

HIH Casualty & General Insurance Ltd, Re

Also known as:

McMahon v McGrath

McGrath v Riddell

House of Lords

09 April 2008

Case Analysis

Where Reported

[2008] UKHL 21; [2008] 1 W.L.R. 852; [2008] 3 All E.R. 869; [2008] Bus. L.R. 905; [2008] 4 WLUK 230; [2008] B.C.C. 349; [2012] 2 B.C.L.C. 655; [2008] B.P.I.R. 581; [2008] Lloyd's Rep. I.R. 756; (2008) 105(16) L.S.G. 26; (2008) 152(16) S.J.L.B. 30; Times, April 11, 2008 [Official Transcript](#);

Case Digest

Subject: Insolvency

Keywords: Australia; Letters of request; Cross-border insolvency; Assets; Jurisdiction; Pari passu; Distribution; Liquidators; Corporate insolvency

Summary: If the country of the principal winding up of an insolvent company was a "relevant country or territory" for the purposes of the [Insolvency Act 1986 s.426](#) and the liquidators in that country had requested English liquidators to remit to them the assets collected in England so that they could, pursuant to the insolvency law of that country, implement a universal scheme of pari passu distribution to ordinary unsecured creditors, the request was one to which, in principle, the English liquidators ought to accede. Reliance simply on the fact that under the foreign insolvency scheme there would be a significant class or classes of preferential creditors whose debts would not have priority under the English insolvency scheme was not sufficient to justify a refusal.

Abstract: The appellant Australian liquidators (C) appealed against a decision ([2006] EWCA Civ 732, [2007] Bus. L.R. 250) that the court should not accede to a request by an Australian judge asking that provisional liquidators in England be directed to remit the English assets of four insolvent Australian insurance companies to C for distribution in accordance with the Australian statutory scheme.

The alternative was for the assets to be retained in England and distributed in accordance with the English statutory scheme. Australian law had certain statutory provisions relating to insurance companies which departed from the insolvency principle of a pari passu distribution of assets among unsecured creditors. It was common ground that if the English assets were sent to Australia, insurance and reinsurance creditors would be paid in priority to ordinary creditors. The courts below held that it would not be right to direct a remission of assets in circumstances where the remission would reduce the dividends that would have been recovered under the English scheme of insolvency distribution by those creditors who were not insurance creditors.

(1) The [Insolvency Act 1986 s.426\(4\)](#) and [s.426\(5\)](#) gave the court jurisdiction to accede to the request of the Australian court and, on the facts of the case, the court ought to accede to that request. The exercise of the s.426 power so as to direct the remission of the assets to Australia would not constitute the disapplication of the English insolvency scheme. To hold that the power under the section to direct the remission of assets from the country where an ancillary liquidation was being conducted to the country where the principal liquidation was being conducted could not be exercised if the effect would be to reduce the amount of dividends receivable in England by any class of creditors or by any individual creditor would be to deprive the section of much of its intended potential to enable a single universal scheme for insolvency distribution to be achieved. The English courts had a statutory obligation in an English winding up to apply the English statutory scheme. There was no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme, [Bank of Credit and Commerce International SA \(In Liquidation\) \(No.11\), Re \[1997\] Ch. 213, \[1996\] 8 WLUK 25](#) considered. If the country of the principal winding up was a "relevant country or territory" for s.426 purposes and the liquidators in that country had requested English liquidators to remit to them the assets collected in England so that they could, pursuant to the insolvency law of that country, implement a

universal scheme of pari passu distribution to ordinary unsecured creditors, the request was one to which, in principle, the English liquidators ought to accede. The English liquidators should first discharge the debts of those creditors who, under the English insolvency scheme, were entitled to preferential payment. (2) There might be circumstances in which a refusal to remit assets pursuant to such a request might be justified. Reliance simply on the fact that under the insolvency scheme applicable to the principal winding up there would be a significant class or classes of preferential creditors whose debts would not have priority under the English insolvency scheme was not sufficient to justify a refusal. There was nothing unacceptably discriminatory or otherwise contrary to public policy in the Australian statutory provisions. The fact that Australia had been designated a "relevant country or territory" for s.426 purposes indicated that, in general terms, the Australian insolvency scheme was acceptable in this jurisdiction. (3) (Per Lord Hoffmann) The court had jurisdiction at common law, under its established practice of giving directions to ancillary liquidators, to direct remittal of the English assets, notwithstanding any differences between the English and foreign systems of distribution. Those differences were relevant only to the question of whether to exercise discretion to do so.

Judge: Lord Hoffmann; Lord Phillips of Worth Matravers; Lord Scott of Foscote; Lord Walker of Gestingthorpe; Lord Neuberger of Abbotsbury;

Counsel: For the appellants: Jonathan Sumption QC, Simon Mortimore QC, Tom Smith, Geoffrey Vos QC, Peter Arden QC
For the respondents: William Trower QC, Jeremy Goldring

Solicitor: For the appellants: Norton Rose; Clifford Chance
For the respondents: Freshfields Bruckhaus Deringer

Chancery Division (Companies Court)

HIH Casualty & General Insurance Ltd, Re

[2005] EWHC 2125 (Ch); [2006] 2 All E.R. 671; [2005] 10 WLUK 198

Appellate History

Affirmed by

Court of Appeal (Civil Division)

**HIH Casualty & General Insurance Ltd,
Re**

[2006] EWCA Civ 732; [2007] 1 All E.R. 177; [2007] Bus. L.R. 250; [2006] 6 WLUK 158; [2007] B.C.C. 335; Times, July 5, 2006

Reversed by

House of Lords

**HIH Casualty & General Insurance Ltd,
Re**

[2008] UKHL 21; [2008] 1 W.L.R. 852; [2008] 3 All E.R. 869; [2008] Bus. L.R. 905; [2008] 4 WLUK 230; [2008] B.C.C. 349; [2012] 2 B.C.L.C. 655; [2008] B.P.I.R. 581; [2008] Lloyd's Rep. I.R. 756; Times, April 11, 2008; (2008) 105(16) L.S.G. 26; (2008) 152(16) S.J.L.B. 30

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Official Committee of Unsecured
Creditors of Navigator Holdings Plc**

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PC (CI)

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Gerrard, Petitioner

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