapplicable to Beluga Chartering however, renders moot the issue of whether Lord Hoffmann's

or Lord Scott's approach represents what the common law *is*, or indeed, what the common law *ought* to be. In the absence of clear authority, we prefer to reserve our opinion on this.

77 What is clear is that the traditional common law position gives the court a general power to order the remittal of realised assets to the principal place of liquidation. But it does not have the power to authorise the local liquidator to ignore the statutory insolvency scheme so as "to deprive creditors proving in a [local] liquidation of their statutory rights under that scheme" (*per* Lord Scott in *Re HIH Insurance* at [59]).

78 It was common ground that the Singapore Subsidiaries were unsecured creditors and did not enjoy any other priority under the Act. Their only claim to a statutory priority for the judgment debt was the ring-fencing provision in s 377(3)(*c*) which we have held did not avail them. No evidence was put before us that a general *pari passu* distribution would not be ordered in the German liquidation or that a different result would ensue under the German insolvency regime. Applying Lord Scott's traditional approach to the scope of the power of remittal, it followed that we had the power to hold that the Singapore Liquidators were at liberty to remit the Singapore assets to the German Liquidator for distribution. There was no question of "disapplying" any statutory insolvency provision or depriving the Singapore Subsidiaries of any vested rights under the Act or other written law.

79 As a matter of interest and to provide a comparison, on Lord Hoffmann's approach, remittal of assets to a foreign liquidator would be permitted even if the distribution in the foreign liquidation differs from that mandated by Singapore's statutory insolvency scheme, as long as it is not contrary to principles of justice or local public policy. The mere fact that the foreign insolvency scheme differs from the local insolvency scheme would not suffice to constitute injustice. In a case such as the present where there was no indication that the scheme of distribution would differ and the only known creditors (namely, the Singapore Subsidiaries) were not preferential creditors and had no priority under the local statutory scheme, there would have been no basis for not remitting the local assets. Hence, regardless of which approach was taken, it was clear to us that the ancillary liquidation doctrine would result in remittal being ordered.

80 We return here to Ms Wee's submission that the court should exercise a discretion that was said to exist under the common law – one that paralleled the ring-fencing provision in s 377(3)(*c*) – to direct that assets would be remitted to the principal place of liquidation only after making provision for locally incurred debts and liabilities. We could see no basis for this. There is certainly nothing in the development of the common law ancillary liquidation doctrine to warrant a view being taken that a statutory scheme on priority can be applied by analogy under the common law doctrine to situations that were not contemplated by Parliament. We were therefore unable to accede to the proposition that the court had a discretion under the common law that extended to a *positive* power to ring-fence assets even when there was no statutory basis for doing so. It has never been thought that the court has the power to confer on a creditor a priority that it does not otherwise have under the statutory regime, and Ms Wee could not point us to any common law rule to this effect. All the cases have been concerned with the converse proposition – whether a statutory provision may be disapplied to achieve a universal scheme of distribution. Moreover, any impetus as presently exists is towards universalism rather than to favour local creditors or to confer a preference on locally incurred debts. As Scott V-C observed in *Re BCCI* (at 242C–D), "[i]t is basic to an English winding up that English creditors cannot be ring-fenced and treated more favourably than foreign creditors".

81 We were also urged to consider that the statutory framework on international insolvency in Singapore has failed to keep pace with commercial and business realities. However, insolvency law involves a multitude of social and economic considerations and compromises. Moreover, this is an area that is presently being actively reviewed. The Insolvency Law Review Committee ("the Law Review

Committee") recently concluded its review of Singapore's bankruptcy and corporate insolvency regimes and submitted a report dated 4 October 2013 ("the Insolvency Review Report"). Chapter 11 sets out the Law Review Committee's summary of the present law on cross-border insolvency, and notes that there is uncertainty over the common law doctrine of "modified universalism" and that there are few express legislative provisions for matters arising in cross-border insolvency: see p 230 of the Insolvency Review Report. The Law Review Committee has recommended the adoption of provisions of the UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) ("the Model Law"), which will set out a comprehensive framework for international cooperation in insolvency matters and provide clarity and certainty: see pp 234-235 of the Insolvency Review Report. We note in passing that the provisions of the Model Law would have furnished a clear framework for the resolution of the issue that arose in the present appeal: see p 233 of the Insolvency Review Report; Arts 21 and 22 of the Model Law.

