Judgment : Mr Justice Neuberger, Chancery Division. 12th April 2000.

Introduction:

1. This is an application for sanction of a scheme of arrangement Insurance Ltd., (""the company") and the scheme creditors, pursuant to section 425 of The Companies Act 1985. The application is made by the company's joint provisional liquidators.

2. The background: The facts and the proposed scheme, which I take substantially from the skeleton argument of Mr. Richard Snowden, who appears on behalf of the Petitioners, is as follows. The company is a subsidiary of Anglo American Insurance Holdings Ltd., which itself is a subsidiary of Anglo American Insurance Group UK plc, which is owned in turn by Zurich Centre Group Holdings Ltd., whose ultimate parent company is Zurich Financial Services AG, which is the ultimate holding company in the Zurich Insurance group of companies. The company began writing business in the London insurance market on 13th April 1987. Over the next eight years, it got into difficulties. In about 1995, the Directors of the company decided to commute certain of the company's reinsurance protections. Accordingly, in 1996, the company entered into agreements with the reinsurers, including a company called Central Solutions Ltd., ("*Centre*") and "*Anglo American Insurance Company (Bermuda) Limited*", to commute certain reinsurance contracts provided by those companies with effect from December 1995. Part of the consideration received by the company was cash and securities amounting to sixty seven million dollars. The transaction involved the company entering into a new reinsurance contract with Centre, with the aim of providing support for the company if after collection of all other reinsurance recoveries its gross assets fell to zero. I am told that the provisional liquidators do not fully understand all the aspects of that transaction at the moment.

3. According to the Directors of the company, the 1995 accounts had been finalized by October 1996, and by then it was clear that the financial position of the company for the year ending 31st December 1996 was going to be adversely affected by a number of factors. The cumulative effect of these factors was that the company's liabilities, including contingent and prospective liabilities, exceeded its assets. In the absence of additional finance being available, the Board decided on 10th March 1997 to cease paying claims and to present a winding-up petition and to seek the appointment of provisional liquidators. Such a petition was presented the following day, and Mr. Anthony McMahon and Mr. Philip Wallace of KPMG, who are the applicants, were appointed as joint provisional liquidators of the company by Mr. Justice Carnwath, with a view to promoting a scheme arrangement and investigating antecedent transactions. The order appointing the provisional liquidators also provided for the appointment of an informal creditors committee. It also contained a fairly wide order under section 127 of the Insolvency Act 1986. The petition has been adjourned from time to time to enable the scheme to be formulated and the next hearing of the petition is due to be 26th July 2000.

4. The reasons put forward for the scheme are as follows. The company is plainly insolvent. Its audited accounts for the period ending 31st December 1998 show an estimated deficiency of some seventy-eight million dollars. Although insolvent, the company is expected to have sufficient assets to pay a proportion of the claims against it. There are three alternative ways in which the liabilities of the company could be ascertained and its assets collectively distributed.

   First, through a conventional liquidation; secondly, under a scheme of arrangement within the liquidation; or thirdly by a scheme of arrangement outside a liquidation. The company's business is such that the run-off of liabilities is unlikely to be completed for some years and the provisional liquidators are of the opinion that a scheme of arrangement outside a liquidation is the preferable alternative. The main advantages of a scheme are said to be as follows. First, the investing and handling of the company's assets will not be subject to the fees which would otherwise be payable if they are required to be paid into the comparatively low interest bearing insolvency services account in a compulsory liquidation.

   Secondly, payments to creditors will predominantly be made in the currency of their respective claims, rather than in sterling as in a compulsory liquidation, thus minimising exchange rate fluctuations and meeting a creditor's expectations.

   Thirdly, a more flexible investment policy could be utilised so as to suit the company's requirements.

Alternative Dispute Resolution Law Reports. Typeset by NADR. Crown Copyright reserved.

Fourthly, the procedure for resolving disputes ought to provide substantial savings of costs, a consideration of particular weight to this court, following the CPR.

Fifthly, the scheme should maximise the return to creditors and allow for accelerated payments.

