Beluga Chartering GmbH (in liquidation) *v* Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (Deugro (Singapore) Pte Ltd, non-party)
[2013] SGHC 60

Case Number : Companies Winding Up No. 5 of 2012 (Summons No 3435 of 2012)

Decision Date : 12 March 2013

Tribunal/Court : High Court

Coram : Vinodh Coomaraswamy JC

Counsel Name(s) : Sim Kwan Kiat and Pang Chong Ren Alexander (Rajah & Tann LLP) for the applicant; Liquidators for the first respondent in person; Wee Ying Ling Beverly (Insolvency & Public Trustee's Office) for the second respondent; Bala Chandran s/o Kandiah (Mallal & Namazie) for the non-party.

Parties : Beluga Chartering GmbH (in liquidation) — Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (Deugro (Singapore) Pte Ltd, non-party)

Insolvency Law

12 March 2013

Vinodh Coomaraswamy JC:

Introduction

Beluga Chartering

1 Beluga Chartering GmbH ("Beluga Chartering") is a limited liability company incorporated in 1996 under the laws of Germany. [note: 1] It is registered in the Commercial Register of the District Court of the German city of Bremen. [note: 2]

2 On 1 June 2011, upon the application of 3 individuals described as "managing directors" of Beluga Chartering, [note: 3] the Insolvency Court of the Bremen District Court ("the Bremen Court") made a finding that Beluga Chartering was insolvent. [note: 4] The Bremen Court accordingly appointed Mr Edgar Grönda ("the German Liquidator") as Beluga Chartering's permanent insolvency administrator [note: 5] under the German Insolvency Code ("*Inolvenzordnung*", commonly abbreviated as "*InsO*"). [note: 6]

3 On 17 February 2012, the High Court in Singapore wound up Beluga Chartering under Division 5 of Part X of the Companies Act on grounds of insolvency and appointed Mr Chee Yoh Chuang and Mr Abuthahir Abdul Gafoor ("the Singapore Liquidators") as its liquidators. [note: 7]

4 Beluga Chartering is hopelessly insolvent. Counsel for the Singapore Liquidators informed me that Beluga Chartering has approximately 500 creditors worldwide who are owed debts of approximately €1.2bn. Beluga Chartering's assets amount to approximately €20m. [note: 8] A quick calculation shows that each unsecured creditor will, ignoring entirely costs of liquidation, receive substantially less than 2 cents in the Euro.

This application

This application

5 The Singapore liquidators now apply pursuant to s 273(3) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") for my determination of the following two questions of law:

(a) Whether the provisions of Part X of the Act, in particular s 350(2), apply to Beluga Chartering and its Singapore liquidators without exception or modification, such that the Singapore liquidators are required to comply with Part X in carrying out their duties as liquidators of Beluga Chartering; and

(b) Subject to the determination of issue (a), whether the Singapore liquidators have the power, either under Part X of the Act or the general law, and are at liberty to repatriate Beluga Chartering's assets in Singapore to the German Liquidator (or elsewhere as directed by the German Liquidator 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.

6 I answer these questions now:

(a) Yes. Subject to the provisos which follow at [7]-[8] below, the Singapore Liquidators *are* bound by Divisions 1, 2, 4 and 5 of Part X of the Act, including s 350(2), in the liquidation of Beluga Chartering without exception or modification such that they are required to comply with all of the obligations set out in those provisions in carrying out their duties as liquidators of Beluga Chartering.

(b) The Singapore liquidators have not a power but an *obligation* under s 377(3)(c) of the Act to transmit the proceeds of Beluga Chartering's Singapore liquidation to the German Liquidator to be administered in accordance with German law, subject to the proviso which follows at [7] below.

7 The proviso to the answers to both questions is that before transmitting the Singapore Proceeds (defined at [18] below) to the German Liquidator, the Singapore Liquidators are obliged to comply with section 377(3)(c) of the Act. The Singapore Liquidators must first, therefore: (i) pay any debts of Beluga Chartering which fall within s 328 of the Act; and (ii) pay any debts and satisfy any liabilities which Beluga Chartering has incurred in Singapore. This includes an obligation to satisfy the unsatisfied judgment debts against Beluga Chartering in favour of the Singapore Subsidiaries (defined at [13] below). This proviso is, in itself, subject to the further proviso at [8] below.

8 The Singapore Liquidators' distribution obligations under s 377(3)(c) of the Act are subject to the Court's discretion under the ancillary liquidation doctrine to disapply all or part of those distribution obligations in its discretion in order to advance the objectives of the ancillary liquidation doctrine, if to do so is appropriate in all the circumstances of the case and so far as is consistent with justice and Singapore public policy.

9 As will appear from the extended form of my answers, and for the reasons which I set out in detail below, the two questions framed and presented to me on this application are not entirely apt to cover what is in substance in issue in this application. But those questions and the summary answers I have given suffice as a basis to commence discussion of the issues raised.

The applicants

10 Beluga Chartering was initially the sole applicant. But s 273(3) of the Act empowers the

Singapore Liquidators – not Beluga Chartering – to apply to the Court for directions such as the ones sought on this application. So, Beluga Chartering applied for an order adding the Singapore Liquidators as joint applicants. I made the order with the consent of all parties.

11 The German Liquidator is not an applicant. However, counsel for the applicants confirmed: (1) that he represents the German Liquidator in addition to the Singapore Liquidators and Beluga Chartering for the purposes of this application; (2) that the German Liquidator does not take a position different from that taken by the Singapore Liquidators and by Beluga Chartering on this application; and (3) that the German Liquidator accepts that he will be bound by my determination of this application.

12 The applicants have named two respondents to this application:

(a) Beluga Projects (Singapore) Pte Ltd ("Beluga Singapore"); and

(b) Beluga Chartering Asia Pte Ltd ("Beluga Asia").

13 Each respondent is a judgment creditor of Beluga Chartering. [note: 9] Each respondent is a wholly-owned subsidiary of Beluga Chartering. [note: 10] Each respondent is a company incorporated in Singapore. Each respondent is itself in liquidation. [note: 11] Beluga Asia was ordered to be wound up on 2 September 2011 in Companies Winding Up No 102 of 2011. Its liquidator is the Official Receiver. Beluga Singapore was ordered to be wound up on 13 January 2012 in Companies Winding Up No 101 of 2011. Its liquidators are Mr Sim Guan Seng and Mr Goh Yeow Kiang Victor, both of Baker Tilly TFW LLP. I shall refer to both respondents as "the Singapore Subsidiaries".

deugro (Singapore) Pte Ltd

14 Also before me is a non-party to this application: deugro (Singapore) Pte Ltd ("deugro Singapore"). deugro Singapore is a company incorporated in Singapore and carrying on business in Singapore. deugro Singapore owes Beluga Chartering US$1,259,647.42 [note: 12] ("the deugro Asset"). The deugro Asset is Beluga Chartering's only known asset in Singapore. deugro Singapore has been served with and heard on this application because the deugro Asset is in essence the subject-matter of this application.

15 deugro Singapore also asserts a right to set off US$410,000 [note: 13] against the deugro Asset. The Singapore Liquidators, presumably with the German Liquidator's knowledge and consent, have acknowledged deugro Singapore's right of set off in that amount. [note: 14] In light of that, deugro Singapore informed the Court [note: 15] that it takes a neutral position as to whom it is to pay the remainder of the deugro Asset. Taking that set-off into account reduces the deugro Asset to US$849,647.42. [note: 16]

Beluga Asia and Beluga Singapore become judgment creditors of Beluga Chartering

16 On 31 March 2011, the Singapore Subsidiaries together sued Beluga Chartering in Suit No. 227 of 2011 ("the Suit") as joint plaintiffs. On 1 April 2011, they sought and obtained an injunction against Beluga Chartering freezing the deugro Asset pending trial or further order ("the Injunction"). That Injunction remains in force today.

17 On 20 April 2011, the Singapore Subsidiaries obtained joint judgment against Beluga Chartering

in default of appearance. The judgment required Beluga Chartering to pay Beluga Singapore the sum of S$560,663.47 and to pay Beluga Asia the sum of S$854,967.74.

The parties' positions on the application

18 The gist of the Singapore Liquidators' application is that they, with the German Liquidator's concurrence, seek directions from the Court permitting them to transmit the deugro Asset, after taking into account deugro Singapore's set-off, to the German Liquidator for him to distribute to Beluga Chartering's worldwide creditors – including the Singapore Subsidiaries – in a single insolvency under and in accordance with the InsO and German law. [note: 17] For reasons I give below at [278], it is an open question whether deugro Singapore's claimed right of set-off is valid under Singapore insolvency law. I therefore express no view as to whether or not as a matter of Singapore insolvency law the money which the Singapore liquidators seek to transmit to the German Liquidator ought to take into account deugro Singapore's claimed set-off. I will refer to the money to be transmitted to the German Liquidators simply as the "the Singapore Proceeds", whatever the quantum may be.

19 Beluga Asia and Beluga Singapore oppose Beluga Chartering's application. Beluga Asia was represented by the Official Receiver. Beluga Singapore was not represented by counsel and made no separate submissions. However one of Beluga Singapore's joint liquidators attended the hearing of this application on behalf of Beluga Singapore with the consent of all parties. He informed me that Beluga Singapore associates itself with the Official Receiver's submissions in their entirety.

20 deugro Singapore, as I have said, takes a neutral position on the application, given that the Singapore Liquidators have acknowledged its right of set-off.

21 It is common ground that Beluga Chartering has no known preferential creditors under Singapore law, [note: 18] other than of course the costs and expenses of the Singapore winding up under s 328(1)(a) of the Act. There is, further, undisputed expert evidence before me that under the InsO and German law, all of Beluga Chartering's general body of unsecured creditors – regardless of nationality [note: 19] – will be paid out of the assets available to the German Liquidators of Beluga Chartering on a *pari passu* and pro rata basis. [note: 20]

The parties' submissions summarised

22 The Singapore Liquidators argue as follows. The Singapore liquidation is ancillary to the German liquidation. The Singapore Proceeds, although realised in a liquidation in Singapore, should be transmitted to the principal liquidation in Germany. There, all of Beluga Chartering's global assets can be pooled in a single global fund. Out of that fund, the German Liquidator can declare dividends *pari passu* for all of Beluga Chartering's creditors worldwide. The incidents of an ancillary liquidation, including the power to transmit assets to a principal liquidation, are not expressly set out in Part X of the Act. But these incidents are either implicit in the statutory regime of Part X or they run in parallel with Part X at common law. Transmission of the Singapore Proceeds to the German liquidation will cause the Singapore Subsidiaries no prejudice. They will be treated equally with the general body of Beluga Chartering's unsecured creditors under the InsO and German law. Conversely, unsecured creditors in Singapore should not have priority over all other unsecured creditors of Beluga Chartering by the happenstance that Beluga Chartering has assets in Singapore.

23 In response, the Official Receiver argues as follows. Nothing in the Act expressly or impliedly permits a Singapore Court to authorise the Singapore Liquidators to transmit the Singapore Proceeds to a foreign liquidator. The Act does not contain a provision analogous to s 426 of the Insolvency Act

1986 (c 45) (UK) ("English Insolvency Act"). That section expressly permits the insolvency courts of England and Wales to lend assistance to a foreign liquidation. English decisions on the incidents of an ancillary liquidation are therefore of little assistance to a Singapore Court. The Singapore courts historically have not been persuaded to operate outside the statutory framework of the Act in company law matters. Therefore, there is no common law power to authorise transmission. Even if the common law ancillary liquidation doctrine is found to apply in Singapore, the transmission of assets realised in Singapore is subject to satisfaction of liabilities incurred in Singapore, in accordance with the ring-fencing provision found in Division 2 of Part XI of the Act. Even though Beluga Chartering was not carrying on business in Singapore, s 350(2) in Part X of the Act is wide enough to apply the ring-fencing provision in Division 2 of Part XI to a liquidation under Division 5 of Part X, such as that of Beluga Chartering. Alternatively, Beluga Chartering was carrying on business in Singapore, despite not having registered under s 368 of the Act, and the ring-fencing provision applies to it.

24 A summary of my conclusions is as follows:

(a) The ancillary liquidation doctrine is neither an express nor an implied part of the statutory insolvency scheme under Part X of the Act.

(b) But the ancillary liquidation doctrine is nevertheless a long-standing part of Singapore law. So too are the English common law principles underpinning that doctrine. Those principles were most recently analysed by Lord Hoffman in the House of Lords decision of *Re HIH Casualty and General Insurance Ltd and others; McGrath and others v Riddell and another* [2008] 1 WLR 852 ("*Re HIH*").

(c) Therefore a Singapore court will, as far as is consistent with justice and Singapore public policy, cooperate with the courts in the place of incorporation of an insolvent foreign company to ensure that all of its assets are distributed to its creditors under a single system of distribution. To that end, the Singapore courts have a discretion, to be exercised in all the circumstances of the case, to disapply the obligations of Singapore liquidators under Singapore's statutory insolvency scheme even if the effect would be to deprive creditors who have proved in Singapore of substantive rights under Singapore's insolvency law.

(d) Section 377(3)(c) of the Act applies to the liquidation of Beluga Chartering by virtue of s 350(2) of the Act. Section 365 of the Act does not prevent s 377(3)(c) from so applying. The Singapore Liquidators are therefore bound both by the transmission obligations and the distribution obligations in s 377(3)(c) of the Act.

(e) The Singapore Liquidators' obligation to distribute the Singapore Proceeds in accordance with s 377(3)(c) is subject to the Court's discretion under the ancillary liquidation to disapply that obligation if it is appropriate to do so in all the circumstances of the case and if to do so is consistent with justice and Singapore public policy.

(f) On the facts of this case, I decline to exercise my discretion to disapply the obligation in s 377(3)(c) to the Singapore liquidation of Beluga Chartering.

25 The result is that the Singapore Liquidators are obliged to transmit the Singapore Proceeds to the German Liquidator, but only after they pay its debts and satisfy its liabilities incurred in Singapore. This will include the judgment debt due to the Singapore Subsidiaries.

26 To explain in detail the basis for these conclusions, I first consider the history of our statutory insolvency scheme. I then analyse the provisions of our statutory insolvency scheme in the context

of its text, history and purpose. I then consider three seminal cases – two from England and one from Singapore – which consider how that scheme should be applied in the liquidation of a foreign company. I conclude by summarising the undisputed facts of this case and by applying the principles which I derive from this analysis of the law to those facts.

History of our statutory insolvency scheme

Universalism and territorialism

27 Both the applicants and the respondents have framed their arguments at several levels of conceptual generality. At the highest level, the dispute has been framed as a contest between two competing aspirations in cross-border insolvency: universalism and territorialism. The Singapore Liquidators on behalf of Beluga Chartering advocate a version of universalism. The Official Receiver on behalf of the Singapore Subsidiaries advocates a version of territorialism.

28 The following passage from the article "Lessons for the Development of Singapore's International Insolvency Law" by Assistant Professor Wee Meng Seng, (2011) 23 SAcLJ 932 at para 6 explains in a nutshell the difference between the two approaches:

> At the most basic level, territorialism envisages that each country will seize local assets and apply them for the benefit of local creditors, with little or no regard for foreign proceedings. By contrast, universalism advocates that a court administers the bankruptcy of a debtor on a worldwide basis with the help of other courts in each affected country. . . . [P]ure versions of universalism and territorialism represent the extreme ends of a spectrum within which different shades of territorialism and universalism have been developed. In practice, the real battle is fought between modified territorialism and modified universalism."

29 English insolvency law gives effect to the goals of universalism – at least in part – through the ancillary liquidation doctrine. Whatever the normative accounts of this doctrine may say, the classical descriptive account of the doctrine is found in the four propositions set out in the decision of Sir Richard Scott V-C in *Re Bank of Credit and Commerce International S.A. (No. 10)* [1997] 1 Ch 213 ("*Re BCCI* ") (at 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 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.

30 The aspiration comprised in Scott V-C's third proposition is implemented in English insolvency law by a transmission order. It is by transmitting the proceeds of a local liquidation to the principal

liquidation for distribution that the universalist aspiration is achieved. A transmission order is, in essence, what the Singapore Liquidators want in this application.

31 The debate between universalism and territorialism – whether pure or modified – may be useful conceptual background material for the questions posed on this application. However, that debate is essentially a normative one. It is therefore at too high a level of generality to be of direct assistance to me as a court of first instance. Determining the applicants' questions requires me to ascertain and apply Singapore insolvency law as it is, not as it should be. And so I start with our statutory insolvency scheme.

The history of our legislation

32 Our statutory insolvency scheme is set out in the Act. It is derived from the Malaysian Companies Act 1965 (Act No 79 of 1965) ("the 1965 Act"). That was in turn based on the Companies Act 1961 (No 6839 of 1961) of the Australian state of Victoria ("the 1961 Act"). The Malaysian Act, the 1961 Act and our Act have their ultimate roots in the Companies Act 1948 (c 38) (UK) ("the 1948 Act") and its predecessor legislation in England.

33 Despite certain idiosyncrasies, the fundamental features of our statutory insolvency scheme can be found either verbatim or with readily recognisable analogues in the historical English insolvency enactments and also in the modern descendants of these enactments which have developed in parallel in England and in the Commonwealth. I consider first the historical English enactments.

English authorities remain of relevance in interpreting our Act

34 The English Companies Act 1862 (25 & 26 Vict c 89) ("the 1862 Act") was the first English statute to bear that name. It was the model for the Straits Settlements' Companies Ordinance 5 of 1889 ("the 1889 Ordinance"). The provisions of the 1889 Ordinance and the courts' approach in interpreting and applying it are readily familiar to any insolvency lawyer or judge even today.

35 In 1890, the courts of the Straits Settlements decided the case of *In re The Rawang Tin Mining Co., Limited, & The Chartered Bank of India, Australia And China* (neutral citations [1890] Ky 14, [1890] SLJ 8; hardcopy citations [1885-90] 4 Ky 570, [1890] 3 Straits LJ 27). The judgment of O'Malley CJ at first instance was upheld on appeal by Pellereau and Wood JJ in the Court of Appeal. They applied the insolvency provisions of the 1889 Ordinance to decide the case.

36 What is at once striking upon reading the judgment of O'Malley CJ is how easily a modern reader – even over 120 years after the case was decided in 1890 – can understand not only the court's statements of general principle but also the court's references to specific provisions in the statutory insolvency scheme under the 1889 Ordinance. I cite as an example a passage from the judgment of O'Malley CJ:

> The object of the [1889] Ordinance under the operation of which it is said that these assets are recoverable is to make an equitable provision in the nature of a bankruptcy for the distribution of the effects of the Company amongst the persons entitled; to secure that, all the assets of the Company shall be collected and made available for equal distribution among the creditors. Its provisions are framed to carry out this object, and the effect of those provisions is to make the property of a Company which is being wound-up, trust property, affected with an obligation to be dealt with in a particular way, and to fix all the assets with a trust for equal distribution among the creditors. Then, at what stage of the winding-up must we take it that the trust is so created? We must look at the purpose of such a trust, and at what is needed to make it

effectual, and also at Sections 195 and 212. Those sections provide that all dispositions of property of the Company made between the commencement of the winding-up and the order of winding-up shall be void unless sanctioned by the Court, and that all attachments and executions put in force after the commencement of the winding-up, without leave of the Court, shall be void. I think, these shew that the control of the Court is absolute as from the commencement of the winding-up, that is to say, by Section 135, from the filing of the petition, and that the trust should be regarded as being created as from that date, and that would be in the present case, 2nd of September.

English common law remains relevant

37 In *RBG Resources plc (in liquidation) v Credit Lyonnais* [2006] 1 SLR(R) 240 ("*RBG*"), Woo Bih Li J held that the ancillary liquidation doctrine and the transmission orders that it entails are part of Singapore's common law. I agree.