82 In the circumstances, we declined to accept Ms Wee's suggestion that we could as a matter of the common law, impose a ring-fencing provision analogous to s 377(3)(*c*).

83 We therefore held that we ought to exercise our power to direct the Singapore Liquidators to remit the realised assets of Beluga Chartering in Singapore to the German Liquidator, without first satisfying the judgment debt owed to the Singapore Subsidiaries.

An issue on the side: What is the effect of foreign insolvency proceedings on claims before the Singapore court?

84 Our decision on the foregoing issues was sufficient for us to dispose of this appeal. However, it may be helpful for us to make a few observations on an issue that arose in the course of the arguments, namely the position of a foreign liquidator where local liquidation proceedings are not initiated. This did not arise on the facts of this appeal because a winding up order was made in Singapore.

85 If an insolvent foreign company – whether registered or unregistered – is not concurrently wound up in Singapore, the application of the ancillary liquidation doctrine does not arise, and any issues that arise before the Singapore courts would instead involve questions of recognition. There are broadly two types of recognition that the Singapore courts may be requested to grant: (i) recognition of the title of the foreign liquidator and (ii) recognition of the foreign proceedings.

Recognition of the title of the foreign liquidator

86 The law of the place of incorporation of a company governs an agent's authority to act on behalf of the company, and if a liquidator is properly appointed under that law, his authority and title to act on behalf of a company should be recognised: see Rule 179 of *Dicey, Morris and Collins on The Conflict of Laws vol 2* (Sweet & Maxwell, 15th Ed, 2012) at para 30-102; Ian Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 4th Ed, 2009) at paras 30-057 to 30-058; *Cambridge Gas* at [20]; *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] 1 Ch 513.

87 Unlike personal bankruptcy proceedings, a winding up order does not automatically vest the assets of the company in the liquidator; instead, the legal title to assets remains with the company (albeit impressed with a statutory trust), but the power of the board of directors to deal with the company's assets is displaced in favour of the liquidator. Accordingly, a liquidator of a foreign company will be recognised as the representative of the company for the purposes of getting in and realising the company's worldwide assets and there would generally be no basis for a Singapore court to decline to recognise the liquidator's claim to assets belonging to the company under general

principles of property law.

88 This general principle has been applied by the High Court. In *Re Cosimo Borrelli and another* Originating Summons No 762 of 2010 (unreported), the High Court granted a declaration that a provisional liquidator of a company incorporated in the Cayman Islands was authorised and empowered to recover and take possession of the company's movable and immovable assets. Further, in *Re Aero Inventory (UK) Limited (in administration)* Originating Summons No 127 of 2011 (unreported), the High Court ordered that the administrators of an English company would have power over the company's property and assets in Singapore as they had under English law pursuant to an administration order made by the English High Court.

Recognition of foreign winding up proceedings

89 We turn next to the recognition of the foreign proceedings or of the effect the initiation of such proceedings would have. We limit our discussion in this context to the question of whether a stay of execution that is consequential on a foreign winding up order would extend to assets located in Singapore such that creditors here would not be entitled to execute against or attach these assets.

90 A statutory moratorium on the commencement or continuation of legal proceedings and process triggered by a winding up order does not generally have extraterritorial effect: see *In re Oriental Inland Steam Co; Ex p Scinde Railway Co* (1873-74) LR 9 Ch App 557 at 558-560 *per* James and Mellish LJJ; *In re Vocalion (Foreign), Limited* [1932] 2 Ch 196 at 201-202. This is premised on the fundamentally territorial nature of jurisdiction. It follows that under the common law rules of recognition, a court would not recognise the jurisdiction of a foreign legislature or court to impose a stay on any proceedings in the forum court and so would not be bound by any such stay: see *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 at 117-118.