5. **The proposed scheme**: I should explain the scheme in outline. The provisional liquidators would become the initial scheme administrators and would manage the run-off of the company's liabilities and realise and distribute its assets in accordance with the provisions of the scheme, and they would be supervised by a creditors' committee. The scheme would apply to all liabilities of the company, except to those of secured creditors, at least to the extent of the security, to those with preferential claims and to pre-scheme costs. Any claims which would rank as preferential claims under a liquidation pursuant to the Insolvency Act 1986, would be paid in full after the scheme becomes effective, as would most categories of costs, charges and expenses. It is also right to say that the scheme would not affect the rights of secured creditors or holders under letters of credit or trusts. I should also mention that scheme creditors would be able to rely on any set-offs upon which they could have relied if the company had been wound up pursuant to the current petition and the order had been made on the date on which the scheme becomes effective.

6. Apart from scheme creditors, the scheme would also bind the Policyholder's Protection Board ("*PPB*"), which has agreed to make payments in accordance with the terms of the scheme to any scheme creditor who would be entitled to protection under the Policyholder's Protection Act 1975 on a liquidation. Significantly, such payments would ensure, subject to provisions designed to protect the PPB from any excessive currency fluctuations, that such creditor received an equivalent percentage of his claim to that which the PPB would be under a duty to secure that such a creditor was paid if the company had gone into liquidation on the relevant date. The PPB have given undertakings to be bound by the scheme. So far as the duration of the scheme is concerned, it is anticipated that it may last for eight years or more, but there are provisions for its earlier termination in appropriate circumstances. There are also provisions for what are called mini schemes, so that if it is in the interests of scheme creditors as a whole to propose further schemes, they can be put into effect, albeit subject to court sanction. Importantly, the scheme is designed to coexist alongside a liquidation, so it would not terminate if the company is wound up. So too, the PPB's obligations would survive the winding-up. This is relevant, because there is a particular possibility in this case that a winding-up may be desirable, as it would be in the interests of the creditors to enable the liquidators to utilise remedies under the Insolvency Act 1986 in relation to the conduct of the company's affairs and transactions, which took place prior to the making of the order of Mr. Justice Carnwath.

7. To avoid the assets of the company being paid into the insolvency services account, the scheme also contains provisions which would ensure that the scheme assets are held on trust by the scheme administrators to be applied in accordance with the terms of the scheme. Under the scheme, creditors would be required to notify the company of their claims in the normal manner, as if the company was solvent. Significantly, disputes would be dealt with under the scheme's dispute resolution procedure, which would provide for a limited stay of proceedings against the company to reduce the cost to the company of participating in litigation, and to allow time for agreement of a scheme claim.

8. The precise nature of the stay would differ, depending upon whether the scheme creditor's claim is in respect of a common liability, that is, where the company is liable for a proportion of a share of a claim with coinsurers (and I will refer to these scheme creditors as "*common liability creditors*") or is in respect of other claims, that is, where the company is the sole insurer or where the claim is not an insurance claim (and I will refer to such creditors as "*other creditors*"). Common liability creditors would be prevented from bringing proceedings against the company to establish the existence or amount of the claim until six months after obtaining judgment against or reaching a settlement with the company's coinsurers and giving notice of that to the company.

9. Other creditors would be prevented from bringing claims for six months after having given notice of their claim to the company. In each case, in the absence of agreement, once the period of the stay has expired, scheme creditors would have the right to take proceedings in any jurisdiction to establish their claim. As soon as practicable, the scheme administrators would have to set a payment percentage

Alternative Dispute Resolution Law Reports. Typeset by NADR. Crown Copyright reserved.

so as to enable an early part-payment to be made to scheme creditors in respect of established scheme claims after they are determined and there is provision for further payment in such event if the payment percentage increases.

10. The scheme is an asset reserving scheme, which means that, when setting the payment percentage, the scheme administrators would take into account the expected future recoveries from reinsurance and investment income, in addition to cash assets. In so doing, the scheme administrators would have to balance the interests of scheme creditors whose claims were expected to crystallize early in the scheme, and those whose claims are expected to take longer to crystallize, the short-term and long-term creditors, in other words.

11. Short-term creditors would be likely to prefer the payment percentage to be set as high as possible as soon as possible.

12. Long-term creditors would be concerned that, if the payment percentage were set too high too soon, there would be a risk that if there were more claims or fewer assets of the company than expected, the scheme administrators would be unable to maintain the level of payment percentage and therefore they would receive less than the short-term creditors.

13. Difficulties inevitably could arise in reaching such a balance as a result of the inherent uncertainties in estimating the company's long-term liabilities. The scheme, therefore, would require sufficient assets to be retained by the scheme administrators to enable an equal percentage of claims to be paid as they are established in the future.