38 But it was not *RBG* which first introduced the ancillary liquidation doctrine into Singapore law. As long ago as 1926, Murison CJ in *Re Lee Wah Bank* (neutral citation [1926] MC 5; hardcopy citation 2 Malayan Cases 81), a decision of the courts of the Straits Settlements, expressed the ancillary doctrine's underlying principles and made a transmission order. The Chinese Merchants Bank Ltd was a bank incorporated in Hong Kong with a branch in Saigon. It went into liquidation in both Hong Kong and in Saigon but not in the Straits Settlements. The Saigon branch had a credit balance in an account with the Lee Wah Bank Ltd in Singapore. The question for Murison CJ's determination was whether Lee Wah Bank should pay that credit balance to the Saigon liquidators (as an asset of the Saigon branch) or to the Hong Kong liquidator (as the principal liquidators, being the liquidators in the insolvent company's place of domicile).

39 Murison CJ said as follows:

> The general principle in cases of this kind is clear enough. It is laid down by Vaugham [sic] Williams J. . . . thus:- "Where there is a liquidation of the concern the general principle is - ascertain what is the domicile of the company in liquidation; let the Court of the country of domicile 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."
>
> The domicile of a trading company is fixed by the situation of its principal place of business . . . and there is no doubt at all that in this case the domicile of the liquidating Company is Hong Kong.

40 Singapore's version of the ancillary liquidation doctrine is historically derived from and strongly aligned with the ancillary liquidation doctrine in English law. The dictum of Vaughan Williams J which Murison CJ cites in this passage is from the decision in *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385 at 394. The principles in this case continue today to comprise at least part of the foundation of the ancillary liquidation doctrine in English law: see *Re HIH* at [60].

Conclusion

41 Company law – and in particular insolvency law – did not start with a blank slate in Singapore in 1967. By 1967, the ancillary liquidation doctrine was a well-established part of Singapore law. Further, the decisions of English and Commonwealth courts considering statutory insolvency schemes under or derived from common English ancestors remain of assistance today in interpreting and applying the provisions of our own scheme. Decisions of these courts analysing or distilling common law principles

which apply in insolvency – such as the ancillary liquidation doctrine – are equally of assistance today.

42 Of course, we must always be mindful of local idiosyncrasies. There are only three idiosyncrasies in our statutory insolvency scheme that are relevant to this matter. They are ss 365, 368 and aspects of s 377. All of these provisions are found in Division 2 of Part XI of the Act. I will consider and analyse these idiosyncrasies separately in the course of this judgment.

43 For these reasons, and subject to this qualification, I cannot accept the Official Receiver's submission that the ancillary liquidation doctrine and the transmission orders necessary to give effect to it do not form part of Singapore law. They both form a long-standing part of Singapore's insolvency law and its common law. I also cannot accept the Official Receiver's submission that I should not rely on English and Commonwealth decisions in interpreting our statutory insolvency scheme and in considering the common law gloss that has been put upon it

Some basic but necessary definitions

44 Before looking in detail at that statutory insolvency scheme, certain basic definitions are necessary to avoid conceptual confusion.

Definition of "company"

45 The word "company" is defined in s 4(1) of the Act as follows:

> "company" means a company incorporated pursuant to this Act or pursuant to any corresponding previous written law".
>
> [Emphasis added.]

46 This is a circular definition. The second use of "company" (underlined above) in this definition must, therefore, be given something other than the statutory meaning. The opening words of s 4 of the Act permit us to do this. Those words tell us that the definitions set out in s 4 apply "unless the contrary intention appears". The circularity manifests a contrary intention. In this context, the second use of the word "company" must simply mean "legal person".

47 Therefore under s 4(1) a "company" is a legal person which has acquired its corporate status under Singapore's past or present companies legislation. The necessary consequence is that every legal person which has acquired its corporate status *otherwise* than under Singapore's companies legislation is not a "company" within the meaning of the Companies Act.

48 To avoid confusion, I will refer to a company as defined in s 4(1) of the Act as a "Singapore company". This is not a tautology: section 4(1) of the Act itself shows that "company" in the Act does not always mean "company" as defined in section 4(1).

Singapore-incorporated non-company

49 Not every legal person incorporated under Singapore law is a Singapore company. The Companies Act is only one of the many Singapore statutes under which one or more persons can be deemed a legal person and acquire corporate status – be "incorporated" – under Singapore law: see for example s 3(2) of the Central Provident Fund Act (Cap 36, 2001 Rev Ed), s 2(1) the Central Sikh Gurdwara Board Act (Cap 357, 1985 Rev Ed), s 2(1) of the Minister for Finance (Incorporated) Act

(Cap 183, 1985 Rev Ed), s 2(1) of the Bishop of Singapore Ordinance (Cap 355, 1985 Rev Ed), s 4 of the Limited Liability Partnerships Act (Cap 163A, 2006 Rev Ed).

50 I will refer to a legal person incorporated under Singapore law but *not* under Singapore's *companies* legislation as a "Singapore-incorporated non-company".

Definition of "foreign company"

51 A "foreign company" is defined in s 4(1) of the Act:

> "foreign company" means –
>
> (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.
>
> [Emphasis added]

52 We must once again read "company" in the term "foreign company" and in paragraph (a) of the statutory definition of that term simply as meaning "legal person". To apply the section 4(1) definition of "company" to the definition of "foreign company" would otherwise lead to a paradox and a circularity.

53 So a "foreign company" as defined in paragraph (a) of the definition of that term in s 4(1) of the Act means a legal person, corporation, society, association or other body incorporated outside Singapore.

Definition of "unregistered company"

54 "Unregistered company" is defined in s 350(1) of the Act as follows:

> 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.
>
> [Emphasis added]

55 This is a non-exhaustive definition. The legislature contemplates entities which are outside the statutory definition but which are nevertheless "unregistered companies". We must therefore give the term "unregistered company" an ordinary meaning for the non-exhaustive statutory definition to supplement. Once again, we cannot apply the s 4(1) definition of "company" because that would lead to a paradox. So "company" in this phrase again simply means "legal person".

56 "Unregistered" simply means the opposite of "registered", as defined by s 4(1) of the Act. But in the context of this statutory definition, "unregistered" refers to *and only to* non-registration under s 19(3) of the Act. Registration under s 19(3) must not be confused with registration under s 368.

Section 368 and the rest of Division 2 of Part XI of the Act set out a registration regime for a foreign company which establishes a place of business or carries on business in Singapore. Even if a foreign company registers under Division 2 of Part XI, it remains nevertheless an "unregistered company" within the meaning of s 350(1). I explain why at [86] below. I make this point here because both parties' submissions incorrectly conflate non-registration under Division 2 of Part XI with the concept of an "unregistered company" defined in s 350(1). [note: 21] They are distinct concepts.

57 The ordinary meaning of "unregistered company" is therefore a legal person not registered under s 19(3) of Singapore's companies legislation or its predecessors. To that ordinary meaning, the non-exhaustive definition adds certain classes of entities – a "partnership", "association" or "company" consisting of more than 5 members – but which the legislature deems to be "unregistered companies" for the purposes of the Act.

58 A "foreign company" obviously *is* an "unregistered company". A Singapore company equally obviously *is not* an "unregistered company". Thus the definition in s 350(1) makes express provision for *both:* including the former and excluding the latter. But the key concept in the term "unregistered company" is not whether the legal person is local or foreign to Singapore*: the key concept is incorporation under the Act*. A legal person is an "unregistered company" so long as it is not incorporated under the Act *even if it is incorporated under Singapore law*. Thus, a Singapore-incorporated non-company is just as much an "unregistered company" as a "foreign company" is an "unregistered company". To put it another way, every foreign company is also an unregistered company. But not every unregistered company is a foreign company.

59 This is confirmed by s 354 of the Act. This section applies to a defunct unregistered company the same provisions in relation to unclaimed property as apply to a Singapore company. In doing so, the section specifically contemplates that an "unregistered company" whose insolvency is governed by Division 5 of Part X can have its origin *in Singapore*.

60 This is an important point for the analysis which follows. It is perfectly possible for an unregistered company to have been incorporated or to otherwise be an entity under Singapore law – as long as that law is not Singapore's *companies* legislation.

61 Bearing these distinctions in mind, I now turn now to consider the statutory insolvency scheme under the Act and the competing submissions of how it should be interpreted and applied in the case of cross-border insolvency.

The statutory insolvency scheme under the Act

Liquidation of a Singapore company

62 Part X of the Act is entitled "Winding Up". It comprises 5 Divisions. Divisions 1, 2, 3 and 4 of Part X apply to the winding up of "companies". "Company" here means a Singapore company, there being no signal from the context that we should disregard the statutory definition in s 4(1). Section 254(1) of the Act gives the Court a discretion to wind up a Singapore company compulsorily and appoint a liquidator if any one of the statutory grounds is established.

63 A liquidator of a Singapore company appointed under section 254(1) of the Act has five broad sets of obligations: (a) to ascertain, get in and realise the assets of the Singapore company; (b) to settle a list of contributories and creditors of the Singapore company and to ascertain by adjudication of proof the value of each creditor's claim; (c) to distribute the realised assets of the Singapore company in accordance with the priorities established by law and to return any surplus to the

contributories; (d) to investigate and ascertain the causes of the Singapore company's insolvency and if appropriate seek recourse against those responsible for it; and (e) when warranted, to conclude the liquidation by applying to Court for an order for his release and the dissolution of the Singapore company. All of these obligations are, of course, subject to sufficient assets being available to fund their discharge (see section 323(1) of the Act and r 187 Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed)).

64 A liquidator of a Singapore company derives his power to act for and on behalf of that company to achieve these broad objectives under and by virtue of Singapore law. He is appointed by a Singapore court. He holds the insolvent company's assets under a statutory purpose trust created by Singapore insolvency law to preserve the assets of the company for distribution among the insolvent's unsecured creditors: *In re The Rawang Tin Mining Co., Limited, & The Chartered Bank of India, Australia And China* [1890] Ky 14, [1890] SLJ 8; *Ng Wei Teck Michael v Oversea-Chinese Banking Corp Ltd* [1998] 1 SLR(R) 778 at [31]; *Power Knight Pte Ltd v Natural Fuel Pte Ltd (in compulsory liquidation)* [2010] 3 SLR 82 at [43]-[52]; *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167 at 179-181.

65 Where the Singapore company's assets, management and books and records are all within Singapore, it is a straightforward task for the liquidator to exercise his powers in order to discharge his obligations. All third parties in Singapore are subject to Singapore law and are obliged to recognise the liquidator's power and authority under Singapore law to act for and on behalf of the insolvent Singapore company. If they fail to do so, the Singapore Court will exercise its coercive powers to compel them to do so.

66 The analysis becomes more complex if the Singapore company has some or all of its assets outside Singapore. The liquidators' statutory duties and powers under the Act are not subject to any express or implied statutory territorial limits. There is therefore no statutory basis for holding that these duties and powers stop at Singapore's shores. As Sir Richard Scott V-C said in *Re BCCI* at 236G: "Every . . . winding up has a theoretical international application." The only limit on these powers and duties is practical one, as Scott V-C recognised at 241H:

> The effective jurisdiction of the court is, for winding up purposes, necessarily territorial. English liquidators can get in assets of the company that are within the jurisdiction of the court. But they can only get in assets of the company that are outside the territorial jurisdiction of the court if or to the extent that their title to control the company is recognised by the courts of the country in which the assets are situated. The English statutory scheme purports to have worldwide, not merely territorial, effect. Every creditor of the company, wherever he may be resident and whatever may be the proper law of his debt, can prove in an English liquidation. The liquidators must get in and realise the company's assets as best they may whatever may be the country in which the assets are situated.
>
> [Emphasis added]

67 Thus, even though there is no statutory basis to limit the international nature of the winding up of a Singapore company, the ever-pragmatic common law recognises a territorial limitation on the liquidator's otherwise worldwide duties and powers. This limitation arises because of the practical difficulty in performing these duties and exercising these powers outside Singapore.

68 So the position is this: Divisions 1, 2 and 4 of Part X are clearly universalist in their theoretical approach and statutory intent. Every Singapore liquidator of a Singapore company is a worldwide

liquidator with worldwide duties and worldwide powers. Further, every creditor of an insolvent Singapore company is entitled to come in and prove his debt in the Singapore liquidation, wherever in the world the creditor may be incorporated or domiciled, wherever in the world he may carry on business and whatever law may govern his claim against the Singapore company.

69 But that is not to say that Divisions 1, 2 and 4 of Part X expressly or impliedly enact or envisage the ancillary liquidation doctrine. In fact, they do not do so. They are oblivious to any need to do so. They proceed on the fundamental but unstated basis that the Singapore liquidation will be the only liquidation in every case. This is not surprising. Divisions 1, 2 and 4 of Part X deal with liquidating a Singapore company. Conceptually, a Singapore company is a creature of a Singapore statute. Therefore, it can be born, live and die only under Singapore law. So a Singapore company must of necessity be wound up under Singapore law as the law of its place of incorporation. And pragmatically, it will have been the expectation of creditors and others doing business with a Singapore company anywhere in the world that its liquidation will take place in Singapore and under Singapore's insolvency law. That is why there are no provisions in these Divisions which impose a statutory restriction on the territorial scope of the liquidator's duties, or which provide a mechanism for determining whether – and if so when, in what circumstances and to what extent – the Singapore liquidator is to prevail over or defer to any ancillary foreign liquidator of the Singapore company which may be appointed in a foreign jurisdiction.

70 I now turn to consider how, if at all, this conceptual approach differs in the Singapore liquidation of a foreign company.

Liquidation of an unregistered company

71 As its title suggests, Division 5 of Part X governs the "Winding up of unregistered companies". Section 351(1) of the Act gives the Court a discretion to wind up an "unregistered company" on certain grounds. The Singapore Court placed Beluga Chartering in liquidation under s 351(1) on the insolvency ground. So I will analyse only the insolvency ground in this judgment.

72 Division 5 of Part X is not intended to be a complete, self-contained code for the liquidation of unregistered companies. That is why the legislature inserted s 350(2) into that Division.

73 I analyse the scope of s 350(2) in greater detail at [105]-[117] below. It suffices for now to note simply that the word "companies" appears twice in s 350(2) and encompasses at the very least Singapore companies. So s 350(2) provides at the very least that nothing in Division 5 of Part X precludes the provisions of Divisions 1, 2 and 4 of Part X – which apply to the compulsory liquidation of a Singapore company – from applying in the liquidation of an unregistered company. Section 350(2) also provides, at the very least, that the liquidator of an unregistered company may exercise any power which he could exercise and do any act which he could do under Divisions 1, 2 and 4 of Part X.

74 Division 3 cannot apply to the liquidation of an unregistered company because it applies only to voluntary liquidation, not compulsory liquidation as required by s 350(2), and because s 351(1)(b) expressly provides that an unregistered company cannot be liquidated voluntarily.

Division 5 of Part X does not enact or envisage the ancillary liquidation doctrine

75 Division 5 of Part X governs the winding up of both foreign companies and Singapore incorporated non-companies (see [58] above), both being sub-types of unregistered companies. Division 5 is therefore equally capable of governing the liquidation of a wholly foreign entity with no domestic dimension as it is of governing the liquidation of a wholly domestic entity with no cross-

border dimension. That is why Division 5 of Part X has no provisions in it specifically to govern the insolvency of *foreign* companies – as a subclass of unregistered companies – or even specifically to govern insolvencies of unregistered companies with a cross-border dimension. It simply sets out the default rules which govern the winding up of *any* entity – domestic or foreign – which is not incorporated under Singapore's companies legislation.

76 Like Divisions 1, 2 and 4 before it, Division 5 of Part X of the Act is not premised on a liquidation initiated under s 351(1) running in parallel with a foreign liquidation, let alone being ancillary to such a liquidation. It proceeds on the basis that the Singapore liquidation of an unregistered company will be the only liquidation. I say this for several reasons.

77 First, in the case of an unregistered company which is a Singapore-incorporated non-company, the Singapore liquidation will clearly be the principal liquidation envisaged by the Act. The Singapore liquidation will not ordinarily be accompanied by a liquidation in another jurisdiction let alone be ancillary to another such liquidation.

78 Second, in the case of a foreign company, there is no provision anywhere in Division 5 of Part X that a Singapore liquidator of a foreign company appointed under s 351(1) is to play an ancillary role to a foreign liquidator of that foreign company. It is not even a prerequisite for a winding up order under s 351(1) that the foreign company be in liquidation elsewhere so that the Singapore liquidation may be ancillary to it.

79 Third, ss 351 and 352 of Division 5 of Part X expressly envisage that the court can appoint a Singapore liquidator for a foreign company after a foreign liquidation ends and even after the foreign company has been dissolved or has otherwise ceased to exist under the relevant foreign law. In such a situation too, there will be no principal liquidation elsewhere and hence no liquidation for the Singapore liquidation to be ancillary to.

80 Division 5 of Part X of the Act is therefore completely indifferent to whether the liquidation of a foreign company under its provisions will be preceded by or followed by a liquidation in its home jurisdiction or indeed in any other foreign jurisdiction. A liquidation under Division 5 can start before a foreign liquidation has commenced or after a foreign liquidation has concluded. It can even take place after the foreign company has been dissolved.

81 This explains why there are no provisions in Division 5 of Part X which restrict the territorial scope of the liquidator's duties or which provide a mechanism for determining whether – and if so when, in what circumstances and to what extent – a Singapore liquidator of an unregistered company is to prevail over or defer to any foreign liquidator of the unregistered company. Division 5 – like Divisions 1, 2 and 4 – simply assumes that the Singapore liquidation of an unregistered company will in every case proceed from beginning to end as a worldwide liquidation with the Singapore liquidation being the only liquidation. There is no statutory basis in Division 5 to divert the Singapore liquidation of an unregistered company from that course. Division 5 does not expressly or impliedly envisage or enact the ancillary liquidation doctrine because it does not even envisage or enact cross-border aspects of Singapore's insolvency law.

82 The liquidation of an unregistered company under Division 5 of Part X of the Act – which includes the liquidation of a foreign company – is just as much a worldwide liquidation as the liquidation of a Singapore company under Divisions 1, 2 and 4 of Part X. Lord Hoffman confirmed this in *Re HIH* (at [8]-[9]):

> In the late 19th century there developed a judicial practice, based upon the principle of

> universalism, by which the English winding up of a foreign company was treated as ancillary to a winding up by the court of its domicile. There is no doubt that an English court has jurisdiction to wind up such a company if it has assets here or some other sufficient connection with this country: *In re Drax Holdings Ltd* [2004] 1 WLR 1049. And in theory, such an order operates universally, applies to all the foreign company's assets and brings into play the full panoply of powers and duties under the Insolvency Act 1986 like any other winding up order: see Millett J in *In re International Tin Council* [1987] Ch 419, 447: 'The statutory trusts extend to [foreign] assets, and so does the statutory obligation to collect and realise them and to deal with their proceeds in accordance with the statutory scheme.'
>
> But the judicial practice which developed in such a case was to limit the powers and duties of the liquidator to collecting the English assets and settling a list of the creditors who sent in proofs [to the English liquidators]. The Court, so to speak, "disapplied" the statutory trusts and duties in relation to the foreign assets of foreign companies. The practice was based partly upon the pragmatic consideration that any foreign country which applied our own rules of private international law would not recognise the title of an English ancillary liquidator to the company's assets. But it was also based on the principle of universalism."

83 This passage, when read together with the passage from *Re BCCI* set out in [66] above, confirms that the English statutory insolvency scheme – on which our Part X is based – contemplates a worldwide liquidation of a foreign company in which the local liquidator enjoys or is subject to the full panoply of worldwide statutory rights, powers and obligations as the liquidator of a local company. Any limitation on the liquidator's theoretical worldwide power is imposed by the common law and not by statute. It is therefore incorrect, as the Singapore Liquidators appear to presume, that because the Singapore liquidation is characterised as an ancillary liquidation, the Singapore Liquidators' statutory duties are by that fact alone confined to collecting Singapore assets [note: 22] and transmitting the proceeds to the principal liquidation.