91 What then would be the position of creditors bringing execution proceedings in the local courts in the absence of winding up proceedings being taken here? We were not referred to any English authority directly on point, although the issue has arisen tangentially in a number of cases.

92 In *Firswood Ltd v Petra Bank* [1996] CLC 608, the assignee of a creditor of an insolvent Jordanian bank attempted to obtain a judgment against the bank in England, and to bypass the liquidator in the process. The issue before the court was whether the creditor could obtain leave to serve the writ out of jurisdiction. The English Court of Appeal declined leave and observed (at 618) that the assignee had no higher claim to priority than the creditor and the creditor would, by contracting with a Jordanian company, have expected that Jordanian law would apply to govern priorities in the event of the company's insolvency. The court therefore held (at 618) that it would not permit parallel proceedings in England when the only purpose was for the assignee to obtain an English judgment and to "deprive the liquidator of assets for distribution to the general body of creditors".

93 In *Felixstowe Dock & Railway Co v United States Lines Inc* [1989] QB 360, a company incorporated in the United States was placed under Chapter 11 proceedings pursuant to the United States Federal Bankruptcy Code and a restraining order was made to enjoin the commencement or continuation of judicial proceedings against the company or the issuance of legal process. English and European creditors of the company obtained *Mareva* injunctions in England prohibiting the removal of the company's assets from the jurisdiction, and the company filed summonses to set aside the injunctions. Hirst J was not convinced that the fair and equitable treatment of the general body of creditors would be frustrated if the assets in England were not released for the benefit of the Chapter 11 proceedings (at 386A–B). Instead, the applicant creditors would suffer substantial prejudice as

they would not derive any benefit if the funds were remitted to the United States and used to keep the company as a going concern (at 387A–D). However, Hirst J imposed a condition that the funds could not be released until after the expiry of a reasonable period of notice to the company, which would then be free to apply to the court for a winding up order (at 386B–D). It was therefore evident that Hirst J did not think that the creditors should be wholly free to execute their judgment against the company's assets in England at the expense of the remaining body of creditors.

94 The two cases in the preceding paragraphs may be compared with *In Re Suidair International Airways Ld (application of Vickers-Armstrong, Ld)* [1951] 1 Ch 165. A provisional winding up order was issued against the debtor company in South Africa. Six days later, a judgment creditor – who had knowledge of the winding up order – took out garnishee proceedings against the company's bank account in England and two writs of *fieri facias* for the seizure of the company's goods. A final winding-up order was made in South Africa and subsequently also in England. The creditors applied for an order that they were entitled to retain the benefit of the two writs against the English liquidator. Wynn-Parry J held that although the execution would have been void under South Africa law as it had been put in force after the presentation of the winding up petition, the English court could only administer the assets of the company within its jurisdiction under English law (at 173). Wynn-Parry J decided to exercise his discretion under s 325(1)(c) of the UK 1948 Act to allow the creditor to retain the benefit of its execution against the liquidator in the light of the company's conduct in impeding the creditor from obtaining the fruits of its judgment (at 172). Although the result in this case suggests that a creditor may enforce a judgment debt against a company notwithstanding pending foreign insolvency proceedings, it should be noted that this was a case that arose in the context of the creditor's rights in an ancillary winding up in England. It was therefore not a situation where the English court was being asked to consider only the effect of a foreign winding up order.

95 The courts in Hong Kong have considered the question of when proceedings should be stayed because of a foreign insolvency order. In *Modern Terminals (Berth 5) Ltd v States Steamship Company* [1979] HKLR 512, a company incorporated in Nevada that had been placed under Chapter 11 proceedings sought a stay of proceedings against it in the Hong Kong courts. Trainor J entered judgment in favour of the creditor on the grounds that Hong Kong was the proper forum to adjudicate the claim, but decided (at 523) that a stay of execution ought to be ordered on the basis of the nature of Chapter 11 proceedings and the principle of universal distribution of a bankrupt's effects in *Galbraith v Grimshaw and another* [1910] AC 508.