14. A proportion of the company's assets are located in the United States and for the effective operation of this scheme, it would be necessary to obtain protection relief from the United States Bankruptcy Court for the Southern Division of New York under section 304 of the US Bankruptcy Code. It is right to say that there are certain assets in the form of cash or letters of credit in New York, New Jersey and Connecticut, which when provided to the relevant authority of these States is a condition of conducting business there.

The function of the Court:

15. I turn then to the function of the court. The jurisdiction of the court to approve a scheme in a case such as *this is derived in section 425 of the Companies Act 1985. Subsections (1) and (2) are in the following terms: "(1) Where a compromise or arrangement is proposed between a company and its creditors, or any class of them, or between the company and its members, or any class of them, the court may on the application of the company or any creditor or member of it or, in the case of a company being wound up, ... of the liquidator ..., order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such a manner as the court directs. (2) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the court, is binding on all creditors or the class of creditors or on the members or class of members (as the case may be) and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."*

16. The role of the court in sanctioning the scheme of arrangement is set out in Buckley on the Companies Acts Vol. 1, page 473-4 of the current fourteenth edition. *"**Function of the court**. In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second, that the class was fairly represented by those attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."*

Alternative Dispute Resolution Law Reports. Typeset by NADR. Crown Copyright reserved.

17. That statement has been approved in a number of cases, including **Re: National Bank Ltd**. (1966) 1 W.L.R. 819 at 829 A to E, **Re: Osiris Insurance Ltd**. (1999) 1 B.C.L.C 182 at 188g to 189g, and Re: BTR plc (1999) 2 B.C.L.C. 675 at 680, b to g, in which permission to appeal was refused by the Court of Appeal. Chadwick L.J. gave a judgment on 19th February 1999 in that connection and he specifically incorporated the passage from Buckley in the judgment below containing those observations. Most recently, the passage from **Buckley** has been approved by Mrs. Justice Arden in **Re: The Hawk Insurance Co. Ltd.,** 21st December 1999, 24th January 2000.

18. **The issues**: So far as the statutory requirements are concerned, the position is as follows. First, the scheme is a compromise or arrangement. Secondly, the procedure which is required to identify and notify all potential scheme creditors of the meeting of the scheme creditors to consider the scheme and the creditors meetings has been undertaken. Thirdly, the requirements of section 426 of the Companies Act 1985 were satisfied by the very detailed explanatory statement sent to the scheme creditors.

19. There were two meetings of creditors; the first was of policyholders protected under the Policyholders Protection Act 1975, ("*protected policyholders*"); the second was of all other scheme creditors ("*The other scheme creditors"*). The creditors meetings were held on 15th March 2000 and that the vote at each of those meetings was substantial and virtually unanimous, being subject only to one dissenting vote, that of Centre, which was valued by the provisional liquidators at one dollar. Apart from that, the votes in favour of the scheme ran into many millions of dollars and a large number of voters voted in favour.

20. The points on which I have been addressed and which I have to consider are really four. First, in light of the reference in section 425 to "***class of creditors***", was it appropriate to have only two meetings of scheme creditors or should those creditors have been divided into further or other classes, with a view to such additional class having a separate meeting? Secondly, can and should I approve the scheme so as to survive and be binding in the event of a subsequent liquidation? Thirdly, are the provisions of clauses 2.5 and 2.6, relating to set-off, sufficiently clearly drafted to protect Centre, and indeed other creditors (although only Centre, through Mr. David Mabb, appear before me today, given that it is intended that the equivalent of the right to set-off under Rule 4.90 of the Insolvency Rules 1986 should apply under the scheme. The fourth issue concerns the particular position of the PPB, *and policyholders in relation set off..* [sic]

21. **The first issue**. The basic principle relating to classes of creditors is set out in the well-known judgment of Lord Justice Bowen of **Sovereign Life Assurance Co. v Dodd** (1892) 2 Q.B. 573 at 583, where the central part of the ratio is in these terms: *"It seems plain that we must give such a meaning to the term "class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."*