Division 5 of Part X applies to all foreign companies

84 The next point I make is that Division 5 of Part X governs the winding up of every foreign company – a foreign company being one of the two classes of unregistered companies – whether or not the foreign company is carrying on business in Singapore. Section 351(4) of the Act provides that in Division 5 of Part X, "'to carry on business' has the same meaning as in section 366." Section 366, of course, appears in Division 2 of Part XI.

85 Division 5 of Part X clearly applies even to foreign companies which have a place of business or which carry on business in Singapore: see ss 351(1)(a), 351(1)(c)(i), 351(2)(a) and 351(2)(b).

86 Division 5 of Part X also applies to the winding up of every foreign company even if the particular foreign company has registered under section 368 of the Act. In other words, an unregistered company which is a foreign company remains an unregistered company within the meaning of section 350(1) *even if* it registers under section 368. I say this for four reasons. First, the term "unregistered company" is defined in s 350(1) of the Act to include a "foreign company" without any qualification. The definition does not exclude foreign companies which register under section 368. Second, the only express exclusion in s 350(1) is for companies "incorporated" under Singapore's companies legislation. So the relevant registration which removes a legal entity from the scope of the term "unregistered company" is registration by the Registrar of Companies under section 19(3) of the Act. Third, Division 2 of Part XI of the Act clearly contemplates that a foreign company which complies with its obligation to register under section 368 can be put into liquidation in Singapore. But Division 2 of Part XI itself contains no section which enables a court to make a winding up order

analogous to section 254(1) (for Singapore companies) and section 351(1) (for unregistered companies). So the only section under which a court can wind up a foreign company – whether or not registered under s 368 – is s 351(1). Fourth, the legislative intent is that a foreign company which carries on business in Singapore without registering commits an offence (s 386). Parliament can hardly be taken to have legislated separately in Division 5 of Part X for the liquidation of lawbreakers who carry on business in Singapore but fail to register under s 368.

87 So even in the case of a foreign company – whether or not it has a place of business in Singapore and whether or not it carries on business in Singapore – the Act contemplates that the Singapore liquidation will in every case proceed from beginning to end as a worldwide liquidation with the Singapore liquidation being the only liquidation. Even for foreign companies, Division 5 of Part X does not expressly or impliedly envisage or enact the ancillary liquidation doctrine.

88 But s 377 does. It is that section to which I now turn.

The insolvency provisions of Division 2 of Part XI

89 Division 2 of Part XI deals with insolvency only in s 377. In the historical context of our statutory insolvency scheme, s 377 is based on a relatively recent precursor. It originated in the 1961 Act and has no precursor in the 1948 Act or its predecessors. It operates by way of a gloss on the general insolvency scheme of Part X, which is far older. It represents the first attempt in the history of the insolvency scheme on which our Act is based to put certain aspects of the common law ancillary liquidation doctrine on a statutory footing.

90 Three further aspects of Division 2 of Part XI are entirely local idiosyncrasies which we introduced in 1967 or later. These are: (a) s 365 which deals with the applicability of Division 2 of Part XI; (b) s 368 which determines which foreign companies are obliged to register in Singapore and when they must do so; and (c) s 377(3)(c) and s 377(7) which oblige a Singapore liquidator to ring-fence Singapore assets for payment of the foreign company's preferential debts under Singapore law and for payment of debts incurred in Singapore by the foreign company.

91 The legislative history of the most important aspect of s 377 – subsection (3) – is set out in *Tohru Motobayashi v Official Receiver* [2000] 3 SLR(R) 435 at [39] – [40] ("*Tohru Motobayashi*"). For present purposes, it suffices only to make the following observations about s 377(3) of the Act.

92 The analogue in the 1961 Act of our Part XI is also numbered Part XI and is also titled "Various Types of Companies Etc". The model for our s 377(3) is s 352(3) of the 1961 Act which provided as follows:

> (3) A liquidator of a foreign company appointed for the State 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 State or Territory of the Commonwealth 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) shall not, without obtaining an order of the Court, pay out any creditor to the exclusion of any other creditor of the foreign company;

(c) shall, unless otherwise ordered by the Court, only recover and realise the assets of the foreign company in the State and shall pay the net amount so recovered and realised to the liquidator of that foreign company for the place where it was formed or incorporated.

93 Section 377(3) of the Act reads as follows:

(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.

[Emphasis added]

The words I have underlined in s 377(3) are where our legislature has effected changes of substance to s 352(3) of the 1961 Act.

94 The three limbs of s 377(3)(c) impose three duties on a Singapore liquidator of a foreign company.

95 The first limb of s 377(3)(c) is taken directly from s 352(3)(c) of the 1961 Act. It imposes a specific territorial limit – by statute – on the obligation of the Singapore liquidator of a foreign company to get in and realise that company's assets. The effect of this limb is to confine by statute, and subject to contrary order by the court, every insolvency to which this section applies *prima facie* to local assets only. This reverses the fundamental but unstated worldwide nature of every liquidation under Part X, whether of a Singapore company or of a foreign company.

96 The second limb of s 377(3)(c) requires the liquidator of a foreign company to "pay the net amount so recovered and realised to the liquidator of that foreign company for the place where it was formed or incorporated". This duty is taken virtually word for word from s 352(3)(c) of the 1961 Act. This limb states another aspect of the ancillary liquidation doctrine. It obliges the Singapore liquidator to transmit the Singapore proceeds to the principal liquidator so that he can distribute assets from a central pool in the principal liquidation in the foreign company's place of incorporation.

97 But in Singapore, this obligation is subject to a proviso which has no equivalent in 352 of the 1961 Act. Under our Act only, the Singapore liquidator must first pay preferential creditors under s 328 of the Act before paying any proceeds of the Singapore liquidation to the principal liquidator. Although the proviso is a local innovation, the substance is not novel. It merely puts on a statutory

footing what has always been taken to be the case in an ancillary liquidation but which was left unexpressed in s 352(3)(c) of the 1961 Act. As Lord Hoffman said in *Re HIH* at [21], "the usual English practice is, when remittal to a foreign liquidator is ordered, to make provision for the retention of funds to pay English preferential creditors." Thus, even under the ancillary liquidation doctrine, local assets are ring-fenced for the benefit of local preferential creditors.

98 The third limb of s 377(3)(c) is the crucial one for the purposes of this case. It requires the liquidator to pay "any debts" and satisfy "any liabilities incurred in Singapore by the foreign company" before paying the net proceeds of the Singapore liquidation to the foreign liquidator. This limb ring-fences Singapore assets for the payment of debts incurred in Singapore by a foreign company. It is a wholly novel provision, having no equivalent in English or Australian legislation, or in the common law. It was enacted in Singapore in 1967 and mirrored in Malaysia in 1985 (*Tohru Motobayashi* at [40]). It abrogates the usual rule at common law and under Part X which is that all debts in each class of every liquidation – whether of a Singapore company or a foreign company – stand on an equal footing in a Singapore liquidation regardless of where they were incurred.

99 It is important to note that s 377(3)(c) is not so territorial as to mandate ring-fencing for creditors *from Singapore* (cf [28] above). The national origin or domicile of the creditor is quite irrelevant under s 377(3)(c). Only the origin of the *debt* which the creditor claims against the foreign company is relevant. So in that sense, s 377(3)(c) is not territorial: all creditors, whatever their origin or domicile, enjoy the benefit of having Singapore assets ring-fenced to pay Singapore debts.

100 But although s 377 enacts aspects of the ancillary liquidation doctrine, it is far from an attempt to enact or codify it. This is because it continues to envisage that a Singapore liquidation of a foreign company could be its sole or principal liquidation: thus s 377(4) envisages that a Singapore liquidation of a foreign company can commence and conclude with no principal liquidator in place.

Does section 377(3)(c) apply to the liquidation of Beluga Chartering?

101 The question for me is whether s 377(3)(c) applies in the liquidation of Beluga Chartering. The Official Receiver submits that it does because that is the effect of s 350(2) of the Act, whether or not Beluga Chartering was carrying on business in Singapore. [note: 23] I therefore now consider the scope of s 350(2) and s 365 of the Act.

102 There are three issues which I must consider:

(a) what "companies" means on each of the two occasions it appears in s 350(2);

(b) what, if anything, is the significance of the different structure of the two limbs of s 350(2); and

(c) whether s 365 of the Act establishes a condition precedent to the application of s 377 of the Act.

103 In my view, for the reasons which follow, s 350(2) of the Act is wide enough not to preclude the operation of the insolvency provisions in s 377 in a liquidation under Division 5 of Part X. And s 365 does not establish a condition precedent for the application of s 377 of the Act. The result is that section 377(3)(c) applies to Beluga Chartering.

104 I now explain my reasons for arriving at these conclusions.

Scope of s 350(2) – meaning of the word "companies"

Scope of s 350(2) – meaning of the word "companies"

105 I set out s 350(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]

106 Section 350(2) comprises two limbs. The word "companies" is used once in each limb, as underlined above. For consistency, the word "companies" should obviously be ascribed the same meaning in both limbs unless there is a compelling reason not to.

107 The word "company" in the Act does not always mean "Singapore company" (see [44] to [61] above). What "company" or its plural means in any particular provision is in every case a question of context. To understand in context what "companies" means in s 350(2), I must turn to the origins of that section. Doing so shows that the use of "companies" is one of those occasions when company simply means "legal person".

108 Section 350(2) is derived from s 314 of the 1961 Act which is in turn derived from s 404 of the 1948 Act. I therefore start with s 404 of the 1948 Act.

109 The structure of Parts X and XI of our Act are modelled on the structure of Parts IX and Part X of the 1948 Act respectively. Section 404 of the 1948 Act is found in Part IX of that Act and reads as follows:

> **404. Provisions of Part IX cumulative**
>
> 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:
>
> Provided that an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part of this Act.
>
> [Emphasis added]

110 I make two points. The first limb of s 404 specifically refers only to the *preceding* provisions of the 1948 Act. This is not surprising. There were no insolvency provisions in any subsequent part of the 1948 Act. The second point is that the second limb of s 404 qualifies the second use of the word "companies" by following it with the words "formed and registered under" the 1948 Act. This is only an apparent tautology. Section 455 of the 1948 Act contained the same definition of "company" as our Act, with editorial changes, and was subject in the same way to a contrary context. By these additional words, the second limb of s 404 made clear that that Division did not preclude – in the liquidation of an unregistered company – the availability to the court or a liquidator of powers and

discretions made available in the insolvency of *locally-incorporated* companies. If the 1948 Act had intended the word "companies" in the first limb to be confined as in the second limb, it would have followed the first use of the word "companies" by the same limiting phrase as appears in the second limb. But the 1948 Act did not do that. That provides a clear indication and a contrary context. "Companies" in the first limb of s 404 of the 1948 Act simply meant legal persons.

111 Section 404 of the 1948 Act is the base for s 314(2) of the 1961 Act. Section 314(2) is found in Part X of the 1961 Act and reads as follows:

> **Section 314(2): Provisions of Division cumulative**
>
> The provisions of this Division shall be in addition to and not in restriction of any provisions contained in this or any other Act 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.
>
> [Emphasis added]

112 Again, I note two points: s 314(2) deliberately broadened the language to refer to any insolvency provision *wherever appearing* in the 1961 Act, and indeed in the whole of the Victorian statute book. This again is not surprising: unlike the 1948 Act, the 1961 Act *did* contain insolvency provisions in subsequent provisions, namely s 352(3) of the 1961 Act, the precursor of our section 377(3). Because s 352(3) of the 1961 Act is capable of applying only to foreign companies, this broadening of the scope of s 314(2) reinforces the view that it – like s 404 of the 1948 Act – intended the first use of the word "companies" to mean simply "legal persons" and not just locally-incorporated companies.

113 The second point is that s 314(2) of the 1961 Act differs from s 404 of the 1948 Act because it deliberately removed the modifying phrase "formed and registered under this Act" from the second use of the word "companies". The effect of this deliberate deletion is to assimilate the meaning of the second use of the word "companies" in this section with the first use. So the consequence of this deletion is that "companies" was intended simply to mean "legal persons" in the second limb of s 314(2) as well.

114 Section 350(2) of our Act follows precisely the wording of s 314(2) of the 1961 Act, subject only to editorial amendment. In my view, that indicates that our legislature intended our s 350(2) to have the same scope as s 314(2) of the 1961 Act. "Companies" means "legal persons" on both occasions in section 350(2).

115 I am fortified in this interpretation by noting the effect of a contrary interpretation in the case of the liquidation of a foreign company registered under s 368 of the Act. It is common ground that that company can be placed in liquidation only under Division 5 of Part X. It is also common ground that in its liquidation, s 377(3)(c) would apply with full force. But if s 350(2) operates positively to preclude all of s 377 from applying to a liquidation under Division 5 of Part X simply because s 377 is not a provision which relates to the liquidation of *Singapore* companies, then s 377(3)(c) could not apply even to the liquidation of a foreign company which *had* registered under s 368. That cannot have been the legislative intent. And no party before me has suggested that it was.

Scope of s 350(2) in Division 5 of Part X – two limbs

116 But even if I am wrong in the interpretation of "companies" in s 350(2), it is my view that the first limb of s 350(2) does not operate to exclude provisions which fall outside its scope from applying to a liquidation under Part 5 of Division X. Section 350(2) comprises two limbs. The second limb is phrased in the *positive*. Its effect is positively to permit all powers and discretions falling within its scope to apply in the liquidation of an unregistered company. The first limb of s 350(2), by contrast, is phrased in the *negative*. It simply provides that no provision in Division 5, by the fact alone of its existence, *precludes* a provision outside Division 5 from applying to the liquidation of an unregistered company. Unlike the second limb of s 350(2), the first limb does not operate positively to apply to the liquidation of an unregistered company those provisions that are *within* its scope. Nor does it operate positively to preclude those provisions that are *outside* its scope from applying to the liquidation of an unregistered company. Therefore, it is not correct to say that s 350(2) *positively precludes* a provision which falls *outside* the scope of the first limb of s 350(2) from applying to the liquidation of an unregistered company by that fact alone.

117 So even if the word "companies" is read as meaning only *Singapore* companies, the only consequence is that s 350(2) fails expressly to provide that nothing in Division 5 of Part X of the Act precludes insolvency provisions such as s 377 of the Act from applying to the winding up of a foreign company under Division 5 of Part X. That does not carry the necessary implication that something in Division 5 *does* preclude s 377 from applying. So on that ground alone, s 377 may apply to the liquidation of a foreign company under Division 5 of Part X however one interprets "companies" in s 350(2).

118 The question then arises: is there anything else which prevents s 377 from applying to the liquidation of a foreign company under Division 5 of Part X?

Difficulties in interpreting s 365

119 On its face and looked at in isolation, s 377 is in absolute terms and is wide enough to apply to a foreign company such as Beluga Chartering. Given my finding that nothing in s 350(2) on its proper construction prevents section 377 from applying to a foreign company, that is sufficient to lead to the result that s 377 applies to Beluga Chartering.

120 I must, however, consider s 365 of the Act. That section appears at the beginning of Division 2 of Part XI of the Act and provides as follows:

> **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.

121 Section 365 is commonly interpreted as setting a condition precedent for the application of s 377. So, in *RBG* (at [25]), counsel for the creditor conceded that s 377 did not apply to a foreign company which was not registered under section 368. As a result, arguments as to the construction of s 365 were not addressed before Woo Bih Li J.

122 The condition-precedent interpretation has startling consequences. To start with, it means that s 365 creates a circularity. To put it simply: on this interpretation, s 365 provides that all of the sections of Division 2 of Part XI – including s 368 – apply *only* to a foreign company which complies with s 368. Only a company which registers under s 368 is obliged to register under s 368. How can that be right? Even if we dismiss this circularity by saying that pedantic quibbles over semantics must

give way to clear legislative intent, there is a second, larger consequence.

123 The condition-precedent interpretation creates a huge loophole in Division 2 of Part XI. It means that all of Division 2 of Part XI – including s 386, the penalty provision – cannot apply to a foreign company unless it registers under s 368. So a company cannot be prosecuted for failing to register under s 368 unless it has registered under s 368. That cannot have been the legislature's intent.

124 In the context of s 377, the condition-precedent interpretation leaves out of the scope of s 377 of the Act foreign companies to which the legislature clearly intended s 377 to apply. On this interpretation, s 377 does not apply to a foreign company which establishes a place of business in Singapore or which carries on business in Singapore *but which at no time – whether before or after doing either – registers under s 368*. Did the legislature really intend to exempt that foreign company from all of Division 2 of Part XI including s 377? It could not have intended that. Why would the legislature have intended to withdraw the benefit of s 377 from the creditors of a foreign company simply because the foreign company carried on business in Singapore in complete and unremedied breach of its obligation to register under s 368? And this loophole is so clear that it cannot be resolved by any amount of purposive interpretation of the qualifying condition in s 365.

125 In *RBG*, Woo J found a practical resolution to at least part of these difficulties. Woo J acknowledged that the condition-precedent interpretation conceded before him to be correct led to the second difficulty I have identified. He arrived at a practical solution, holding at [31] that a foreign company which establishes a place of business or carries on business in Singapore but which fails to register under s 368 remains nevertheless under a continuing obligation to register under that section. Once it complies and registers, it becomes subject to s 377. But it is not at all clear how a continuing obligation can arise at all given the circularity between s 365 and s 368. And even Woo J accepted that his practical solution was only a partial solution. It did not deal at all with the case of a foreign company which is obliged to register but never registers at all. This loophole clearly troubled him. Thus, Woo J said at [64]: "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."

126 These difficulties can all be resolved, but at a price. We can interpret s 365 as not setting a condition precedent but as simply describing *one class* of foreign companies to which Division 2 of Part XI applies**.** The price is that this interpretation of s 365 takes it from being underinclusive to being overinclusive. It applies s 377 to a class of foreign companies which the legislature arguably never intended it to apply to: a foreign company which neither has a place of business nor carries on business in Singapore.

127 I will show at [128] to [148] below that s 365 need not be interpreted as a condition precedent for the application of the provisions of Division 2 of Part XI. To achieve this, I will rely on section 365's legislative history and a textual analysis of s 365. The overinclusiveness is not a counterargument to this interpretation. The problem of overinclusiveness manifests itself only in relation to s 377(3)(c). Insolvency law holds the solution to that problem.

The history of s 365

128 The modern precursor of section 365 of the Act is section 406 of the English Companies Act 1948. The equivalent of a "foreign company" in the 1948 Act is an "oversea company". Section 406 as enacted reads as follows:

406 Application of ss.407 to 414

The next eight following sections shall apply to all oversea companies, that is to say, companies incorporated outside Great Britain which, after the commencement of this Act, establish a place of business within Great Britain, and companies incorporated outside Great Britain which have, before the commencement of this Act, established a place of business within Great Britain and continue to have an established place of business within Great Britain at the commencement of this Act.

129 I make three observations about section 406 of the 1948 Act. First, section 406 did not on its face establish a condition precedent for the application of sections 407 to 414 of that Act. It did not say that those 8 sections shall apply *only* to oversea companies. The second point is that none of the conditions set out in section 406 depended on any other section of the 1948 Act. There could be no circularity. Finally, and in any event, sections 407 to 414 all have to do with, and *only* with, obligations to do with or arising from registration. Those sections are not cross-referenced from anywhere else in the 1948 Act. So it did not matter whether section 406 did or did not create a condition precedent. Section 406 was the only gateway into ss 407 to 414. And those sections had no meaning outside the context of oversea companies obliged to register under the 1948 Act.

130 Section 406 of the 1948 Act was the model for section 344 in Division 3 of Part XI of the 1961 Act. Section 344 appeared at the beginning of Division 3 of Part XI and provided as follows:

Foreign companies to which this Division applies

344. (1) ...[T]his Division applies to a foreign company only if it has a place of business or is carrying on business within the State.