96 A similar approach was adopted in *CCIC Finance Ltd v Guangdong International Trust & Investment Corporation* [2005] 2 HKC 589, where a judgment creditor made an application for a garnishee order *nisi* to be made absolute, and the insolvent company applied for a stay of all proceedings. The company was incorporated in the People's Republic of China. A Chinese court declared the company bankrupt and a Liquidation Committee was appointed. Deputy Judge Gill accepted the principle of universalism (at [56]–[57]) and concluded that the making absolute of the garnishee order would interfere with the liquidation of the company (at [85]). He therefore exercised a discretion to refuse the application for a garnishee order absolute as it would have offended the *pari passu* principle by allowing the creditor to obtain an unfair preference over similarly ranked creditors (at [96]) and granted the company's application for a stay of all proceedings (at [102]). Both decisions were followed by Reyes J in *Hong Kong Institute of Education v Aoki Corporation* [2004] 2 HKLRD 760, where the court entered judgment against the defendant company but stayed execution as the company was undergoing a civil rehabilitation under the law of incorporation of the company.

97 Stays of proceedings or execution have also been ordered in other jurisdictions when there is a pending foreign winding up order: see *Turners & Growers Exporters Ltd v The ship "Cornelis Verolme"*

[1997] 2 NZLR 110 (New Zealand); *Cunard Steamship Company Limited v Salen Reefer Services* AB 773 F 2d 452 (2th Cir, 1985) (United States).

98 While the issue remains open for further consideration on a subsequent occasion, we offer these provisional observations. Singapore courts are clearly not bound by any stay of legal proceedings that flows from a foreign winding up order in the absence of local winding up proceedings. Nonetheless, it remains open to the courts to assist the foreign liquidation proceedings by exercising their inherent discretion to stay proceedings: see Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at para 16-62; Philip Wood, *Principles of International Insolvency* (Sweet & Maxwell, 2nd Ed, 2007) at paras 28-044 to 28-045; *Cross Border Insolvency* ch 10 at paras 10.27 and 10.54-10.56; see also the instructive discussion in P St J Smart, "International insolvency: ancillary winding up and the foreign corporation" (1990) 3 ICLQ 827 at pp 845-846.

99 Most courts recognise the desirability and practicality of a universal collection and distribution of assets and that a creditor should not be able to gain an unfair priority by an attachment or execution on assets located within the jurisdiction of the court subsequent to a winding up order made elsewhere. However, this can only operate as a very broad statement of principle. Whether and how the Singapore court will render assistance to foreign winding up proceedings through the regulation of its own proceedings will depend on the particular circumstances before it. Assistance might, for example, take the form of a stay of a claim if Singapore is not the *forum conveniens*; or staying an execution or attachment; or exercising a discretion against granting a garnishee order absolute; or refusing leave to serve process out of the jurisdiction; or winding up the company in Singapore. We would observe however that the commencement of legal proceedings against a defendant foreign company or an attempt to levy execution against its assets is not precluded by the mere fact that insolvency proceedings have been commenced against the company in another jurisdiction.

Conclusion

100 For these reasons, we allowed the appeal and directed that the Singapore Liquidators of Beluga Chartering were at liberty to remit the company's assets in Singapore to the German Liquidator subject to any deductions authorised or required under the Act, notwithstanding the existence of the Singapore Subsidiaries' unsatisfied judgment debt. The parties agreed that they would bear their own costs of the appeal.

101 We wish to express our gratitude to Mr Sim and Ms Wee for their assistance. We especially wish to record our appreciation to Prof Yeo for the characteristic clarity and incisiveness with which he elucidated the relevant issues. Prof Yeo's submissions were of considerable assistance to us.

[note: 1] AEIC of Namir Ahmed Khanbabi, Record of Appeal Vol IV (Part A) at p 40.

[note: 2] AEIC of Kwok Sai Soo, KSS-1, Record of Appeal Vol IV (Part B).

[note: 3] Agreed Statement of Facts for SUM 3435/2012 at para 4.

[note: 4] Record of Appeal Vol IV (Part A) at p 238.

[note: 5] Record of Appeal Vol IV (Part B) at pp 221-222.