22. In my judgment, that test, by definition, has to be determined by reference to the facts of the particular case and the terms of the particular scheme. That, indeed, is reflected in the three recent cases to which I have already referred, Osiris, BTR and Hawk. In the Court of Appeal, when refusing permission to appeal against Mr. Justice Jonathan Parker's decision in BTR, Lord Justice Chadwick said this at page 9 of the transcript: *"The way in which Parliament's intention is given effect, as it seems to me, and it has seemed to judges over the century or so since Lord Justice Bowen considered the matter in 1982, is that the court is not bound by the decision of the meeting. A favourable resolution at the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting is unrepresentative, or that those voting in favour at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court. That, as it seems to me, is the check or balance which Parliament has envisaged. Further, that, as it seems to me, is the only practical check that can be imposed in circumstances where, as Mr. Justice Jonathan Parker pointed out, it is a fact of life that shareholders having shares which confer the same rights under the company's constitution and under the scheme may, nonetheless, be motivated to vote in different ways."*

23. To my mind, whether or not a particular group constitutes a separate class must depend on the particular facts of the particular case and on the nature of the differences said to exist between the two alleged classes and the relevant terms of the particular scheme. Having identified those matters, the court must then answer the question posed by Lord Justice Bowen, bearing in mind the following factors.
    (1) The fact that section 425 enables the majority to ""exercise a most formidable compulsion upon the dissentient or would-be dissentient creditors, and it therefore requires to be construed with care", per Lord Justice Bowen.
    (2) The fact, identified by Lord Justice Chadwick, namely, that the court still has power, indeed the duty, not to approve a scheme which is, or perhaps may be, unfair in its terms or by virtue of the way in which it was arrived at.
    (3) Practical considerations are not irrelevant. In that connection, they obviously play a part, as they do in relation to the implementation of any principle of law in a commercial context. That point is well illustrated by the point made by Mr. Justice Jonathan Parker in **BTR**, and indeed by myself in **Osiris,** to the effect that if one gets too picky about potential different classes, one could end up with virtually as many classes as there are members of a particular group.

24. Here it could be said that the common liability creditors are different from any other scheme creditors. It could be said that the American creditors are a separate class. It could be said that the long-term and short-term creditors fall into different classes. It seems to me the last example represents an excellent illustration of how the terms of the scheme can influence the issue of whether two groups may be in the same class or not. If the terms of the scheme had involved dividing up the assets into two ring-fenced parts, one for long-term creditors and the other for short-term creditors, then it would obviously be well arguable that each constitutes a separate group. However, given that that aspect is to be dealt with as I have described, it seems to me that there will be no sufficient conflict between the two groups of creditors for them to constitute separate classes.

25. As for the US policyholders, although many of them will have a right to make a claim against a fund in New York, New Jersey or Connecticut, it does not seem to me that that puts any of them in a different class. The terms of the scheme will not deprive them of any such rights, nor will it deprive them of the right to claim against the fund, although they will be subject to the normal hotchpot doctrine, which would have applied in a liquidation.

26. The difference between the common liability creditors and the other creditors cannot, to my mind, be said to be a difference in substantive rights. They are both subject to a six month moratorium after they have made their claim, they are both entitled to proceed with their claim at the end of the six month moratorium, and admitted claims in both categories are entitled to receive distribution notably due to the insolvency of the company. The only difference arises from the fact that, in order to minimise the cost for the company of having to enter into negotiations or litigation with creditors, an extra hurdle is to be placed in the way of the common liability creditors before they can make the claim against the company.

27. Applying the test suggested by Lord Justice Bowen (even bearing in mind his precatory words) and the observations of Lord Justice Chadwick, I am satisfied that there is here, in relation to such common liability and other creditors, only one class of creditors. These conclusions mean that it is unnecessary to decide whether, if there should have been additional classes, I would still have had jurisdiction to approve the scheme, on the basis that the vote at the meeting was so overwhelming that it is clear that the fact that the separate classes did not have separate meetings made no conceivable difference to the outcome, or whether the point goes to the jurisdiction of the court.

28. Whatever way I might have been otherwise tempted to deal with that issue, Mrs. Justice Arden decided in Hawk that the point is one that goes to the jurisdiction of the court and I would have thought it right to follow that conclusion. It seems to me undesirable that judges of co-ordinate jurisdiction should differ on a point of this sort unless the later judge is satisfied that a relevant authority or statute or a compelling argument was not put before the first judge. It seems to me that is

 Crown Copyright reserved.

not the case here, and I would have thought it right to let the matter be conclusively determined by the Court of Appeal.

29. The second issue. The second issue is whether the court has jurisdiction to impose a scheme, in effect, on a liquidator which is in any way different from the statutory scheme which applies on liquidation.

