

# Remittal of assets in cross-border insolvency proceedings

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## [Introduction](#)

## [Decision](#)

## [Section 426 of the Insolvency Act](#)

## [Ancillary winding-up proceedings](#)

## [No prejudice to Bahamian-based creditors](#)

## [Comment](#)

### **Introduction**

The Bahamas Supreme Court recently considered the relationship between the statutory provisions in recognition proceedings which permit the turnover of property to a debtor (a foreign corporation or other foreign legal entity subject to a foreign proceeding in the country in which it is incorporated or established) and the common law power to direct remittal of assets to the foreign main proceedings where an ancillary liquidation is underway – a position which was considered by the House of Lords in *Re HIH Casualty and General Insurance Ltd (Re HIH)* ([2008] UKHL).

### **Decision**

The ruling rendered on February 23 2017 arose from an application for directions on the part of the liquidators of Caledonian Bank (in liquidation) seeking an order that the joint official liquidators be directed to remit funds realised within the Bahamas to the principal liquidators in the Cayman Islands under the court's inherent jurisdiction and/or under Sections 254 and 255 of the Companies Winding-up Amendment Act 2011. Pursuant to Section 254, on the application of a foreign representative, the court may order the turnover to a foreign representative of any property belonging to a debtor. The section also provides for other ancillary orders that a foreign representative<sup>(1)</sup> may seek on being recognised.

The court's conclusion turned in particular on whether the power to direct a remittal was available based on the authorities or whether this power was available within the scope of the statute.

### **Section 426 of the Insolvency Act**

In *Re HIH* Lord Scott held that there are two possible sources of such power:

- inherent power in the court established not by statute but by previous judicial decisions; and
- Section 426 of the Insolvency Act 1986.

Section 426 provides for cooperation between courts exercising jurisdiction in relation to insolvency and the assistance that may be given to other courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory on a request for such assistance being made. The House of Lords was unanimous in its decision that the order could and should be made under Section 426 of the UK Insolvency Act, Australia being a "relevant country", irrespective of whether the absence of *pari passu* distribution in the Australian liquidation would preclude such an order under the general power of the court to give directions.

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## Ancillary winding-up proceedings

In the Caledonian ancillary winding-up proceedings, although the court accepted that the Cayman Islands had been designated a relevant foreign country, as it relates to the statutory power to order remittal, Judge Winder determined that Part VIIA of the Companies (Winding-up Amendment) Act, which relates to international cooperation in insolvency proceedings, does not apply to ancillary winding-up proceedings as:

*"(a) Section 254 of the Act relates to applications by foreign representatives as defined by the Act.*

*(b) The section relates to foreign representatives seeking the assistance of the Court rather than domestic liquidators seeking a direction in an ancillary winding up proceedings.*

*(c) Part VIIA relates to circumstances where a company has been placed in liquidation by a foreign court and not to circumstances where parallel winding up orders have been made in respect of the same company."*

In contrast, Winder accepted that the common law power of the court to order remittal of assets in an ancillary liquidation to the principal liquidation exists, and held that there was no prohibition as the court possessed the power to order the remittal of assets to a foreign liquidation where the local law provided for a *pari passu* distribution. *Re Swissair Schweizerische Luftverkehr-Aktiengesellschaft* ([2009] EWHC 2009 (Ch)) was cited as authority for this proposition.

The court determined that ancillary winding-up proceedings are to be conducted in a manner which feeds into a main liquidation process underway in the company's main centre of business activity (or jurisdiction of domicile). The court also cited *Re Bank of Credit and Commerce International SA (No 10)* ([1997] Ch 213) and the dicta of Vice Chancellor Richard Scott that:

*"The accumulation of judicial indorsements of the concept of ancillary liquidations have, in my judgment, produced a situation in which it has become established that in an 'ancillary' liquidation the courts do have power to direct liquidators to transmit funds to the principal liquidators in order to enable a pari passu distribution to worldwide creditors to be achieved."*

## No prejudice to Bahamian-based creditors

Both the Bahamas and the Cayman Islands provide for a *pari passu* distribution in liquidation proceedings. The court therefore accepted the evidence that there would be no prejudice to the Bahamian-based creditors in making an order for the remittal of assets. The Bahamian based creditors had already submitted proofs in the Cayman proceedings where there would be a *pari passu* distribution. In fact, the creditors stood to benefit because under Cayman law as deposit holders of banking institutions (which the Bahamian creditors would constitute) they would receive the advantage of being treated as preferred creditors in the case of liquidation – a provision that is not available under Bahamian law.

## Comment

After also considering the Hong Kong case *Joint Official Liquidators of A Company v B&C* ([2014] 5 HKC 152), where assets in Hong Kong were remitted to the principal liquidation in the Cayman Islands, and *Beluga Chartering GmbH (in liquidation) v Beluga Projects (Singapore) Pte Ltd (in liquidation)* ([2014] SGCA 14), where assets in a Singapore company were remitted to Germany, Winder determined it to be in the best interest of the company creditors to remit the assets realised to the principal liquidation.

In doing so, the court held that where there is one company with one set of assets and one set of creditors whose interests as a whole should be considered, no creditor should be disadvantaged or placed at a greater advantage as a result of where it is situated or because the assets were situated elsewhere.

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## **Endnotes**

(1) Defined as a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign proceeding.

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