[Emphasis added]

131 I make three observations about s 344. First, unlike s 406 of the 1948 Act, it attached the word "only" to the condition which it set out. The word must have been inserted deliberately and must be given a meaning. It made s 344(1) a condition precedent. Second, s 344 of the 1961 Act was followed by s 346 of the 1961 Act which required every foreign company to register within one month *after* it established a place of business or commenced to carry on business within Victoria. But s 344 made no reference to s 346. There was no circularity. The only condition which s 344 imposed on the application of s 346 was that the foreign company either had a place of business in Victoria or carried on business in Victoria. The third observation is that – unlike ss 407 to 414 of the 1948 Act – Part XI of the 1961 Act dealt with registration *and insolvency*. So s 344 was intended to and did function as a condition precedent to the application of every one of the provisions of Division 3 of Part XI in the 1961 Act, whether dealing with registration or with insolvency. It was if – and *only* if – the condition in s 344 was satisfied that any of the provisions of Division 3 of Part XI of the 1961 Act applied to a particular foreign company.

132 Section 344 of the 1961 Act was the model for s 329 of our Act. In 1967, s 329 provided as follows:

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.

[Emphasis added]

133 Section 346 of the 1961 Act was the model for s 332 of our 1967 Act. In 1967, s 332 provided as follows:

> **Documents, etc., to be lodged by foreign companies having place of business in Singapore.**
>
> 332. —(1) Every foreign company shall within one month after it establishes a place of business or commences to carry on business in Singapore, lodge with the Registrar for registration – . . . ."
>
> [Emphasis added]

Sections 329 and 332 as enacted in 1967 in our Act are identical to s 344 and 346 of the 1961 Act, save only for changes of an editorial nature.

134 By adopting the language of s 344 of the 1961 Act – including its use of the word "only" – our s 329 made clear that it established a condition precedent to the application of all the provisions in Division 2 of Part XI. Those provisions applied to every foreign company which satisfied the condition in s 329 *and to no other types of foreign companies*. That condition precedent made sense in light of the conceptual sequence underlying s 332: *first*, a foreign company establishes a place of business or commences carrying on business in Singapore; *second*, the obligation under s 332 immediately binds the foreign company; and *finally*, the foreign company has one month to discharge that obligation and register under s 332. That condition precedent also made sense in that it required examining only whether the foreign company has a place of business or carries on business in Singapore, and not whether it had complied with its registration requirement. It was not circular.

135 In 1984, s 54 of the Companies (Amendment) Act 1984 (Act 15 of 1984) amended s 332. After amendment, s 332 read as follows:

> **Documents, etc., to be lodged by foreign companies having place of business in Singapore.**
>
> 332. —(1) Every foreign company shall, ~~within one month after~~ before it establishes a place of business or commences to carry on business in Singapore, lodge with the Registrar for registration – . . . ."
>
> [Strikethrough and underlining added]

136 A foreign company was now obliged to register under s 332 *before* it established a place of business or commenced carrying on business in Singapore. The Report of the Select Committee on The Companies (Amendment) Bill [Bill No. 16/83] preceded the 1984 Amendment Act. It does not record the reason for this change in the language. Presumably, the intention was to ensure that there was no longer a one-month window during which a foreign company could legally carry on business in Singapore without being registered. By reason of the change, the obligation to register bound a foreign company at an earlier point in time in the conceptual sequence: at a time when it neither had a place of business nor carried on business in Singapore. So the sequence envisaged by the amended s 332 was: first, the obligation under s 332 binds a foreign company intending to establish a place of

business or carry on business in Singapore; second, the foreign company complies with its obligation under s 332; and finally, the foreign company actually establishes a place of business or commences to carry on business in Singapore.

137 But when s 332 was amended in this way, s 329 was not amended. It remained in the form set out in [132] above. This must have been due to oversight. But it caused an immediate and serious problem. The condition in s 329 was still drafted as a condition precedent. And it still governed the application of the entirety of Division 2 of Part XI. That meant that it continued to govern the registration obligation under s 332. But at the point in time when a foreign company was obliged to register under the new s 332, the foreign company had neither established a place of business in Singapore nor commenced carrying on business in Singapore as required by the unamended s 329. The unamended condition precedent in s 329 meant that the entirety of Division 2 of Part XI, including the registration obligation itself, did not apply to the very foreign companies to which it was intended to apply. Section 332 would *never* operate as intended.

138 Division 2 of Part XI was next amended in 1987. This set of amendments originated in the Companies (Amendment) Bill (Bill No. 9 of 1986). By the time of the 1986 Bill, s 329 of the Act had been renumbered as s 365. Section 332 had been renumbered as s 368.

139 Clause 62 of the 1986 Bill proposed an amendment to address the logical inconsistency between s 368 and s 365. Section 365 as reformulated in the 1986 Bill was 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.

140 Note that the word "only" is now missing from the proposed s 365. It was no longer to operate as a condition precedent.

141 The 1986 Bill was referred to a Select Committee after its second reading. The Select Committee reformulated the proposed language of s 365 as follows:

> **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.

142 The Select Committee chose the new language precisely to address the logical inconsistency between s 365 and s 368. As then Finance Minister Mr Richard Hu Tsu Tau said at page D69 in the Report of the Select Committee on the Companies (Amendment) Bill [Bill No. 9/86]:

> "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."
>
> [Emphasis added]

143 The Select Committee did not reintroduce the word "only" in their proposed s 365. It too, like the original wording of cl 62, was not to operate as a condition precedent.

144 The Select Committee's report resulted in the Companies (Amendment) Act 1987 (Act 13 of 1987). The 1987 Amendment Act adopted the Select Committee's formulation of s 365. Section 365 has remained in that form to this day.

145 Section 365 as it stands applies Division 2 of Part XI to a foreign company which complies with s 368. But unlike its Singapore precursor (see [132]) and unlike its Australian model (see [130]), s 365 no longer prescribes that Division 2 of Part XI applies to the class of foreign companies which it specifies *and to no others*. It no longer operates as a condition precedent. It merely describes *one* of the classes of foreign companies to which Division 2 of Part XI applies.

146 This reading of s 365 is consistent with the drafting convention of the Act. Sections 365 and 130B are the only provisions in the Act which appear at or near the beginning of a Division and deal with the application of the Division. Section 130B was inserted into the Act in 1993 and amended in 2004. Both incarnations of s 130B are cast as conditions precedent by using the word "only". The omission of the word in s 365 must be given interpretive significance.

147 In the specific context of s 365, the absence of "only" is all the more significant because it is not just an omission but a deletion. "Only" was present in s 365's precursor but was then deleted both by the cl 62 in the 1986 Bill and by the Select Committee's reformulation of cl 62. Further, that deletion achieved a purpose: it solved a specific problem with the operation of section 368 caused by s 365's precursor being a condition precedent which specified an inapt condition. Given that the legislature amended s 365 in 1987 to correct an inapt condition precedent, it cannot have been the legislature's intent for the amendment to enact another inapt condition precedent, creating circularity, loopholes and underinclusiveness.

148 For these reasons, I hold that s 365 does not establish a condition precedent for the application of s 377. The condition which s 365 sets out is a sufficient but not a necessary condition for s 377 to apply to a foreign company. If s 365 is read as not creating a condition precedent, s 368 can apply as it was intended by the 1984 Amendment Act. The obligation in s 368 is capable of binding a foreign company both *before* and *after* it establishes a place of business or commences to carry on business in Singapore.

The scope of the insolvency provisions in s 377

149 The price of achieving the legislature's intent of bringing in the defaulting foreign company within the scope of section 377 is the over inclusiveness I have identified at [126] above. Insolvency law holds the key to addressing this over inclusiveness.

150 First, a winding up order against a foreign company is not a matter of right but a matter of discretion. A Singapore court will not exercise that discretion unless the foreign company has a sufficient connection with Singapore. This is usually, but not always, established by the presence of substantial assets in Singapore and a reasonable possibility of some benefit to creditors within the jurisdiction which will "warrant setting in motion all the machinery of a company liquidation in . . . Singapore": see *Tong Aik (Far East) Ltd v Eastern Minerals & Trading (1959) Ltd* [1965] 2 MLJ 149 following *Banque des Marchands de Moscou (Koupetschesky)(in liq) v Kindersley* [1951] 1 Ch 112.

151 Second, the Singapore court has under the ancillary liquidation doctrine a discretion to disapply

even substantive aspects of Singapore's insolvency law in appropriate circumstances, so far as is consistent with justice and Singapore public policy. I deal with this discretion in more detail when I analyse the decision in *HIH* at [191] to [218] below.

152 The position I have now arrived at is that under Singapore's statutory insolvency scheme, the insolvency of every foreign company takes place under Division 5 of Part X, supplemented by the provisions of Divisions 1, 2 and 4 of Part X and by the insolvency provisions in s 377 of the Act.

153 It may be said that interpreting s 365 as not setting a condition precedent to the application of Division 2 of Part XI, and therefore to the application of s 377(3)(c), is a parochial and regressive step because it enlarges the scope for s 377(3)(c) to undermine the *pari passu* principle.

154 There are two responses to that. First, the merits of ring-fencing as a rule of insolvency law is something that the legislature considered in 1967 and thought fit as a matter of policy to enact. Until the legislature reconsiders ring-fencing and amends or abolishes it, it must apply.

155 Second – although it might sound heretical to say it – the *pari passu* principle is not sacrosanct in any mature insolvency scheme. I now speak of the *pari passu* principle only in its narrow distributive sense and not in the sense it is sometimes used to describe rules which safeguard the integrity of the insolvent company's estate *prior* to distribution. The *pari passu* principle is today so riddled with exceptions that it accords far more closely with reality to acknowledge that all that the *pari passu* principle does now is simply to set out the rule of rateable distribution by which an insolvent company's assets are distributed to that class of creditors which is unfortunate enough to receive dividends in the lowest priority in a particular insolvency.

The pari passu principle

156 The *pari passu* principle in compulsory liquidation in England is expressly stated by Rule 4.181 of the English Insolvency Rules 1986. Rule 4.181 reads as follows:

> **Debts of insolvent company to rank equally**
>
> 4.181. Debts other than preferential debts rank equally between themselves in the winding up and, after the preferential debts, shall be paid in full unless the assets are insufficient for meeting them, in which case they abate in equal proportions between themselves.

157 Curiously, there is no equivalent provision in our Act or the rules made under it. The only statutory statement of the *pari passu* principle that we have is s 300 of the Companies Act. But that provision applies only to voluntary winding up. In Singapore, the *pari passu* principle in insolvent liquidation is a creature of the common law: *Hitachi Plant Engineering & Construction Co Ltd and another v Eltraco International Pte Ltd and another appeal* [2003] 4 SLR(R) 384 at [56] approving *Joo Yee Construction Pte Ltd v Diethelm Industries Pte Ltd* [1990] 1 SLR(R) 171 at [18].

158 Section 300 traces its history back to s 133(1) of the English 1862 Act ([34] above) which read as follows:

> 133. The following Consequences shall ensue upon the voluntary Winding up of a Company: -
>
> 1. The Property of the Company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the Regulations of the Company, be distributed amongst the Members according to their Rights and Interests in the Company.

[Italics in original]

159 Section 133(1) enacts an absolute *pari passu* rule: *all* property of the insolvent company is to be applied *pari passu* in satisfaction of *all* liabilities of the insolvent company, without exception. That rule can truly be said to be a paramount rule of distribution. But that is not the *pari passu* rule we have today.

160 The *pari passu* principle today is riven with *de facto* and express exceptions, both intrinsic to and extrinsic to the Act. First, only assets which are the property of the insolvent company go into the distributable pool for the benefit of creditors. Assets in which a third party, whether a creditor or not, has a proprietary interest are to that extent not the insolvent company's property and do not go into the pool. For example, all of the following property stands outside the distributable pool: property subject to a security interest (whether fixed or floating), property subject to an express or implied trust and property subject to a retention of title clause. All of these are, in legal terms, property rights and not exceptions to the *pari passu* principle. But all of these are, in practical terms, *de facto* exceptions to the *pari passu* principle.

161 Second, unlike s 133 of the 1862 Act, the modern content of the *pari passu* principle is heavily qualified by statute. First, a liquidator must pay all preferential claims before applying the *pari passu* principle to distribute the insolvent company's remaining assets in settlement of its remaining liabilities. Prominent amongst these are, of course, the costs and expenses of liquidation, the interests of employees and unpaid tax.

162 Once preferential creditors have been paid, it is the liquidator's duty to distribute the remaining assets *pari passu* to unsecured creditors. Even here, insolvency law creates or recognises further *de facto* qualifications to the *pari passu* principle. Even at this point, not all members of the general body of unsecured creditors receive a rateable proportion of what is left.

163 The foremost amongst these exceptions is insolvency set-off. Where available, insolvency set-off is subject to the mandatory principle, the retroactivity principle and the hindsight principle: see *Re BCCI* at 236G; *Stein v Blake* [1996] 1 AC 243 at 253-255. All of these features mean that insolvency set-off is the functional equivalent of security. It not only permits but – because it is mandatory and self-executing – *requires* a creditor with a right of set-off to retain for his exclusive benefit the full value of his debt to the insolvent company. Although an unsecured creditor in the strict legal sense, the creditor with a right of set-off receives a better than rateable distribution of the insolvent company's assets, just as a secured creditor would. Insolvency set-off is yet a further departure from the *pari passu* principle.

164 In addition to statutory departures from the *pari passu* principle, it is also possible for the Court to sanction a departure from the *pari passu* principle. In *Re BCCI* Nicholls V-C and the Court of Appeal held that a liquidator can depart from the *pari passu* distribution scheme – and the Court can approve that departure – if it is merely ancillary to the liquidator's exercise of any of the powers which are exercisable with the sanction of the Court under the English equivalent of ss 272(1)(b), 272(1)(c) or 272(1)(d) of our Act.

165 Finally, there are express exceptions to the *pari passu* principle in statutes other than the Companies Act. Some examples include priority schemes for depositors of insolvent banks and finance companies (s 62 of the Banking Act (Cap 19, 2008 Rev Ed) and s 44A of the Finance Companies Act (Cap 108, 2011 Rev Ed)), priority of specified liabilities of insolvent insurers (s 49FR of the Insurance Act (Cap 142, 2002 Rev Ed)), and statutory derogations from the *pari passu* principle in order to

uphold the finality of certain transactions (Parts II and III of the Payment and Settlement Systems (Finality and Netting) Act (Cap 231, 2003 Rev Ed); Division 4 of Part III of the Securities and Futures Act (Cap 289, 2006 Rev Ed)).

166 All of this shows that the distribution of assets in any mature insolvency scheme is now fundamentally based on policy. Once the absolute *pari passu* principle is qualified, there is no longer a principled basis on which to determine which qualifications are legitimate and which are not. Each qualification represents a pure policy decision by that jurisdiction's legal system (see *Re HIH* at [21]). These policy considerations will naturally differ from nation to nation. One jurisdiction may consider bribery such a scourge that it recognises a proprietary claim to the bribe or its traceable proceeds vested in the principal, one result of which is to accord the principal of an insolvent bribe-taker *de facto* priority over the bribe-taker's preferential and unsecured creditors: see *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638. Another may consider it undesirable as a matter of policy to do so: *Lister & Co v Stubbs* (1890) 45 Ch D 1; *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17. All of these choices rest on policy, not principle.

167 I therefore do not consider it correct today – if it ever was – to describe the *pari passu* principle as the fundamental or default policy of insolvency distribution underlying our statutory insolvency scheme. Indeed, it can be said with justification that a principal purpose of any mature insolvency scheme is precisely to delineate *departures* from the *pari passu* principle on policy grounds.

Section 377(3)(c) and the pari passu principle

168 So it is not to the point to argue against s 377(3)(c) or in favour of the ancillary liquidation doctrine by saying that the former is a departure from the fundamental *pari passu* scheme of distribution in insolvency or that the latter advances it, as the Singapore Liquidators do. [note: 24] The departure from the *pari passu* principle in s 377(3)(c) of the Act in the winding up of a foreign company is no different from the other departures from the *pari passu* principle which operate in any liquidation – whether those departures arise under the Act, at common law or under other statutes. In all cases, pure policy is at work.

169 Although it is not for me to defend the legislature but simply to apply its enactments, it seems to me that the policy underlying s 377(3)(c) is an entirely valid policy decision for our legislature to have taken. A foreign company which a Singapore court will wind up will almost certainly have assets in Singapore and liabilities in Singapore. Those assets and those liabilities are almost certain to be causally connected. That causal connection will be especially strong if the foreign company had a place of business in Singapore or carried on business in Singapore: it is almost certain that that foreign company's assets in Singapore would not exist without it incurring those liabilities, whether to employees, trade creditors or others connected to its Singapore business or place of business. It is entirely legitimate to say that those assets should first be applied against those liabilities to the exclusion of other liabilities.

170 As the then CJ Chan Sek Keong said writing extra-judicially in "Cross-Border Insolvency Issues Affecting Singapore" (2011) 23 SAcLJ 413 at para 15: "Territorialism had, and still has, a lot of advantages for local creditors individually in practical terms. It may amount to a preference, but it may be justified in that local creditors' claims have also contributed to the assets of the insolvent company". By local creditors, of course, is meant creditors whose debts arose locally.

171 Further, it is not arbitrary for a foreign company which does not have a place of business or which does not carry on business in Singapore to come subject to s 377. The solution lies in the

common law discretion either to make the winding up order in the first place or under the ancillary liquidation doctrine to disapply s 377(3)(c) of the Act in an appropriate case, so far as is consistent with justice and Singapore public policy. Indeed, it is restricting ring-fencing to foreign companies which register under s 368 which is arbitrary and unprincipled. The policy imperatives which led the legislature to enact s 377(3)(c) do not turn on whether the foreign company has or has not complied with section 368.

172 Conceptually, it is no counter argument to ring-fencing to say simply that ring-fencing is regressive because it undermines *pari passu* distribution. As I have shown at [155] to [167], the entire insolvency distribution scheme can be said to be designed to undermine *pari passu* distribution. Further, even the most ardent universalist – or modified universalist – accepts that it is entirely valid and appropriate for the ancillary liquidation doctrine to ring-fence local recoveries to discharge both the costs of the local liquidation and other local preferential debts. And universalists also accept that once the proceeds of the ancillary liquidation are transmitted to the principal liquidation, those recoveries should be ring-fenced in the principal jurisdiction to discharge the preferential creditors under the law of the principal liquidation. One can scarcely envisage a greater departure from the *pari passu* principle. And it does not address the point of principle to dismiss these preferential distributions as *de minimis*.

173 The obligation of a liquidator of a Singapore company to discharge Singapore preferential debts is now embedded in section 377(7) read with section 377(3)(c) and section 328 of our Act. But there is no magic in being a preferential creditor: the debt owed to a preferential creditor is nothing more than an unsecured debt. The words "*other* unsecured debts" in the introductory words to section 328 make this clear. The only difference between the body of preferential creditors and the general body of unsecured creditors is that insolvency law has conferred priority on the former but not the latter.

174 So why do universalists argue that ring-fencing local assets for locally-incurred debts is a regressive and parochial departure from the *pari passu* principle while accepting without question that ring-fencing local assets for local preferential debts is a valid departure from the *pari passu* principle? Surely the answer cannot be as simple as saying that only those exceptions which are shoe-horned into section 328 and which therefore bear the label "preferential debts" are valid departures from *pari passu* distribution while all others are unprincipled, parochial and regressive. If that were the case, the legislature could quite easily absolve the ring-fencing in section 377(3)(c) of all criticism by the simple expedient of transposing it into section 328. But that would be to elevate form over substance.

175 The transmission order which the Singapore Liquidators seek amounts in substance to a request that they be permitted to disregard s 377(3)(c) in the liquidation of Beluga Chartering. There is no warrant for me to permit them to do that in the statutory insolvency scheme under the Act. The only remaining question, therefore, is whether there is any common law principle which enables me to disapply the Singapore Liquidators' obligation under s 377(3)(c) in the liquidation of a foreign company.