30. In general, while I believe that the court should be very careful before making an order which would involve approving a scheme which differs in any way from the statutory scheme appropriate to liquidations in terms which would carry over and be binding on a subsequent liquidator, I do consider that the court has jurisdiction to make such an order.

31. First, it appears to me that section 425 can be invoked to provide for a binding scheme, binding on the liquidator and the liquidation, after the company has gone into liquidation and liquidators have been appointed. In that connection I was referred to three cases. In **Re: Trix Ltd** (1970) 1 W.L.R. 1422, Mr. Justice Plowman had to consider a compromise between a liquidator and the company under section 245 of the Companies Act 1948, which gave powers to a liquidator to compromise claims with the sanction of the court. The effect of the proposal put before the court was that the assets of the company would have been distributed to creditors other than in accordance with their rights as they would have been under the liquidation regime set out in the Companies Act 1948 and the Bankruptcy Act 1914. Mr. Justice Plowman held that it was inappropriate to make such an order under section 245 of the 1948 Act, but he went on to say that the court would have had power to make the order under section 206 of the 1948 Act.

32. Section 206 is the statutory predecessor of section 425 of the 1985 Act. Mr. Justice Plowman said this at 1423H to 1424C: "*I am therefore confronted with an important question of principle, namely whether it is right to authorise such a distribution, as I am asked to do, without either the consent of every creditor or a scheme of arrangement under section 206 which would bind apathetic creditors (of whom there are apparently a very large number here) and the dissentient minority, which in this case appears to be one.*

In my judgment, it is not right. The matter is one which the creditors should decide for themselves and on which they are entitled to express their views at a meeting or in court.

However convenient it may be for the liquidators to have a compromise sanctioned by the court, it is in my judgment, wrong in principle to allow that course to be taken, for none of the persons affected has had any opportunity of being heard to challenge it--indeed the whole object is to preclude such a challenge.

On the other hand, if a scheme were brought in, every creditor would have an opportunity of voting for or against it and, if he thought fit, of challenging it before the court when the petition to sanction it was heard. Furthermore, the creditors would have the protection of the court at an earlier stage in relation to proper notice of the meetings to consider the scheme and the circular explaining it. Last and not least, the court would not have to be involved in the merits of the scheme unless some creditor thought fit to appear and oppose it, in which case the court would have the benefit of argument and evidence on both sides."

33. I would refer also to the observations on Sir Donald Nicholls, Vice Chancellor at first instance, and Lord Justice Dillon in the Court of Appeal, in **Re: BCCI S.A. No. 3** (1993) BCLC 1490. It seems clear from the passage at 1507 that the Vice Chancellor took the view, that section 425 could apply to such a case. It also seems to have been the view of Lord Justice Dillon who, said at 1509i to 1510b: "*When the liquidation supervened, the rights of all concerned were governed by the pari passu rule in company liquidation which superseded the arrangements for the previous clearing house settlement arrangements. As I see it, in a liquidation there can be a departure from the pari passu rule by a scheme of arrangement under section 425; but equally, there can be a departure from the pari passu rule if it is merely ancillary to an exercise of any of the powers which are exercisable with the sanction of the court under part 1 of schedule 4 to the Insolvency Act 1986.*" However, he did go on to say this: "*There are some things which cannot be done without a scheme of arrangement and in the normal run that would include a very large number of proposals, and indeed almost all, if not all, proposals for rearrangement of rights as between creditors of different companies or different classes of creditors.*" I think support can also be found for my view in the reasoning of the Privy Council in **Kempe v. Ambassador Insurance Co. (In Liquidation)** (1998) BCC 311.

34. Secondly, if section 425 can be invoked so as to bind the company, and therefore the liquidator and the creditors, after the company has gone into liquidation, it is hard to see any logic or sense in the court not being able to approve a scheme before the company has gone into liquidation so as to bind the company and the liquidator after it has gone into liquidation. That is particularly true in a case such as this, where a petition to wind up the company has been presented because the company is insolvent, and indeed where the scheme is intended to bind all the creditors, those creditors have voted overwhelmingly to support the scheme, and subject to one point, the scheme proposals do not alter the substantive right of the secured or preferential creditors or the rules relating to set-off, and in particular Rule 4.90 of the Insolvency Rules 1986, which would apply in liquidation.

35. Furthermore, the court often is asked to approve a scheme in a case just such as this, namely, where the company is insolvent. The scheme requires to be managed on the basis that, subject to the specific sort of events which are catered for in the scheme itself, which would involve the scheme administrators coming back to court and asking for the scheme to be discharged, they expect to be carrying it on on a long-term basis. If at any time the scheme was liable to be destroyed by a petition to wind up the company, it would render the potential effectiveness of such a scheme nugatory, or at any rate much reduced. I also consider that the wording of section 425 tends to support the conclusion I have reached.

36. Additionally, as I see it, the decision of Mr. Justice Jacob in **Re: Mark One (Oxford Street) Ltd.,** (1998) BCC 984 supports this conclusion, albeit only by analogy. In that case it was held that when discharging an administration order and giving directions for the liquidation, the court could, in effect, override the strict liquidation code. It is right to record that in reaching this conclusion, Mr. Justice Jacob differed from Mr. Justice Lightman, who reached a contrary view in Re: Powerstore Trading Ltd. (1998) BCC 305, but at the moment, as I have already indicated, it appears to me, as a judge of first instance, I should, in the absence of a very good reason to the contrary, follow the latter decision.

37. Finally, something of a footnote point tends to support this conclusion. Section 320(2) of the Companies Act 1948 provides that any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors should be void to all intents. It is fair to say that the law relating to what was then called fraudulent preferences-- referred to in the title of section 320--has been radically redrafted. However, it is interesting to note, as Mr. Snowden points out, that there is no such provision in the Insolvency Act 1986, the Companies Act 1985 or the Insolvency Rules 1986.

38. In those circumstances, I consider that I can and should, subject to the fourth point, not be deterred from approving the scheme on the basis that it will survive the liquidation and be binding on the liquidator.

39. **The third issue.** The third issue concerns the effect of clauses 2.5 and 2.6 of the scheme. I do not think it is necessary for me to set out those provisions. In their original form, it was Centre's submission, through Mr. David Mabb, that scheme creditors, excluding the PPB, for reasons which will become apparent, might, in certain circumstances, have rights which were somewhat different under the scheme from those contemplated by the Insolvency Rules, in particular Rule 4.90 in the context of a liquidation. Since it was the intention of the scheme, subject to the fourth point, to give all creditors of the company precisely the same rights in this connection as they would have had under Rule 4.90, this was not a matter on which there was any conflict between Mr. Mabb and Mr. Snowden, other than with regard to drafting. The rules relating to the set-off are deceptively simple, at least on a quick reading of Rule 4.90. I would refer only to the judgment of Lord Justice Hoffmann in **M.S. Fashions Ltd. v. B.C.C.I. SA** (1993) Ch. 425 at 435 D to H, and, as Lord Hoffmann, in **Stein v. Blake** (1996) A.C. 243 at 252E to 253B.

40. During argument, it appeared to me that while Mr. Snowden may well be right and that clauses 2.5 and 2.6 as originally drafted did (subject to the fourth issue) give rights to all creditors, with the exception of PPB, which were precisely the same as those that they would have had under Rule 4.90, it did appear to me that there was a real possibility of a judge reaching a different conclusion in the light of the points made by Mr. Mabb.

41. In those circumstances, two questions arose. The first was whether it would be sensible to redraft clauses 2.5 and 2.6. Secondly, if so, how. I have no doubt that these sorts of amendments are clearly within my jurisdiction to sanction when approving the scheme, without the need for further reference to creditors.

42. Mr. Mabb came up with a form of words upon which Mr. Snowden had one or two reservations. I am glad to say that over the last thirty-six hours, they have been able to sort out their differences and have come up with a form of words which appears to me to be satisfactory. In those circumstances, other than indicating that I am grateful to the parties for having agreed what seems to me a sensible and workable provision, I propose to say no more about it.

43. **The fourth issue**. I mentioned that there was a fourth point. It arises from the fact that PPB are involved in, and indeed are to be bound by, the scheme. Clause 2.5.3 of the scheme would prevent the company from asserting, by way of set-off against the PPB, any liability to the company of an assignor of a scheme claim, to the company, which liability only becomes established after a payment has been made to the assignor by the PPB. In a liquidation, the company might not have been able to assert a contingent or unliquidated claim by way of set-off against a scheme creditor or the PPB (as to which, see the observations of Lord Justice Hoffmann and Lord Hoffmann, to which I have referred). However, once the company's claim had become liquidated, the "*hindsight principle*" referred to by Lord Justice Hoffmann would operate so as to enable the company to rely on such set-off against the PPB, whether or not the PPB had made a payment to the scheme creditor.