176 I therefore turn now to analyse three seminal cases which contain the answer to that question. They are, in the order in which I shall analyse them, *Re BCCI, Re HIH* and *RBG.*

Three cases

Re BCCI – Nicholls V-C's order

177 Bank of Credit and Commerce International SA ("BCCI") was a company incorporated in Luxembourg. But it transacted most of its business in the United Kingdom. In 1992, BCCI went into

liquidation in Luxembourg. A few days later, Sir Nicolas Browne-Wilkinson V-C made a winding up order in England placing BCCI in liquidation. The English liquidators as well as the liquidators of the various BCCI entities in other jurisdictions entered into a contribution agreement and a pooling agreement. Their goal was the universalist's goal: to create a central, trans-jurisdictional pool of assets to receive the net proceeds of realisations and recoveries from each liquidation and out of which the creditors in each group company's liquidation would receive as far as possible the same level of dividend. Once realisations and recoveries reached the central pool, the distribution to unsecured creditors would, in the words of Sir Richard Scott V-C, "be the responsibility of the Luxembourg liquidators acting in accordance with Luxembourg law and under the supervision of the Luxembourg court".

178 The liquidators in each jurisdiction sought approval for the contribution and pooling agreements from the supervising court in each jurisdiction. The English liquidators' application came before Sir Donald Nicholls V-C. He approved the agreements by an order dated 12 June 1992 ("the Transmission Order").

Re BCCI – Scott V-C's order

179 By July 1996, the Courts of each relevant jurisdiction had approved the contribution and pooling agreements with necessary modifications and all avenues of appeal had been exhausted. The English liquidators had the benefit of Nicholls V-C's Transmission Order permitting them – without further order – to transmit the English proceeds to the Luxembourg liquidators for them to declare and pay a first dividend in the Luxembourg liquidation. But the English liquidators felt that certain matters required resolution before they could act on the Transmission Order.

180 One of those matters was how to deal with the issue of creditors who had proved in the English liquidation but who had the benefit of insolvency set-off against BCCI under English law. These creditors would suffer real prejudice if the English liquidators transmitted the English proceeds to Luxembourg under Nicholls V-C's Transmission Order instead of distributing the English proceeds under and in accordance with English insolvency law. This is because their rights of set-off under Luxembourg insolvency law were considerably narrower than their rights of set off under the Rule 4.90 of the English Insolvency Rules 1986.

181 The English liquidators therefore applied for further directions. The application came before Sir Richard Scott V-C. He summarised the issue thus (at 223H): "The main issue for decision is whether or to what extent this court can disapply rule 4.90 of the Insolvency Rules 1986 in order to allow the rules of Luxembourg insolvency regarding set-off to apply."

182 Scott V-C began his analysis by noting that Browne-Wilkinson V-C when he made the winding up order, Nicholls V-C when he made the Transmission Order and the Luxembourg Court all viewed the Luxembourg liquidation as the principal liquidation and the English liquidation as an ancillary liquidation. Scott V-C then posed for himself this question at 239A: "whether there are any, and if so what, limits to the extent to which the English liquidators in a so-called 'ancillary' liquidation can decline to apply provisions of English insolvency law and procedure in deference to the insolvency law and procedure of the country in which the principal winding up is taking place." The manner in which Scott V-C framed this question is significant: it shows that even though it was common ground that the English liquidation was an ancillary liquidation, he nevertheless considered the English liquidators bound by *all* their obligations under the English statutory insolvency scheme *unless* he could find some legal basis to disapply those obligations.

183 In his search for this basis, Scott V-C undertook a survey of the case law from 1886 to 1989.

The case law showed that the English courts have exercised a power virtually from the time of the first insolvency legislation to disapply aspects of the English statutory insolvency scheme so as to authorise English liquidators of a foreign company to play a role ancillary to the principal liquidators of that foreign company in its home jurisdiction. But what troubled Scott V-C was that the source of this power could not be found in any statute or in common law. In the result, he accepted that such a power had been established "by accretion of judicial decisions" (at 247C), and was too well-established by the time of his decision in 1996 for a judge at first instance to declare that power *ultra vires* (at 247G).

184 Scott V-C thus held that he had the power to disapply the English liquidators' statutory obligations so as to permit them to transmit the English proceeds to the principal liquidators for *pari passu* distribution to worldwide creditors. But he rejected the argument that this power was wide enough to permit him to disapply any aspect of English insolvency law as he thought fit. He held, therefore, that he had no jurisdiction to disapply a substantive rule of the English statutory insolvency scheme such as Rule 4.90 of the 1986 Rules.

185 The result was that Scott V-C permitted the English Liquidators to transmit the English proceeds to Luxembourg. But he required the English liquidators to retain funds for the claims of those creditors who were entitled to the benefit of insolvency set-off under English insolvency law. Scott V-C did not stop there. He also required the English liquidators to retain funds to meet the claims of a host of other English creditors too.

186 The combined practical result of Nicholls V-C's order and of Scott V-C's order was that the Court ring-fenced the English proceeds to meet: (1) the costs, charges and expenses of the English liquidation; (2) the claims of preferential creditors under English law (at 233D); (3) net creditors of BCCI to full amount of the dividend that they were entitled to receive under English insolvency set-off (at 251H and 252D); (4) creditors whose proofs of debt had been or would be admitted by the English liquidators applying English law but which the Luxembourg liquidators might reject on substantive grounds (at 250C and 252E); and (5) and the Deposit Protection Board (at 253E). Indeed, the only real distribution obligation under the English insolvency scheme which the Court disapplied was the obligation under Rule 4.181 of the English 1986 Rules to distribute assets *pari passu* to the general body of unsecured creditors who had proved in the English liquidation.

187 Two points emerge from *Re BCCI*. First, Both Nicholls V-C and Scott V-C took as their starting point the duty under English insolvency law of all English liquidators, by virtue of their appointment and office, to fulfil the entire suite of obligations imposed on them under the statutory insolvency scheme, including the obligations to distribute the English proceeds according to English insolvency law to every creditor, secured or unsecured, who proves in the English liquidation and whose proofs the English liquidators adjudicate upon and admit. This entire suite of obligations applies even if the company being liquidated is a foreign company. Second, even though the English liquidation was an ancillary liquidation, that characterisation did not in itself disapply all or any predetermined part of the English statutory insolvency scheme to the English ancillary liquidation of BCCI.

188 It is therefore wrong to characterise the outcome in *Re BCCI* as a victory for universalism let alone an unalloyed victory even for modified universalism. The result in *Re BCCI* was in fact and in a real sense territorial: an English court held that English insolvency law ring-fenced the English proceeds of an English ancillary liquidation to address the claims and putative claims of a host of creditors whose substantive rights had accrued under English pre-insolvency and insolvency law despite possible inconsistency between English insolvency law and the insolvency law of the principal liquidation. This was subject only to a very narrow exception which gave the court the power to direct that any assets remaining after all of these substantive rights under English law had been

addressed to be transmitted to the principal liquidation. The territorial nature of the outcome in *Re BCCI* is exposed by asking the question: what would have been transmitted to the Luxembourg liquidators if the English proceeds had been insufficient to meet the substantial list of retentions mandated by Nicholls V-C and Scott V-C? The answer is nothing.

189 The decision in *Re BCCI* left unaddressed the scope of the power to disapply aspects of the English statutory insolvency scheme. Was it as narrow as Scott V-C contended, not extending to substantive rights? Scott V-C relied on the fact that insolvency set-off arises under Rule 4.90 of the 1986 Rules and creates substantive rights. But ordinary unsecured creditors also have a substantive right to receive a rateable dividend out of the English proceeds under Rule 4.181 of the same Rules. What is the difference?

190 This question was addressed and answered by the House of Lords in the next case which I analyse: *Re HIH*.

Re HIH – in the English High Court

191 In *Re HIH*, four related insurance companies incorporated in Australia carried on business in Australia and in England. In 2001, an Australian Court made winding up orders and appointed Australian liquidators in respect of all four companies. At the request of the Australian court, the English High Court appointed liquidators – technically provisional liquidators, but nothing turns on the distinction on the facts of *Re HIH* – for the same four companies on the grounds that they had assets in England. The order appointing the liquidators did not empower the English liquidators to make distributions or to transmit the eventual English proceeds to Australia. The liquidators duly performed their statutory duties under English insolvency law and collected substantial English proceeds.

192 In 2005, the Australian court asked the English court to exercise its power under s 426(4) of the English Insolvency Act 1986 and direct the English liquidators to transmit the English proceeds to Australia for distribution by the Australian liquidators, allowing only for the payment of the expenses of the English liquidations and payment of English preferential creditors.

193 Section 426(4) of the English Insolvency Act 1986 reads as follows:

> 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 relevant country . . .

Australia is a "relevant country" for the purpose of this section.

194 The scheme for insolvency distribution in Australia gave priority to all insurance and reinsurance creditors of an insurance company over all other creditors in respect of recoveries from reinsurance and retrocession. David Richards J in the English High Court [2006] 2 All ER 671 framed the principal question before him as follows: "Does the English Court have power to direct the English liquidator of a foreign company to transfer the assets recovered by him to the liquidator of the company in its principal liquidation . . . where the legal regime applicable to the distribution of those assets among creditors is materially different from the regime which applies in England?" (at [57]). The material difference in this case – taking English law as it stood in 2003 – was said to be that English law, under Rule 4.181 of the 1986 Rules, mandated *pari passu* distribution of the English proceeds of HIH's liquidation whereas Australian law did not.

195 Richards J answered the principal question before him in the negative: the English court had no such power unless the English court could ensure that the foreign jurisdiction would distribute the

English proceeds in accordance with English law. But there was no means for Richards J in a transmission order to require the Australian court to apply English law in distributing the English proceeds. So Richards J refused the Australian liquidators' application.

196 In my view, Richards J was correct to hold that the obligation to distribute rateably the English proceeds to the general body of unsecured creditors under Rule 4.181 of the English Insolvency Rules 1986 is just as much a substantive provision of the English statutory insolvency scheme as the rule obliging the English liquidators to apply insolvency set-off under Rule 4.90 of the 1986 Rules. And he was also correct to point out that *Re BCCI* taken to its natural conclusion meant that both Rule 4.181 and Rule 4.90 had to be treated equally: either the court had the power to disapply both or it lacked the power to disapply either. But it is difficult to support his basis for concluding that he lacked the power to disapply either.

197 The basis of Richard J's decision was that Australian law departed from the *pari passu* principle. He made this finding on the basis that the Australian insolvency scheme was materially different from the English insolvency scheme. But this amounts to defining the ideal *pari passu* distribution by reference only to the English insolvency scheme. This is unduly parochial and elevates form over substance.

Re HIH – in the English Court of Appeal

198 On appeal, the English Court of Appeal [2007] 1 All ER 177 upheld the decision of the High Court but for different reasons. The Court of Appeal held that the English courts *did* have a power to disapply substantive provisions of the English statutory insolvency scheme. So the English Court did have the power to direct English liquidators to transmit assets under their control to a principal liquidation even if the insolvency scheme of the principal liquidation distributed assets otherwise than on a *pari passu* basis. But the Court of Appeal held that an English court would exercise the power only if the creditors entitled to prove in the English liquidation or a class of them were either (at [52]):

(a) not prejudiced by having the English proceeds distributed by the foreign liquidators under foreign law; or

(b) would enjoy advantages under that foreign law which offset the prejudice they would suffer.

199 There being prejudice and no such countervailing advantages on the facts of *Re HIH*, the Court of Appeal refused the transmission order.

200 The result of the High Court and the Court of Appeal's decision was to require the English liquidators to perform the entirety of the remainder of their suite of statutory duties under English insolvency law by conducting a separate liquidation and distribution in England of the English proceeds governed by English insolvency law.

201 The Australian liquidators appealed to the House of Lords.

Re HIH – in the House of Lords

202 The House of Lords unanimously allowed the Australian liquidators' appeal and gave directions for transmission.

203 Lord Hoffman allowed the appeal on the basis that the Court had a discretion to direct transmission *both* under s 426 *and* at common law. Lord Walker agreed with Lord Hoffman. Lord Scott allowed the appeal on the basis that the Court had a power to direct transmission *only* under s 426 of the 1986 Act *but not* at common law. Lord Neuberger agreed with Lord Scott. The fifth law lord, Lord Philips, relied solely on s 426 in arriving at his decision and specifically declined to express a view on whether the same result could have been reached under a discretion at common law (at [44]).

204 Lord Hoffman took as his starting point (at [30]) that "the English Courts should . . . co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution". He held that the English courts have always had a discretion at common law – quite separate from section 426 of the English Insolvency Act 1986 – to disapply *any* obligation of an English liquidator under the English statutory insolvency scheme in order to advance this objective. This discretion extends even to disapplying an obligation which might be characterised as a substantive obligation under the English statutory insolvency scheme. The discretion cannot sensibly be confined to cases where the distribution scheme under the foreign insolvency law coincides in all respects – or even in all *material* respects – with English insolvency law. Such a condition would never in practical terms be satisfied. And the case law shows that the English courts have routinely made transmission orders without examining whether the scheme of priorities under the foreign jurisdiction matched the scheme of priorities under English law: at [21]. All that is required is that the English court takes the view that there is a foreign jurisdiction more appropriate than England for the purpose of dealing with all outstanding questions in the insolvency: at [28]. Any differences between English insolvency law and the foreign insolvency law are merely factors to be weighed by the Court in exercising the discretion. The only qualification is that the English court will exercise that discretion only so far as is consistent with justice and English public policy.

205 Lord Hoffman explained the result in *Re BCCI* as a correct exercise of this discretion on the facts. All the classes of debt for which Scott V-C required the English liquidators to make provision were so closely connected with England that justice required an English court not to leave it to the Luxembourg liquidator to make distributions to those creditors in accordance with Luxembourg law: at [17], [25].

206 Lord Scott, with whom Lord Neuberger concurred, arrived at the same result but for different reasons. Not surprisingly, Lord Scott reiterated the views he had expressed 12 years earlier in *Re BCCI* and based his reasoning solely on s 426 of the 1986 Act. He posed the questions which he had to decide in *HIH* as follows:

> (a) Whether the English High Court has the power – under statute or at common law – to direct the transmission of the English proceeds to Australia; and
>
> (b) If so, whether in the circumstances of this case, that power ought to be exercised.

207 On these questions, Lord Scott decided that an English court has no power at common law or under its inherent jurisdiction to permit English liquidators to disapply an aspect of the English insolvency scheme and to deprive creditors proving in an English liquidation of their statutory rights under that scheme. This prevents an English court from directing English liquidators to transmit English proceeds to a foreign jurisdiction if that foreign jurisdiction's scheme of insolvency distribution differs materially from that under English law. The only power which the English courts had to direct transmission in these circumstances was the express statutory power under section 426 of the 1986 Act.

Lord Hoffman's is the preferred approach

208 The Official Receiver submits that Lord Scott's approach is to be preferred over Lord Hoffman's. The Singapore Liquidators submit that that Lord Hoffman's approach is to be preferred over Lord Scott's. I accept the Singapore Liquidators' submission. Lord Hoffman's approach is conceptually coherent, historically sound and focuses on substance over form. The authorities and principles on which it is based have been part of Singapore law since the 1889 Ordinance.

209 In support of their position, the Singapore Liquidators cite an article by Gabriel Moss QC entitled "'Modified Universalism' and the Quest for the Golden Thread" (2008) 21(10) Insolvency Intelligence 145. The thesis of that article is that the fundamental plank in Lord Scott's approach is mistaken. The English statutory insolvency scheme is *not* a complete code governing the entirety of English insolvency law. Mr Moss points out in his article most persuasively many examples where insolvency judges have developed and applied the principles of equity, common law and the conflicts of laws to operate alongside the statutory insolvency scheme.

210 The ancillary liquidation doctrine is one of those judge-made supplements. It is an ancient creature of the common law which, in Singapore as in England, stands outside the insolvency legislation and operates alongside it. The ancillary liquidation doctrine long predates the statutory insolvency scheme in the 1948 Act, the English Insolvency Act, the 1961 Act and our 1967 Act. To this day, the ancillary liquidation doctrine finds no statutory expression in Part X of our Act. Indeed, there is a strong argument that the ancillary liquidation doctrine is impliedly contradicted by the many provisions of Part X which envisage a Singapore liquidation even of a foreign company being the principal worldwide liquidation. Yet the power to make a transmission order has been recognised and has been applied by our courts for over 100 years, well before aspects of the ancillary liquidation doctrine were enacted in section 377(3)(c) in 1967. And it is beyond the power of a judge at first instance to declare this common law discretion *ultra vires*.

211 Lord Hoffman's rationalisation of the source and scope of the ancillary liquidation doctrine focuses on the true question which an application for a transmission order in an ancillary liquidation raises: whether "there is a foreign jurisdiction more appropriate than England for the purpose of dealing with all outstanding questions in the winding up" (see *Re HIH* at [28]). This in turn focuses the inquiry on whether it is right in all the circumstances of the case for the English court to disapply any one or more aspects of its own insolvency law, and if so which, why and to what extent. Lord Hoffman's approach avoids the impossible task of defining *a priori* a bright line to separate those statutory obligations of a liquidator which a Court has the power to disapply and those which it does not. The dividing line is a matter of discretion in all the circumstances of each case, bearing in mind the purpose of the ancillary liquidation doctrine.

212 All the circumstances of the case include the question whether the foreign insolvency scheme is broadly fair. In weighing this point, the Court, under Lord Hoffman's approach, acknowledges that each jurisdiction will have adopted its own scheme of *de facto* and *de jure* priorities in response to its own history, circumstances and policy imperatives. Lord Hoffman's approach avoids the impossible task of defining *a priori* a bright line separating which rules of preferential distribution will make a foreign insolvency scheme broadly fair and which will not. It also avoids the invidious task of examining the system of preferences under the foreign insolvency law to see if it measures up to the local supposed ideal.

213 As I have argued at [156] to [167] above, *every* developed insolvency scheme – including England's, Australia's and Singapore's – departs from the *pari passu* principle. Each jurisdiction pursues

its own policy imperatives and considers its own qualifications to the principle to be reasonable and legitimate. The result of this process in each jurisdiction is an insolvency scheme which has embedded within it by statute or by common law a scheme of *de jure* and *de facto* priorities aligned with its own domestic policy imperatives. As these policy imperatives evolve over time, each jurisdiction's scheme of priorities changes. Indeed, England's own scheme of insolvency priorities in the winding up of insurance companies changed after the HIH liquidations began and moved closer to the Australian scheme. These differences are not a satisfactory conceptual basis on which to extend or withhold cooperation in cross-border insolvencies.

214 Lord Hoffman's approach also recognises that the Court can – and indeed must – in appropriate cases impose safeguards consistent with local justice or public policy in order to protect the position of any creditors disadvantaged by disapplying the local statutory scheme. Indeed, both Lord Hoffman and Lord Scott see a transmission order as more than a binary exercise: the court does not simply yes or no. So in *Re BCCI*, Scott-VC and Nicholls V-C in effect imposed terms to ensure that the transmission order protected the creditors listed in [186] above. But the conceptual basis which permitted them to impose the terms was not satisfactorily explained until *Re HIH*.

215 Lord Scott's explanation in *Re BCCI* was that the terms were not terms at all: they were jurisdictional rigidities inherent in the very narrow scope of the power as he conceived it to disapply provisions of the English statutory scheme. On his analysis, he simply did not have the jurisdiction to do anything but protect the rights under English law of the creditors listed at [186] above. Lord Hoffman's approach explains far better why those creditors ought to have been and were in fact protected by the transmission order made in *Re BCCI*. He explains the protection as an undoubtedly correct exercise of a discretion: undoubtedly correct because the close connection between English law and every single class of debt listed at [186] above meant that it would not have been consistent with justice or with UK public policy to have a Luxembourg liquidator deal with those classes of debts under Luxembourg law.

216 In my view, a broad discretion is a far more conceptually satisfactory basis on which to rest the Court's power to impose terms on a transmission order. For example, any creditor from anywhere in the world may prove in an English (or indeed Singapore) ancillary liquidation of a foreign company. Any such creditor can claim the benefit of substantive rights under English insolvency law. This could include the substantial benefit of *de facto* security offered by insolvency set-off. He can do this even if the mutual credits and mutual debits underlying his proof have nothing whatsoever to do with the insolvent foreign company's English business or assets, with the English proceeds of the liquidation, with English law or with England at all. On Scott V-C's analysis, every such creditor has substantive rights under English law. By that fact alone, every such creditor is entitled to have those substantive rights protected in a transmission order no matter how tenuous or non-existent the link to England or English law. That merely serves to encourage forum-shopping in insolvency. Forum-shopping is just as undesirable in international liquidation as it is in international litigation. On the other hand, on Lord Hoffman's analysis, the court will ring-fence assets in a transmission order for a creditor who asserts English-law insolvency set-off only if the mutual debts and mutual credits are so closely connected with England, as they were in *Re BCCI*, that it is consistent with justice in *that* insolvency to protect *those* creditors' rights. Under Lord Hoffman's approach, the forum-shopping creditor has no right to have English assets ring-fenced: he must establish a valid basis for it.

217 It may be that in the ordinary case, an ancillary insolvency court will readily exercise its discretion under the ancillary liquidation doctrine to make a transmission order. But that should not divert us from appreciating the significance of what the Court is doing in each such case. The Court is *applying* the ancillary liquidation doctrine and *disapplying* one or more aspects of the local insolvency regime. And it does so on the basis that, in respect of the provisions disapplied, the principal

liquidation is more appropriate than the ancillary liquidation for the purpose of dealing with those outstanding questions in the insolvency and it is consistent with justice and local public policy to do so. Transmission is not a matter of course, even if all parties are agreed that the domestic liquidation is correctly characterised as ancillary.

218 I conclude my analysis of *Re HIH* by pointing out that Lord Neuberger, writing extra-judicially, appears to have wavered in his support for Lord Scott's views: see Lord Neuberger, "The International Dimension of Insolvency" (2010) 23(3) Insolvency Intelligence 42. While it would be wrong to read this article as Lord Neuberger acknowledging an outright conversion to Lord Hoffman's point of view, it is I think fair to say that the current weight of English judicial opinion is with Lord Hoffman.

219 What does all of this mean for Singapore law? For the reasons given above, I hold that the Singapore courts too have a discretionary power at common law in an ancillary liquidation to disapply aspects of Singapore's statutory insolvency scheme and to direct Singapore liquidators to transmit the Singapore proceeds of a Singapore liquidation to the principal liquidation for distribution so long as doing so is consistent with justice and Singapore public policy.

220 In Singapore, there is an additional factor which supports my view. There is no equivalent in the English legislation which the House of Lords considered in *Re HIH* of s 377(3) in Division 2 of Part XI of our Act. That section operates as a statutory acknowledgment and approval of the ancillary liquidation doctrine in the insolvency of foreign companies in Singapore. Section 377(3)'s relatively recent origin in the ancestry of our statutory insolvency scheme and its place not in Part X of the Act but in Part XI indicates that it was the legislature's intent not to disturb the statutory insolvency scheme in Part X and not to disturb the conceptual basis underlying it. The rules in s 377(3) are added by way of a supplement or overlay to that scheme.

221 Further, s 377(3) enacts only certain *aspects* of the ancillary liquidation doctrine. Further, it enacts in s 377(3)(c) ring-fencing, which is no aspect of the ancillary liquidation doctrine. That indicates to me that in 1967, our legislature was aware of the ancillary liquidation doctrine as it had developed at common law but did not wish to attempt to codify it. Instead, it adopted the 1961 Act's statement of certain aspects of the doctrine in Part XI. It further added ring-fencing to section 377(3)(c). But that does not operate to exclude the ancillary liquidation doctrine. The ancillary liquidation doctrine continues to exist and develop to this day at common law in parallel with Part X and subject to s 377(3) of the Act.

222 The decision of Woo Bih Li J in *RBG* is the only modern Singapore insolvency authority which turned directly on the application of the ancillary liquidation doctrine. I have differed from certain of his conclusions in that case. So I now analyse that case in some detail and explain why.

RBG

223 RBG Resources plc was an English company. In 2002, the English court appointed liquidators in England over it. A few months later, on the petition of the English liquidators, the Singapore court appointed liquidators in Singapore.

224 RBG at no time registered in Singapore under s 368 of the Act. But RBG had substantial assets in Singapore. By 2005, the Singapore liquidators held a fund of about US$10.5m. In March 2005, the Singapore liquidators applied to Woo Bih Li J for directions authorising them to transmit this fund to the English liquidators subject only to retaining sufficient funds to cover the costs of the Singapore liquidation. RBG had no preferential creditors under s 328 of the Act, so it was not necessary for the Singapore liquidators to seek – or for the Court to consider making – any provision in that regard.

225 RBG owed Credit Lyonnais US$8.6m. Credit Lyonnais opposed RBG's Singapore liquidators' application. After they filed their application, Credit Lyonnais submitted a proof of its debt to the Singapore liquidators, as it was entitled to do. The proof was rejected. Credit Lyonnais then cross-applied for orders directing the Singapore liquidators to: (i) admit Credit Lyonnais' proof; and (ii) to pay Credit Lyonnais in full out of the Singapore proceeds before transmitting the balance to the English liquidators. Credit Lyonnais argued that the ring-fencing provisions of s 377(3)(c) of the Act applied either directly or indirectly to RBG. So as to isolate a question of law, it was assumed for the purposes of Credit Lyonnais' application that RBG was in fact carrying on business in Singapore.

226 Woo Bih Li J allowed the Singapore liquidators' application and dismissed Credit Lyonnais' application. He held that s 377(3)(c) did not apply directly or indirectly to RBG. It could not apply directly because it was conceded without argument that Part XI of the Act, in which s 377(3)(c) is located, applied *only* to foreign companies registered under s 368 of the Act (see *RBG* at [25]). Further, he held that s 350(2) did not permit s 377(3)(c) to apply in the winding up of a foreign company not registered under s 368. This was because the word "companies" in s 350(2) meant *Singapore* companies on both occasions (see *RBG* at [33]-[37] and [105]-[115] above). Finally, Woo J held that even if s 377(3)(c) could apply to RBG, Credit Lyonnais' debts were not "liabilities incurred in Singapore" by RBG within the meaning of s 377(3)(c).

227 Woo J found that in light of the closely-connected origins and history and the continuing similarities between English and Singapore company law, the ancillary liquidation doctrine was a part of Singapore's insolvency law. He was fortified in this conclusion by s 377(3)(c) which implicitly acknowledged the common law doctrine (see *RBG* at [39]). He held that the Court had no jurisdiction to disapply the ancillary liquidation doctrine encapsulated in the first three principles in *BCCI* (see [29] above) in a case to which s 377(3)(c) did not apply directly and where the debt was not incurred in Singapore (see *RBG* at [55]-[58]).

228 Finally, Woo J opined that even if such a jurisdiction existed, the court should not exercise its discretion in favour of Credit Lyonnais. It could not be right for creditors of RBG to be accorded priority simply because they chose to prove their debts in Singapore, regardless of whether or not their debt was *incurred* in Singapore (see *RBG* at [60]). On the facts, there were insufficient factors to warrant ring-fencing of the Singapore proceeds in favour of Credit Lyonnais.

229 Woo J's decision to refuse the orders sought by Credit Lyonnais and grant the order sought by RBG's liquidators is, with respect, undoubtedly correct on the facts of that case. But for the reasons I have given in this judgment, I have arrived at a different conclusion on certain points which Woo J considered in arriving at his decision.

230 The first point on which I have come to a different conclusion is that section 377 cannot apply directly to a company which is not registered under s 365. Because of a concession by counsel (at [25]), Woo J held that Division 2 of Part XI applied *only* to companies which are registered under s 368 (see *RBG* at [15] and [25]). However, s 365 does not in terms provide that Division 2 of Part XI applies *only* to companies which register under s 368 of the Act (see [119]-[148] above). Section 377(3)(c), therefore, could apply directly to RBG, even though it was not registered under s 368 of the Act.

231 I have also arrived at a different conclusion, with diffidence, on whether the word "companies" as used in s 350(2) refers only to Singapore companies. My view is that the word as used there is wide enough to encompass foreign companies (see [105]-[115] above). In any case, the first limb of s 350(2) – which is the only limb which can apply to s 377(3)(c) – operates only *negatively* to provide that Division 5 of Part X and *does not preclude* provisions within its scope from applying to a

liquidation under Division 5 (see [116]-[117] above). So finding that s 377(3)(c) falls outside the scope of the phrase "any provisions contained in this . . . written law" in s 350(2) does not necessarily lead to a conclusion that s 350(2) precludes the operation of s 377(3)(c) in a liquidation under Division 5.

232 I also differ, with diffidence, with Woo J on his holding that the Court has no jurisdiction to disapply the ancillary liquidation doctrine where s 377(3)(c) does not apply directly, and where the debt in question is not incurred in Singapore. There are two unarticulated grounds which underpin the reasoning on this point. The first is that the ancillary liquidation doctrine applies in the winding up of every foreign company unless it is disapplied by the Court. The second is that the source of a jurisdiction to "disapply" the ancillary liquidation doctrine can only be statutory. On both these points, I have reached a different conclusion.

233 In my view, it is not the position that the ancillary liquidation doctrine applies to the liquidation of a foreign company unless that doctrine is disapplied by the Court. The position is that even in the liquidation of a foreign company, it is the statutory insolvency scheme mandated by Division 5 of Part X which applies unless the court disapplies an aspect of that scheme in the exercise of its discretion at common law pursuant to the ancillary liquidation doctrine.

234 The discretion to disapply a provision of the statutory insolvency scheme – and indeed the entire ancillary liquidation doctrine which gives rise to that discretion – is not statutory. It is a creature of insolvency judges, not of insolvency legislators. The origin, the shape and contours, the statement of the principle and its qualifications arise from the common law not from statute. Neither Part X nor its legislative ancestors sets out the ancillary liquidation doctrine's fundamental tenet: that the Court has the power to direct a locally-appointed liquidator of a foreign company to pay the proceeds of the local liquidation to the principal liquidator. Nor does Part X or its ancestors set out the qualification to this fundamental tenet which even the most ardent universalist accepts as part of the ancillary liquidation doctrine: even where the Court makes a transmission order, local assets ought to be ring-fenced to pay the costs of the local liquidation and other local preferential creditors. These aspects of the ancillary liquidation doctrine have all been worked out – expressly or *sub silentio* – in the authorities. These authorities have culminated in Lord Hoffman's analysis in *Re HIH*. And in Singapore, these two fundamental tenets have been enacted in s 377(3)(c) together with the ring-fencing of Singapore assets to pay Singapore debts.

235 What difference then does the existence of s 377(3)(c) of the Act make to this analysis? The existence of s 377(3)(c) in Part XI of the Act does not exclude or control the operation of the ancillary liquidation doctrine. It arguably goes too far to say, as Woo J said, that "[a]ny qualification of the first three propositions [of Scott V-C in *BCCI*] must be by legislation unless the first three propositions no longer apply in the first place" (see *RBG* at [57]). The ancillary liquidation doctrine was part of Singapore law before s 377(3)(c) was enacted in 1967 and even before its precursor was enacted in Victoria in 1961. The legislature knew of the doctrine but chose to enact aspects of it rather than to codify it. Section 377 was not intended to and does not act to freeze the development of the ancillary liquidation doctrine. The content of and qualifications to that doctrine continued to exist and evolve in parallel at common law after s 377(3)(c)'s enactment. So the common law discretion to disapply any limb of s 377(3)(c) is not excluded by the fact alone that the first limb of section 377(3)(c) is expressly subject to contrary order by the court whereas the second and third limbs are expressed as absolute obligations (see [94]-[98] above; cf. *RBG* at [58]). In the same way, albeit in a different context, Lord Hoffman's speech in *Re HIH* has shown us that the ancillary liquidation doctrine was established before and continued to evolve in parallel in England with s 426 of the English Insolvency Act 1986. The statutory insolvency scheme does not exclude the common law doctrine.

236 There is one perhaps procedural difference. Section 377(3)(c) has within it the obligation for a Singapore liquidator to pay the net proceeds of the ancillary liquidation to the principal liquidator. To that extent, there may perhaps not be the need for Singapore liquidators to apply for transmission orders in the same way as in jurisdictions where the ancillary liquidation doctrine is purely common law, at least where they intend to give full effect to the entirety of s 377(3)(c). But even in those cases, where there is any cause for concern, Singapore liquidators would be well-advised to seek directions from the Court.

237 I hope it is not too presumptuous of me to say that I do not think Woo J would have disagreed with my analysis of the law if it had been argued before him in *RBG*. It is clear from his judgment that the key issue on which his decision turned was the fact that Credit Lyonnais' debt was not incurred in Singapore. My analysis, if applied to the facts in *RBG*, would not result in a different outcome.

My decision on the parties' submissions

238 Having concluded my analysis of the law, I now deal with the parties' submissions on the law.

239 The ancillary liquidation doctrine is part of Singapore law and has been from the very inception of our statutory insolvency scheme. This was affirmed in *RBG*, and I agree. Singapore courts – like the English courts – have used the common law to supplement the statutory insolvency scheme for well over a century. The common law ancillary liquidation doctrine is one such supplement. The common legislative history of the Singapore and the English statutory insolvency schemes makes the English decisions in *Re BCCI* and *Re HIH* of high authority and assistance in Singapore in determining the scope and content of the ancillary liquidation doctrine in Singapore law.

240 I accept the submission of counsel for the Singapore Liquidators that the Singapore liquidation of Beluga Chartering is an ancillary liquidation. I also accept that it is *prima facie* fair and equitable for the assets of Beluga Chartering worldwide to be pooled in the principal liquidation in Germany and administered by the German Liquidator for the benefit of the general body of Beluga Chartering's unsecured creditors worldwide.

241 I cannot accept the Official Receiver's submission that the Singapore Liquidators have no procedural basis in our statutory insolvency scheme to seek a transmission order from the court. The transmission order is the primary instrument by which the aspirations of the ancillary liquidation doctrine are given effect to. The procedural basis in Singapore insolvency law for the Court to make a transmission order is an application for directions from the court pursuant to s 273(3) of the Act. [note: 25] That was the basis on which the liquidators in *Re BCCI* and *RBG* sought transmission orders. That is the basis on which the Singapore Liquidators now apply to me. Section 273(3) is not confined, as the Official Receiver submits, to enabling a liquidator to ask the court to clarify the scope and exercise of *existing statutory* powers of the liquidators. [note: 26] The words of s 273(3) are wide. They have, rightly and regularly, been interpreted to cover a transmission order pursuant to the ancillary liquidation doctrine.

242 I cannot accept the Official Receiver's submission that the court has no power to authorise the Singapore Liquidators to transmit the Singapore Proceeds to a foreign liquidator. Under statute, if the ring-fencing limb of s 377(3)(c) applies, then so does the limb obliging the liquidator to transmit the net Singapore proceeds to the principal liquidator. At common law, *RBG* accepted the Court's power to make a transmission order as part of Singapore law. This can be seen as part of the broader discretion recognised by Lord Hoffman in *Re HIH*. This discretionary power exists alongside the statutory insolvency scheme.

243 It is inapt to speak of the Singapore Liquidators as having a *power* under Part X of the Act to transmit the Singapore proceeds to the principal liquidation. Under statute, they do not have a *power* but a statutory *obligation* to do so. That obligation arises not under Part X but under s 377(3)(c). It is subject to the qualifications set out in that section. It is also subject to the common law discretion to disapply it. Apart from s 377(3)(c), a liquidator has neither a power nor an obligation to transmit assets. A transmission order at common law involves disapplying statutory obligations to the liquidator. Only a court may do that.

244 For this reason, I reject the Singapore Liquidators' submission [note: 27] that even if s 377(3)(c) does not apply, a liquidator's power under s 272(2)(j) of the Act to "do all such other things as are necessary for winding up the affairs of the company and distributing its assets" read with s 350(2) of the Act permits a liquidator of a foreign company to disregard his statutory obligations under Singapore's statutory insolvency scheme and unilaterally transmit assets to a foreign liquidator. "Distributing its assets" in s 272(2)(j) clearly refers to distribution under and in accordance with the statutory scheme under the Act. Apart from s 377(3)(c), there is no part of Singapore's statutory insolvency scheme which enacts or envisages the ancillary liquidation doctrine and permits a liquidator to act unilaterally.

245 I cannot accept the submission of counsel for the Singapore Liquidators that there is no reason why the general body of unsecured creditors of Beluga Chartering in Singapore should have priority over all other unsecured creditors of Beluga Chartering in all other countries simply because Beluga Chartering happens to have assets in Singapore. There *is* a reason: s 377(3)(c). Singapore-incurred debts are entitled to the priority that that section confers unless the Court exercises its discretion under the ancillary liquidation doctrine to disapply the Singapore Liquidators' obligation to comply with that section.

246 I also cannot accept the submission that the Singapore Subsidiaries will suffer no prejudice if the Singapore Proceeds are transmitted to the German Liquidation. I accept that the Singapore subsidiaries will be treated equally with the general body of Beluga Chartering's unsecured creditors regardless of nationality under the InsO. But permitting the Singapore Liquidators to transmit the Singapore Proceeds to the German Liquidator without complying with their obligation under s 377(3)(c) to pay the Singapore Subsidiaries in priority out of the Singapore Proceeds causes obvious prejudice to the Singapore Subsidiaries. They will receive little or nothing in the principal liquidation.

247 I cannot accept the Official Receiver's suggestion that even if the court finds that the common law doctrine of ancillary liquidation applies in Singapore, it should be slow to authorise the Singapore Liquidators to transmit the Singapore Proceeds to the German Liquidator. First, the transmission provisions of s 377(3)(c) operate unless disapplied by the Court. Second, in cases where s 377(3)(c) does not apply, the Singapore court will not be slow to exercise the common law discretion recognised by Lord Hoffman in *Re HIH*. It will do so readily in order to advance the ancillary liquidation doctrine so far as is consistent with justice and Singapore public policy.

248 I disagree with the Official Receiver that – assuming s 377(3)(c) does not apply – it is open to the court to require the Singapore Liquidators as a term of the transmission order to pay all debts incurred in Singapore out of the Singapore Proceeds before transmitting the Singapore assets to the German Liquidator. It is true that the common law discretion recognised by Lord Hoffman in *Re HIH* allows the ancillary court to make a transmission order subject to safeguards to ensure that the transmission is consistent with justice and the ancillary jurisdiction's public policy. But those safeguards are defensive in nature. They enable the ancillary court only to decline to disapply certain obligations of the ancillary liquidators under its domestic insolvency law. When the ancillary court takes that course, it preserves the affected creditors' substantive rights under the ancillary

jurisdiction's insolvency law notwithstanding the transmission. But an ancillary court cannot, under the guise of imposing safeguards in a transmission order, *create* new substantive rights where none previously existed under the ancillary jurisdiction's insolvency law. In other words, if s 377(3)(c) did not apply, I would go far beyond the permissible limits of any discretion which I have to *create* ring-fencing rights as a term of a transmission order.

249 The effective question which now remains for me is whether I should exercise the common law discretion available to me to disapply the ring-fencing provisions of s 377(3)(c). That requires me to analyse the factual background including the relationship between the Singapore Subsidiaries and Beluga Chartering, how deugro Singapore came to be a debtor as well as a creditor of Beluga Chartering and how the Singapore Subsidiaries came to be placed in liquidation. It is to that factual background that I now turn.

Factual background

Beluga Chartering

250 Beluga Chartering was, until its insolvency, the ship chartering [note: 28] arm of the Beluga Group of companies. The ultimate holding company of the Beluga Group is Beluga Group GmbH ("Beluga Group"). [note: 29]

251 In 2002, Beluga Chartering incorporated Beluga Singapore as a wholly-owned subsidiary with a paid-up capital of S$2. In 2009, Beluga Chartering incorporated Beluga Asia as a wholly-owned subsidiary with a paid-up capital of S$100,000. [note: 30] Beluga Chartering provided the initial paid-up capital of S$100,000 for Beluga Asia. [note: 31] It no doubt also provided the initial S$2 paid-up capital for Beluga Singapore.