44. This is a point of some subtlety but it is significant for two reasons. First, it does involve the court approving a scheme, which albeit to a limited and minor extent, contains provisions which depart from Rule 4.90. Secondly, it may cause me to reconsider whether my conclusion as to the classes of creditors was correct. I regard the first point as far more significant and difficult than the second point. So far as the second point is concerned, the protected policyholders were a separate class, who had a separate meeting, so there is no problem in that connection. In so far as the PPB is concerned, it is represented in court today, conveniently through Mr. Snowden, and it is content, indeed supports and agrees to be bound by the order.

45. The other point is more troubling. Can the court approve a scheme which is binding on a liquidator and after a liquidation, but which involves a departure from Rule 4.90? In my view, the answer is that the court should very rarely exercise it, but if the particular circumstances of the particular case justify it, then the court has such power.

46. In this connection, I have been referred to two authorities in addition to those which I have mentioned, which bear on the point. First, in **Re: Bank of Credit v. Commerce International SA No. 10** (1997) Chancery 213, Sir Richard Scott, Vice Chancellor, held that he did not have power to permit the liquidators, when exercising their function as liquidators, to depart from Rule 4.90. See at 246C to 248B.

47. Mr. Snowden says that that does not bind me here. Although a decision of the Vice Chancellor it is a decision of a court of concomitant jurisdiction. More importantly, it is a decision relating to the powers of the liquidator and it was not concerned with a scheme. In relation to a case involving a scheme, Mr. Snowden reminds me not only of the three cases to which I have referred, that is, **Trix, B.C.C.I. (No. 3)** and **Ambassador,** but also he refers to observations of Lord Simon of Glaisdale, who was in the majority, in the decision in **National Westminster Bank Ltd v. Halesowen Presswork & Assemblies Ltd.** (1972) A.C. 785. At 809B to D Lord Simon said this: "*It was argued for the respondents that, if there could be no contracting out of section 31" (of the Bankruptcy Act 1914, in very similar terms to Rule 4.90) ""a very usual type of compromise between creditors, in their common interest to keep an insolvent afloat, would be impossible. To this there are, I think, two answers: first, there would be nothing to prevent any such agreement after an act of bankruptcy had been committed"*. Then importantly: "*And secondly, so far as companies are concerned, section 206 of the Companies Act 1948 gives power, subject to the sanction of the court, for a compromise to be made in certain circumstances with creditors which will be binding on all creditors (or all creditors of the class involved). But the mere fact that this argument could be advanced at all in view of*

the conflict of dicta and what I cannot but regard as a clear preponderance of authority emphasizes the desirability that the promised legislation in this field should not be unduly delayed."

48. It is true that, in that passage, Lord Simon does not make it entirely clear that a scheme involving such a departure from Rule 4.90 would be binding after a liquidation (particularly in light of his reference to ""*keeping an insolvent afloat*") but it seems to me that the thrust of his reasoning supports the view that I would have formed on the basis of the other authorities to which I have already referred, namely, albeit that the power should only be exercised in limited and plainly justified circumstances, the court can approve a scheme which involves a departure from Rule 4.90.

49. In my judgment, this is an exceptional case where it is appropriate for the court to approve a scheme, notwithstanding that it involves a departure from Rule 4.90. The departure is very limited, both because of the circumstances in which it would operate and because it would apply only to one person, namely the PPB. Furthermore, it appears to me to be in the public interest, and in the interest of all the creditors, that it should apply in the present case. My concern that Mr. Mabb's points were fully met in relation to the third point emphasises the importance I attach to Rule 4.90 normally being applied in full in any scheme such as this. However, it does seem to me, on the unusual facts of this case, that on the limited aspect of the PPB's rights and bearing in mind the limited circumstances in which the departure can even apply to the PPB, I should sanction the scheme with this unusual feature.

Conclusion: Accordingly, I propose to approve this scheme.

MR. R. SNOWDEN (instructed by Messrs Clifford Chance, London) appeared on behalf of the Applicants
MR. D. MABB (instructed by Messrs Cadwallader, Wickersham & Taft, London) appeared on behalf of the Respondents