252 Namir Ahmed Khanbabi was the Managing Director of Beluga Singapore and the senior manager of Beluga Asia. [note: 32] Mr Marc Olivier Willim was a director of both Beluga Singapore and Beluga Asia. On 13 July 2011, the German Liquidator removed Mr Willim from both positions.

Relationship between Beluga Chartering and Singapore Subsidiaries

253 Beluga Singapore was Beluga Chartering's exclusive mercantile agent for Southeast Asia and Western Australia. Its business included: (1) marketing and selling space on Beluga Chartering's ships, (2) negotiating rates on behalf of Beluga Chartering, (3) receiving on behalf of Beluga Chartering bookings of cargo space, (4) business development and (5) executing and entering into contracts on behalf of Beluga Chartering. [note: 33]

254 Beluga Asia was Beluga Chartering's exclusive shipping agent in Singapore. It handled the following matters for the Beluga fleet of ships: (1) the husbandry of the fleet, (2) managing the operations of the fleet in Asia Pacific and (3) providing port agency services for the fleet in Singapore.

255 There was no management or consultancy agreement between Beluga Chartering and the Singapore Subsidiaries delineating their scope of services, the basis of charging for those services or the nature of the exclusivity. [note: 34] As Mr Khanbabi put it, the Singapore Subsidiaries "relied solely on their shareholders . . . for income and funding". [note: 35] Thus, Beluga Chartering bore all of the operational costs and expenses of the Singapore Subsidiaries from the time they were incorporated. It

did this either by making direct payment to the Singapore Subsidiaries' suppliers in Singapore or by making monthly advances or reimbursements to the relevant Singapore Subsidiary. [note: 36] Beluga Chartering did not capitalise these payments in the accounts of either of the Singapore Subsidiaries; nor did it treat these payments as loans due to Beluga Chartering from either of the Singapore Subsidiaries. [note: 37]

256 Thus, for example, the Singapore Subsidiaries invoiced Beluga Chartering for, and Beluga Chartering reimbursed them for, fitting out expenses for new office premises, [note: 38] start-up financing fees, [note: 39] estimated expenses for Beluga ships docking in Singapore [note: 40] and monthly management fees ranging from S$50,000 to S$150,000 per month. [note: 41] These monthly management fees covered salaries for the employees of the Singapore Subsidiaries, rental, trade creditors and other ongoing business expenses. [note: 42]

Beluga Chartering goes into insolvency

257 On 4 March 2011, Mr Khanbabi on behalf of Beluga Singapore made one of the Singapore Subsidiaries' monthly email requests to Beluga Chartering for a remittance with supporting documentation. He followed this request with several phone calls.

258 By 14 March 2011, if not earlier, it appears that both Singapore Subsidiaries had cause for concern that Beluga Chartering may be in financial distress. [note: 43] Mr Khanbabi then emailed Beluga Group, conveying the Singapore employees' concern whether they would get paid their salaries and be able to meet their own financial commitments that month.

259 Beluga Group's response was from a Mr Roger Iliffe, who emailed Mr Khanbabi on the same day saying that he appreciated the staff's nervousness and that Beluga Group should be able issue a communication to staff the next morning.

260 On 16 March 2011, Beluga Group issued a press release recording that it had petitioned to open insolvency proceedings before the Bremen Court because of accounting irregularities. [note: 44]

261 On the same day, in an apparent attempt to reassure its employees, Beluga Group disseminated that press release internally as an attachment to a mass email. The English version of the mass email sought to reassure employees and expressly asked them not to leave their place of work during office hours unless on vacation leave.

262 Thus it was that, on 16 March 2011, upon the application of Mr Iliffe, amongst others, the Bremen Court appointed Mr Edgar Grönda as Beluga Chartering's temporary Insolvency Administrator "in order to secure Beluga Chartering's assets and protect [its] creditors".

Mr Khanbabi's concern about the Singapore Subsidiaries

263 Mr Khanbabi was aware that without support from Beluga Chartering as shareholder, the Singapore Subsidiaries were not going concerns, had no source of income and were insolvent. As a result he was concerned about his fiduciary duties to the Singapore Subsidiaries.

264 Mr Khanbabi therefore emailed Mr Iliffe, amongst others, at Beluga Group on 17 March 2011: (1) drawing Beluga Group's attention to his fiduciary duties; (2) pointing out that without support from Group, both Singapore Subsidiaries were insolvent; and (3) and asking for a clear direction from Group

whether he should take steps to terminate employees and wind down the Singapore Subsidiaries' business. [note: 45]

265 Mr Iliffe responded on the same day, 17 March 2011, telling Mr Khanbabi that his email of 17 March 2011 would be passed on to the German Liquidator.

266 On 23 March 2011, Mr Iliffe on behalf of Beluga Group sent two standard form letters to Mr Khanbabi: one addressed him in his capacity as Managing Director of Beluga Singapore and the other in his capacity as senior manager of Beluga Asia. The two emails told Mr Khanbabi that no further funds would be forthcoming from Beluga Chartering and told Mr Khanbabi to "take appropriate action in accordance with your local laws in your capacity as [the senior Beluga manager in Singapore / Managing Director]."

267 With no additional funds forthcoming from Beluga Chartering, the Singapore Subsidiaries were insolvent: they were starved of funds, had no business, ceased to be a going concern, had no income and were unable to pay their respective debts. [note: 46] They became immediately unable to pay salaries to their employees or to meet their other expenses. [note: 47]

268 On 31 March 2011, the Singapore Subsidiaries told their employees that they were compelled to shut down business due to lack of funds. They terminated the employees' contracts of employment as at 31 March 2011 [note: 48] without giving the requisite contractual notice. [note: 49] They told the employees of the Singapore Subsidiaries not to expect to be paid their unpaid salaries. They ceased to pay CPF contributions. [note: 50] They terminated the employment passes of all foreign employees.

269 On 1 June 2011, the Bremen Court made a finding that Beluga Chartering's insolvency continued to subsist [note: 51] and appointed Mr Grönda as the permanent insolvency administrator [note: 52] of Beluga Chartering. [note: 53]

The deugro Asset

270 One of the vessels in the Beluga fleet which Beluga Chartering time-chartered was the "MV Beluga Singapore", owned by Beluga Shipping GmbH & Co KG MS "Beluga Persuasion" ("Beluga Persuasion"). [note: 54] As at 28 February 2011, Beluga Chartering owed Beluga Persuasion the undisputed debt of €1,109,200 for the time charter of the MV Beluga Singapore from 1 January 2011 to 28 February 2011. [note: 55]

271 The Beluga group of companies had regular business dealings with the deugro group of companies [note: 56] including deugro Singapore and deugro Danmark A/S ("deugro Denmark"), a Danish company.

272 On 11 March 2011, Beluga Chartering issued 3 invoices [note: 57] to deugro Singapore comprising freight for cargo carried on board the MV Beluga Singapore from Shanghai to Vavouto in New Caledonia and for stevedoring charges. The total sum which deugro Singapore was obliged to pay Beluga Chartering under the three invoices was US$1,259,647.42. [note: 58] This sum comprises, at least in part, sums due for work done by the Singapore Subsidiaries for deugro Singapore. [note: 59] This sum of US$1,259,647.42 is the deugro Asset which forms the subject-matter of this application. It is Beluga Chartering's only known asset in Singapore. [note: 60]

The deugro Liability

273 Pursuant to a booking note dated 5 January 2011, [note: 61] Beluga Chartering undertook an obligation to deugro Denmark to perform five voyages from Phu My in Vietnam to Rosyth in Scotland. By an email dated 24 March 2011 from Beluga Asia to deugro Denmark, copied to Mr Khanbabi, [note: 62] Beluga Asia told deugro Denmark that Beluga Chartering was unable to complete its contractual obligations to deugro Denmark because of the insolvency proceedings against it. On 30 March 2011, therefore, deugro Denmark invoiced Beluga Chartering in the sum of €502,600 being the loss deugro Denmark claimed to have suffered as a result of Beluga Chartering's failure to perform 4 out of the 5 voyages pursuant to the 5 January 2011 booking note. [note: 63] I will refer to this sum of €502,600 which Beluga Chartering owed to deugro Denmark as "the deugro Liability".

274 It will immediately be appreciated that the deugro *Singapore* owed the deugro Asset to Beluga Chartering. But Beluga Chartering owed the deugro Liability to deugro *Denmark*. Further, according to Mr Khanbabi, the deugro Liability did not arise from any of the vessels which the Singapore Subsidiaries managed for the Beluga group and was wholly unconnected to the work which the Singapore Subsidiaries had done on behalf of Beluga Chartering for deugro Singapore and which gave rise to the deugro Asset. [note: 64]

275 On 30 March 2011, deugro Denmark wrote to deugro Singapore about the deugro Liability. In its letter, [note: 65] deugro Denmark set out Beluga Chartering's failure to perform its obligations under the 5 January 2011 booking note, quantified the loss and damage said to be caused by that failure at €502,600 and concluding by saying that "we hereby transfer the rights to our sister company in Singapore [deugro Singapore] to collect this claim towards [Beluga Chartering]."

276 By an email dated 31 March 2011, deugro Singapore gave notice to Mr Khanbabi that deugro Denmark had assigned the deugro Liability to deugro Singapore and that deugro Singapore intended to deduct the deugro Liability from the deugro Asset before making payment of the net sum to Beluga Chartering. [note: 66]

277 deugro Denmark followed up on its letter to deugro Singapore dated 30 March 2011 by executing a formal assignment dated 29 April 2011 ("the deugro Assignment"). By the deugro Assignment, deugro Denmark assigned the deugro Liability to deugro Singapore in consideration of deugro Singapore paying the nominal sum of US$1.00 to deugro Denmark. [note: 67]

278 deugro Denmark assigned the deugro Liability to deugro Singapore *after* Beluga Chartering opened insolvency proceedings against itself and *after* Mr Grönda was appointed as Beluga Chartering's provisional receiver in insolvency. The purpose of the deugro Assignment was to ensure that the deugro group would be entitled to set off the deugro Liability against the deugro Asset even though the debit and the credit in question involved different deugro entities at the time of origination. The deugro Assignment is what gives rise to the right of set-off which deugro Singapore asserts and which the Singapore Liquidators have acknowledged as valid. [note: 68] I express no view as to whether the Singapore Liquidators were correct to have so agreed. That question is not before me. It suffices to draw attention to section 88(2)(b) of the Bankruptcy Act and pose the question: can an assignee of a debt owed by an insolvent company to a third party rely on the assigned debt by way of set-off against his debt to the insolvent company if he had notice of the insolvency at the time of the assignment: see *Re Eros Films Ltd* [1963] Ch 565?

The Singapore Subsidiaries sue Beluga Chartering

The Singapore Subsidiaries sue Beluga Chartering

279 Meanwhile, Mr Khanbabi took what he saw as "the necessary and appropriate action to secure whatever assets there may be for" the Singapore Subsidiaries. [note: 69] Effectively, this meant taking steps to secure the deugro Asset.

280 Thus, on 31 March 2011, the Singapore Subsidiaries as joint plaintiffs commenced the Suit against Beluga Chartering as the sole defendant. They claimed separate sums which Beluga Chartering owed to each Singapore Subsidiary for work done by that Singapore Subsidiary on behalf of Beluga Chartering. [note: 70] The total claim in the Suit amounted to S$1,415,631.21 plus, as is usual, interest and costs.

The Singapore Subsidiaries freeze the deugro Asset

281 Mr Khanbabi was concerned that if the deugro asset was remitted overseas, there was a very real risk that any judgment in favour of the Singapore Subsidiaries, out of which their employees were to be paid, would not be satisfied [note: 71]. To that end, the Singapore Subsidiaries on 31 March 2011 applied *ex parte* for – and on 1 April 2011 obtained – the Injunction prohibiting Beluga Chartering from in any way disposing of its assets in Singapore up to $1,415,631.21. The Injunction expressly specified the deugro Asset as being within the prohibition. The deugro Asset was quantified at S$1,587,294.31, [note: 72] being the equivalent in Singapore dollars as at that date of US$1,259,647.42. After the High Court granted the Injunction on 1 April 2011, Beluga Chartering served the Injunction on deugro. The Injunction remains in force today and is one of the matters which I have been asked to deal with in the application before me. The deugro Assignment was entered into *after* deugro Singapore had knowledge of the Suit and of the Injunction, although before the Singapore Subsidiaries entered judgment in default and levied execution in the Suit.

282 On 20 April 2011, the Singapore Subsidiaries secured judgment in default of appearance in the Suit against Beluga Chartering as prayed, in the total sum of S$1,415,631.21 plus interest and costs.

The Singapore subsidiaries seek to attach the deugro Asset

283 On 3 May 2011, the Singapore Subsidiaries applied *ex parte* for and obtained a garnishee order to show cause ("the Garnishee Order") against deugro Singapore in respect of the deugro Asset. The return date for deugro Singapore as garnishee to show cause why the Garnishee Order should not be made final was fixed for 16 May 2011.

284 On 5 May 2011, the Singapore Subsidiaries' solicitors wrote to deugro Singapore Pte Ltd informing it of the Garnishee Order. On 9 May 2011, deugro Singapore replied through solicitors, [note: 73] saying that it was in the process of verifying the amount, if any, which deugro Singapore owed to Beluga Chartering and putting the Singapore Subsidiaries on notice that it would be effecting a set-off in respect of the deugro Liability which it had by then assigned formally to deugro Singapore on 29 April 2011.

285 On 16 May 2011, deugro Singapore gave formal notice in writing to Beluga Chartering of the deugro Assignment. [note: 74]

286 On 18 May 2011, Beluga Chartering wrote [note: 75] to deugro Singapore asking it to make payment of the deugro Asset into the account opened by the provisional receiver in insolvency in Germany. deugro Singapore did not pay the deugro Asset as requested or at all. Instead, it responded

by a letter dated 19 May 2011 pointing out that not only the Injunction but also the Garnishee Order prevented deugro Singapore from paying the deugro Asset to Beluga Chartering. deugro Singapore ended the letter by reiterating its intention to effect a set-off of the deugro Liability against the deugro Asset pursuant to the deugro Assignment.

Beluga Chartering takes control of the boards of the Singapore Subsidiaries

287 On 19 May 2011, Beluga Chartering as the sole shareholder of Beluga Singapore removed all three directors of Beluga Singapore (including Mr Khanbabi) and appointed as directors in their place Mr Roger Iliffe and the German Liquidator's nominee Mr Heiko Keppler. On the same day, Beluga Chartering as the sole shareholder of Beluga Asia removed one of the two directors of Beluga Asia and appointed as its directors again Mr Iliffe and Mr Keppler. By the same resolution, Beluga Chartering terminated Mr Khanbabi's employment with Beluga Asia. Beluga Chartering did all of this with the approval of Mr Grönda, [note: 76] at that time Beluga Chartering's provisional insolvency receiver. The result was that the insolvency officeholder's nominees now controlled the Boards of both of the Singapore Subsidiaries.

288 On 14 July 2011, the new boards of both Singapore subsidiaries instructed new solicitors in the Suit, who duly filed a Notice of Change of Solicitors.

289 I note that the German Liquidator took no steps to place the Singapore Subsidiaries in voluntary liquidation even though it was clear that both Singapore Subsidiaries were rendered irretrievably insolvent because the essential financial support that Beluga Chartering had extended to them from the time of their incorporation had been irreversibly withdrawn.

Beluga Asia is wound up

290 In the absence of any steps by the German Liquidator through Beluga Chartering to place the Singapore Subsidiaries in creditors' voluntary liquidation, that task was left to the creditors. On 10 August 2011, a creditor known as BSK Stevedores Pte Ltd presented a winding up application against Beluga Asia based on an unpaid debt of S$316,218.30 due as at 12 July 2011 in respect of goods supplied and services rendered to Beluga Asia in respect of ships from the Beluga fleet. [note: 77] Beluga Asia and Beluga Chartering, both now under the control of the German Liquidator, unsuccessfully opposed the application to wind up Beluga Singapore. The Court ordered Beluga Asia to be wound up on 2 September 2011.

Beluga Singapore is wound up

291 On 10 August 2011, a creditor known as Bluefin Project Marine Ltd ("Bluefin") presented a winding up application against Beluga Singapore based on an unsatisfied statutory demand dated 18 July 2011 in respect of a debt of S$64,617.83. [note: 78] Bluefin is Mr Khanbabi personal corporate vehicle. Beluga Singapore, who was by the time of Bluefin's demand under the control of the German Liquidator, did not dispute this debt. [note: 79]

292 Mr Khanbabi affirmed an affidavit in support of the winding up application. He deposed that he had filed the application because Beluga Singapore was no longer a going concern and had failed to pay its creditors, principally ex-employees who were due salary and contributions to the Central Provident Fund Board. [note: 80]

293 The winding up application was initially fixed to be heard on 26 August 2011. However, a series

of applications for stay pending ongoing arbitration proceedings involving Bluefin and Mr Khanbabi, as well as various oppositions to the making of the winding up order, led to the application being heard only on 13 January 2012. On 12 January 2012, the Court substituted a creditor known as Cheng Heng Liang ("Mr Cheng") as the creditor applying for the winding up of Beluga Singapore. Mr Chan was Beluga Singapore' Chartering Manager. His claim was for arrears of salary, CPF contributions and salary in lieu of notice, all of which were undisputed. [note: 81]

294 On 13 January 2012, the Court ordered that Beluga Singapore be wound up. It appointed Mr Sim Guan Seng and Mr Goh Yeow Kiang Victor, both of Baker Tilly TFW LLP, as its liquidators.

Making the Garnishee Order final

295 In the meantime, the garnishee proceedings in the Suit continued in parallel with the winding up proceedings against the Singapore Subsidiaries. The Singapore Subsidiaries sought to make the Garnishee Order final. deugro Singapore opposed this only to the extent of its right to set off the deugro Liability against it.

296 Beluga Chartering also wrote to the Official Receiver [note: 82], stating its intended opposition to the Singapore Subsidiaries' application to make the Garnishee Order final. Beluga Chartering took the position that Beluga Chartering's insolvency and hence the deugro Asset were governed by the German insolvency regime. [note: 83] In my view, the proposition advanced by Beluga Chartering is not an accurate statement of the position under Singapore law. The deugro Asset, arising under Singapore law and having its *situs* in Singapore, was governed by Singapore law.

297 On 10 January 2012, Mr Khanbabi filed an affidavit urging the Court to make the Garnishee Order final. He argued that the deugro Liability was wholly connected to the work done by the Singapore Subsidiaries on behalf of Beluga Chartering for deugro Singapore which had given rise to the deugro Asset. [note: 84] He also pointed out that Beluga Chartering owed the deugro Liability, at the time of its origination, to deugro Denmark and not to deugro Singapore. [note: 85] He invited the Court to infer from the position of the deugro Assignment in the chronology of events that it was created in bad faith in order to frustrate the Singapore Subsidiaries' claim against deugro Singapore. [note: 86] Further, he argued that the Singapore Court should not recognise the German Liquidator because Beluga Chartering was a foreign company not registered in Singapore and the German Liquidator had not (at that point) applied for it to be wound up in Singapore. [note: 87]

298 After a number of false starts, the Singapore Subsidiaries' application to make the Garnishee Order final came up for hearing on 17 January 2012.

Beluga Persuasion applies to wind up Beluga Chartering

299 Also on 17 January 2012, Beluga Persuasion commenced these winding up proceedings, Companies Winding Up No. 5 of 2012/L, seeking an order to wind up Beluga Chartering and appoint Singapore liquidators. Its avowed aim in commencing these proceedings was to prevent the Singapore Subsidiaries completing the execution levied on the deugro Asset by making the Garnishee Order final on 17 January 2012. [note: 88] The application was based on an unpaid and undisputed debt of €1,109,200 arising from the time charter of the MV Beluga Singapore referred to in [270]. [note: 89]

300 Beluga Persuasion sought the winding up order on the grounds that Beluga Chartering had assets in Singapore and was insolvent, alternatively that it was just and equitable to wind it up. [note:

[90] The relevant asset which Beluga Persuasion relied on for its first ground was the deugro Asset. [note: 91] In support of the insolvency ground, Beluga Persuasion relied on the Bremen Court's finding of insolvency and its appointment on 1 June 2011 of Mr Grönda as Beluga Chartering's Insolvency Administrator. In support of the just and equitable ground, Beluga Persuasion argued that it would be unjust to allow the Singapore Subsidiaries to obtain a final Garnishee Order and thereby take the deugro Asset for itself. [note: 92] The winding up was necessary, it was said, to prevent this injustice. [note: 93].

301 As a result of the winding up application, the hearing of the Singapore Subsidiaries' application to make the Garnishee Order final was adjourned on 17 January 2012, to await the outcome of the winding up.

302 The winding up application against Beluga Chartering came up for hearing on 17 February 2012. The court duly made the winding up orderand appointed Mr Abuthahir Abdul Gafoor and Mr Chee Yoh Chuang as its Singapore liquidators.

303 On 14 March 2012, in light of the winding up order, the Singapore Subsidiaries consented to the Garnishee Order being discharged.

Total claims against Singapore Subsidiaries

304 The Official Receiver informed the Court that creditors' as-yet unadjudicated claims against the Singapore Subsidiaries total $1,227,873. That comprises claims of $791,701 against Beluga Singapore and claims of $436,172 against Beluga Asia. [note: 94] Of the total claims of $1,227,873, $333,696 are claims entitled to preferential status under s 328 of the Act comprising preferential debts of $313,099 due to employees of Beluga Singapore and preferential claims of $20,597 due to employees of Beluga Asia. It should also be noted that the sum of $454,617 claimed by Bluefin Project Marine Pte Ltd against Beluga Singapore is in substance, though not in form or in law, a claim by Mr Khanbabi arising from his employment.

305 The Official Receiver's breakdown of these claims is follows:

CLAIMS AGAINST BELUGA SINGAPORE				
No.	**Creditor**	**Status**	**Preferential**	**Ordinary**
1.	Grant, Robert Bell	Employee	S$26,805	
2.	Anthony Vijaya Sekaran	Employee	S$125,769	
3.	Chang Heng Liang	Employee	S$30,813	
4.	Nur Jalilah Suhaili	Employee	S$3,553	
5.	Florian Pinz	Employee	S$27,918	
6.	Teo Kian Yam	Employee	S$21,422	
7.	Ong Siew Chin	Employee	S$9,046	
8.	Hans-Peter Stenske	Employee	S$67,773	
9.	Bluefin Project Marine Pte Ltd	Trade		S$454,617

10.	Singapore Telecommunications Ltd	Trade		S$23,985
	Total		**S$313,099**	**S$478,602**
CLAIMS AGAINST BELUGA ASIA				
No.	**Creditor**	**Status**	**Preferential**	**Ordinary**
1.	Tan Woon Lian	Employee	S$9,297	S$15,600
2.	Noor Lela Osman	Employee	S$5,750	
3.	Koh Kim Choo	Employee	S$2,300	
4.	Mohd Firi bin Salim	Employee	S$3,250	
5.	BSK Stevedoring Pte Ltd	Trade		S$321,551
6.	Singapore Telecommunications Ltd	Trade		S$70,500
7.	Furama City Centre Singapore	Trade		S$874
8.	Blank Rome Solicitors	Trade		S$7,050
	Total		**S$20,597**	**S$415,575**

306 While these claims are yet to be adjudicated, there is no reason to believe that the Official Receiver has misstated them in any way. Further, the Singapore Liquidators have not disputed these figures. They merely point out that these claims are claims by employees of the Singapore Subsidiaries, as opposed to claims by employees of Beluga Chartering, [note: 95] and therefore not entitled to any priority of payment under s 328 in the Singapore liquidation of Beluga Chartering. That is undoubtedly true.

Beluga Chartering was not carrying on business in Singapore

307 Whether Beluga Chartering was carrying on business in Singapore is obviously a factor in the exercise of my discretion to disapply s 377(3)(c). The Official Receiver invites me to find based on these facts that Beluga Chartering was indeed carrying on business in Singapore. I hold that Beluga Chartering never carried on business in Singapore whether under the definition in s 366 of the Act or on any broader meaning of the term. It was therefore not obliged to register under s 368 of the Act.

308 Beluga Chartering arranged its affairs in Singapore as hundreds or even thousands of international enterprises in Singapore do: by establishing wholly-owned subsidiaries in Singapore and by extending personnel, financial and commercial support for the operations of those subsidiaries. Many of these subsidiaries have some or all of their directors in common with their parent companies. Many of these subsidiaries invariably keep the holding companies fully informed about their financial and business status. They may even seek directions from time to time as to how to grow or reduce their business in Singapore. Those subsidiaries undoubtedly carry on business in Singapore. But none of these factors can by themselves or even taken together amount to the *parent company* carrying on business in Singapore.

309 There are no grounds on which I can disregard the corporate structure in which Beluga

Chartering and the Singapore Subsidiaries were embedded. I am therefore obliged in terms of the law to treat each as a separate legal entity. On that basis, Beluga Chartering clearly did not carry on business in Singapore.

310 There are also no grounds for me to attribute the acts of the Singapore Subsidiaries to Beluga Chartering. It is common ground that the management of the Singapore Subsidiaries was distinct from that of Beluga Chartering. [note: 96] The emails between Mr Khanbabi and the representatives of Beluga Chartering support this. Far from taking directions from the management of Beluga Chartering, Mr Khanbabi appreciated and applied a clear separation between his role in the Beluga group and his duties to the Singapore Subsidiaries and to their creditors – in particular to their employees – when the interests of Beluga Chartering and those of the Singapore Subsidiaries diverged.

311 It is also common ground that Beluga Chartering and the Singapore Subsidiaries never agreed that the Singapore Subsidiaries would have general authority to enter into contracts on behalf of Beluga Chartering without its consent. [note: 97] Thus, although there is some evidence that the Singapore Subsidiaries did enter into contracts as a nominal "agent" for Beluga Chartering, that term appears to have been used loosely in the sense of a "representative" rather than the true sense of agent as it is used in the law of principal and agent and in s 366(1) of the Companies Act.

312 I therefore accept the Singapore Liquidators' submissions that Beluga Chartering was not carrying on business in Singapore.

Discretion to disapply the ring-fencing limb of s 377(3)(c)

313 I accept that the usual course in the case of a foreign company which does not carry on business in Singapore will be to apply the common law discretion and to disapply the ring-fencing limb of s 373(3)(c) of the Act to permit a transmission order of the gross Singapore proceeds to take place. But the facts of this case are exceptional. That is why I have set them out at some length and in some detail. On these facts, I have no hesitation in declining to exercise my discretion to disapply the ring-fencing limb of s 377(3)(c) of the Act. The factors I have taken into consideration are set out in the paragraphs which follow. No one of these factors would justify declining to disapply the ring-fencing limb of s 377(3)(c) of the Act. But all of these factors taken together do.

314 Although Beluga Chartering was undoubtedly not carrying on business in Singapore, it came as close as a foreign company can to doing so without actually doing so. The Singapore Subsidiaries were separate *legal* entities from Beluga Chartering but were not in any sense separate *economic* entities. This was not a case where the two Singapore Subsidiaries were capitalised upon incorporation with the intention that they should thereafter run as economically self-sustaining operations. Both Singapore Subsidiaries were wholly dependent from the outset and throughout their lives on monthly remittances from Beluga Chartering.

315 The Singapore Subsidiaries sought these monthly remittances by way of reimbursement for all of their respective expenses in the previous month. These expenses included employee salaries.

316 The Singapore Subsidiaries did not capitalise these monthly remittances in their books. Nor did the Singapore Subsidiaries treat these monthly remittances as shareholders' loans. The practical result was that, although each Singapore Subsidiary was a separate legal person in law from Beluga Chartering, Beluga Chartering accounted for those expenses in its own books as its own expenses.

317 The Singapore Subsidiaries and their employees expended their efforts in promoting the business of Beluga Chartering and Beluga Group. The revenue from the contracts which Beluga

Singapore entered into on behalf of Beluga Chartering fell due to Beluga Chartering and was paid by counterparties directly to Beluga Chartering. Beluga Asia rendered its ship husbandry services to Beluga Group ships.

318 The deugro Asset arises from business done in Singapore and has its closest connection to Singapore. Further, the deugro Asset is at least in part causally connected to the efforts of the Singapore Subsidiaries. It is by the efforts of the employees of the Singapore Subsidiaries, at least in part, that Beluga Chartering earned the deugro Asset. Those employees' claims form the bulk of the judgment debt which Beluga Chartering owes to the Singapore Subsidiaries.

319 Beluga Chartering, by its email dated 23 March 2011 expressly invited the Singapore Subsidiaries' management to "take appropriate action in accordance with [their] local laws". That is precisely what Mr Khanbabi did. He commenced the Suit, obtained the Injunction and levied execution in an effort to make sure that Beluga Group employees in Singapore were paid their salaries out of the economic fruits of their labour.

320 The German Liquidator took no steps to set aside the Singapore Subsidiaries' default judgment even though he was by July 2011 (if not earlier) aware of it and even after his representatives had taken control of the boards of directors of the judgment creditors, ie both plaintiffs in the suit against Beluga Chartering. I take that as an acknowledgment that Beluga Chartering's liability to each Singapore Subsidiary and also the quantum of that liability is undisputed.

321 I accept that if the Singapore Proceeds are transmitted to the German liquidator, the Singapore Subsidiaries will be in no worse position than any other creditor in Beluga Chartering's general body of unsecured creditors worldwide. However, if the Singapore Proceeds are transmitted to Germany, the Singapore Subsidiaries will be worse off than if the Singapore Liquidators fulfilled their obligations under Singapore insolvency law and s 377(3)(c).

322 The Singapore Subsidiaries will suffer real prejudice if I disapply the ring-fencing limb of s 377(3)(c). Beluga Chartering has about €20m in assets and debts of about €1.2bn. [note: 98] Each worldwide unsecured creditor will receive substantially less than 2 cents in the Euro, even if I disregard liquidation costs entirely. If I disapply the ring-fencing limb of s 377(3)(c) and the Singapore Liquidators transmit the Singapore Proceeds to the German Liquidator, the rate of recovery for the general body of unsecured creditors will not increase significantly. That is especially the case because the costs of the Singapore liquidation will have to be paid out of the Singapore Proceeds before transmission. On the other hand, if the Singapore Liquidators fulfil their obligations under the ring-fencing obligation in s 377(3)(c), there will be a substantial difference to the rate of recovery achieved by the Singapore Subsidiaries and, indirectly, by their employees in Singapore. The prejudice to the creditors proving in the German Liquidation will be *de minimis*.

323 For all of these reasons, I decline to exercise my discretion to disapply the ring-fencing limb of s 377(3)(c).

The Injunction

324 The final substantive prayer which the applicants seek from me is an order directing the respondents forthwith to discharge the Injunction so as to free the parties and to free the deugro Asset from the freezing effect of the Injunction in order to permit the payments envisaged in this judgment to be carried out.

325 I am not entirely sure whether I have the power in these proceedings to direct the

Respondents to take certain steps in other proceedings in the manner which the Singapore Liquidators pray. But if the Singapore Liquidators were to make the necessary application to me in the Suit, I would undoubtedly have the power to relax or discharge the Injunction to achieve the same effect as the prayer which the Singapore Liquidators now seek from me in these proceedings.

326 I therefore invite the Singapore Liquidators, in due course, to make the necessary application to me in the Suit so that the consequences of this judgment may be implemented.

Conclusion

327 For all of the foregoing reasons, I answer the questions posed in the application before me in the terms set out at [6] above. I will hear the parties on costs.

328 I made the point in [188] that it is wrong to characterise *Re BCCI* as a victory for universalism, let alone an unalloyed victory for universalism. It would be equally wrong to characterise my decision as a victory for territorialism, let alone an unalloyed victory for territorialism.

[note: 1] Statement of Agreed Facts (Amendment No. 1), para 3.

[note: 2] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 6.

[note: 3] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, page 55.

[note: 4] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 18 and page 56.

[note: 5] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 17 and page 55.

[note: 6] 1st affidavit of Christian Knittel affirmed on 5 September 2012, page 16.

[note: 7] Statement of Agreed Facts (Amendment No. 1), para 5. Note that the date given in para 5 of 20 February 2012 is incorrect.

[note: 8] See paragraph 15 of the Singapore Liquidators' submissions dated 28 Sep 2012.

[note: 9] Statement of Agreed Facts (Amendment No. 1), para 9.

[note: 10] Statement of Agreed Facts (Amendment No. 1), para 6.

[note: 11] Statement of Agreed Facts (Amendment No. 1), para 12.

[note: 12] Affidavit of Kwok Sai Soo filed on 30 August 2012, page 8.

[note: 13] Affidavit of Kwok Sai Soo filed on 30 August 2012, page 8.

[note: 14] Affidavit of Kwok Sai Soo filed on 30 August 2012, pages 8 and 11.

[note: 15] Affidavit of Kwok Sai Soo filed on 30 August 2012, para 2.

[note: 16] Affidavit of Kwok Sai Soo filed on 30 August 2012, page 8.

[note: 17] See para 3 of the Applicants' Written Submissions dated 22 August 2012.

[note: 18] Agreed Statement of Facts (Amendment No. 1), paragraph 14.

[note: 19] 1st affidavit of Christian Knittel affirmed on 5 September 2012, para 6.

[note: 20] Statement of Agreed Facts (Amendment No. 1), para 14.

[note: 21] See for example paragraph 61 of the Official Receiver's submissions dated 21 Aug 2012; paragraph 21 of the Singapore Liquidators' submissions dated 22 Aug 2012.

[note: 22] See paragraph 15 of the Singapore Liquidators' submissions dated 28 September 2012.

[note: 23] Official Receiver's written submissions dated 21 Aug 2013, para 70.

[note: 24] See paragraph 37(a) of the Singapore Liquidators' submissions dated 22 August 2012.

[note: 25] See para 15 of the Official Receiver's submissions dated 21 Aug 2012.

[note: 26] See para 18 of the Official Receiver's submissions dated 21 Aug 2012.

[note: 27] See para 27 of Singapore Liquidators' submissions date 22 Aug 2012.

[note: 28] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 6.

[note: 29] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 94.

[note: 30] Statement of Agreed Facts (Amendment No. 1), paras 6 and 7.

[note: 31] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, para 13.

[note: 32] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 98 and 99; 2nd affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of 2011/Z on 23 September 2011 at para 5.

[note: 33] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, para 4.

[note: 34] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, para 12.

[note: 35] 2nd affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of 2011/Z on 23 September 2011, para 7.

[note: 36] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, para 9 to 11 and 14 to 15. 2nd affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of

2011/Z on 23 September 2011, para 8.

[note: 37] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, para 11 and 16.

[note: 38] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 48, 75, 76 and 77.

[note: 39] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 49 and 50.

[note: 40] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 51.

[note: 41] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 51 to 74.

[note: 42] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 80 to 83 and 85 to 90.

[note: 43] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, para 24.

[note: 44] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 94.

[note: 45] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 95.

[note: 46] 2nd affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of 2011/Z on 23 September 2011, para 6.

[note: 47] 2nd affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of 2011/Z on 23 September 2011, para 6 and page 87.

[note: 48] 2nd affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of 2011/Z on 23 September 2011, page 84 and 85.

[note: 49] 2nd affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of 2011/Z on 23 September 2011, para 21.

[note: 50] 2nd affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of 2011/Z on 23 September 2011, page 84 and 85.

[note: 51] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 18 and page 56.

[note: 52] Agreed Statement of Facts (Amendment No. 1), para 4.

[note: 53] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 17.

[note: 54] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 8.

[note: 55] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 10.

[note: 56] 1st affidavit of Kwok Sai Soo filed in Suit 227 of 2011 on 29 November 2011 at para 5.

[note: 57] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 100 to 102.

[note: 58] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, para 30 and page 100 to 102.

[note: 59] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, para 30.

[note: 60] Statement of Agreed Facts (Amendment No. 1), paragraph 11; 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 24, 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, para 30; 2nd affidavit of Namir Khanbabi filed in Companies Winding Up No. 101 of 2011/Z dated 23 September 2011, para 16.

[note: 61] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 105 to 107.

[note: 62] 1st affidavit of Kwok Sai Soo filed in Suit 227 of 2011 on 29 November 2011 at page 35.

[note: 63] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 105 to 107.

[note: 64] 3rd affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 10 Jan 2012, para 5, 6 and 9.

[note: 65] 1st affidavit of Kwok Sai Soo filed in Suit 227 of 2011 on 29 November 2011 at page 37.

[note: 66] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, page 104.

[note: 67] 1st affidavit of Kwok Sai Soo filed in Suit 227 of 2011 on 29 November 2011 at page 10.

[note: 68] See paragraph 78, Singapore Liquidators' submissions dated 3 September 2012.

[note: 69] 2nd affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of 2011/Z on 23 September 2011, para 16.

[note: 70] 2nd affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of 2011/Z on 23 September 2011, para 16.

[note: 71] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, para 31.

[note: 72] 1st affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 31 March 2011, para 30.

[note: 73] 1st affidavit of Kwok Sai Soo filed in Suit 227 of 2011 on 29 November 2011 at page 43.

[note: 74] 1st affidavit of Kwok Sai Soo filed in Suit 227 of 2011 on 29 November 2011 at page 51.

[note: 75] 1st affidavit of Kwok Sai Soo filed in Suit 227 of 2011 on 29 November 2011 at page 44.

[note: 76] 1st affidavit of Edgar Grönda filed in Suit 227 of 2011 on 31 August 2011, para 6.

[note: 77] 1st affidavit of Yap Thiam Meng @Ng Meng Hwee filed on 10 August 2011 in Companies Winding Up No. 102 of 2011/D, para 7 and page 12.

[note: 78] 1st affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of 2011/Z on 10 Aug 2011, para 7 and page 6.

[note: 79] 2nd affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of 2011/Z on 23 September 2011, para 29.

[note: 80] 2nd affidavit of Namir Ahmed Khanbabi filed in Companies Winding Up No. 101 of 2011/Z on 23 September 2011, para 13.

[note: 81] 1st affidavit of Cheng Heng Liang filed in Companies Winding Up No. 101 of 2011/Z on 23 September 2011, para 8.

[note: 82] 1st affidavit of Kwok Sai Soo filed in Suit 227 of 2011 on 29 November 2011 at page 58.

[note: 83] 1st affidavit of Kwok Sai Soo filed in Suit 227 of 2011 on 29 November 2011 at page 58.

[note: 84] 3rd affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 10 Jan 2012, para 5, 6 and 9.

[note: 85] 3rd affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 10 Jan 2012, para 5, 6 and 9.

[note: 86] 3rd affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 10 Jan 2012, para 7.

[note: 87] 3rd affidavit of Namir Ahmed Khanbabi filed in Suit 227 of 2011 on 10 Jan 2012, para 10.

[note: 88] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 25.

[note: 89] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 10 to 12 and 46.

[note: 90] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 13, 14 and 20.

[note: 91] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 13.

[note: 92] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 23.

[note: 93] 1st affidavit of Heiko Keppler filed herein on 17 Jan 2012, para 25.

[note: 94] See paragraph 46 to 51 of the Official Receiver's submissions dated 28 Sep 2012.

[note: 95] See the heading at the bottom of page 14 of the Official Receiver's written submissions dated 28 Sep 2012.

[note: 96] Agreed Statement of Facts (Amendment No. 1), paragraph 8.

[note: 97] Agreed Statement of Facts (Amendment No. 1), paragraph 8.

[note: 98] See paragraph 15 of the Singapore Liquidators' submissions dated 28 Sep 2012.