CJ

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN 19.6.92.

CAUSE NOS. 284 AND 286 OF 1991

IN THE MATTER OF:

BANK OF CREDIT AND COMMERCE INTERNATIONAL

(OVERSEAS) LIMITED

AND

CREDIT AND FINANCE CORPORATION LIMITED

AND IN THE MATTER OF:

INTERNATIONAL CREDIT AND INVESTMENT COMPANY

(OVERSEAS) LTD.

AND IN THE MATTER OF:

THE BANKS AND TRUST COMPANIES LAW 1989

AND IN THE MATTER OF:

THE COMPANIES LAW (REVISED)

Yesterday I gave leave for the liquidators of Bank of Credit and Commerce International (Overseas) Ltd. ("BCCI Overseas") and Credit and Finance Corporation Limited ("CFC") to execute, with one exception, a series of agreements which have come to be known as the Majority Shareholder Agreements and the Pooling Agreements, and to do everything necessary to implement them fully and comply with their terms. The exception was the agreement containing the terms and conditions on which the Majority Shareholders and the principal BCCI companies' relationship with International Credit and Investment Company (Overseas) Ltd. ("ICIC Overseas") and its related companies, the ICIC group, would be resolved.

The reason for that was that I wanted to hear the specific submissions relating to the ICIC group which were

due to be heard immediately after those relating to BCCI Overseas and CFC before making a decision. That has now happened, and in view of the judgment which I shall be delivering later this morning in relation to the ICIC group, I extend the leave given yesterday to include the ICIC agreement.

The intent of the Majority Shareholder Agreements, taken together, is that the Government of Abu Dhabi will make funds available, subject to conditions, for distribution to certain ordinary unsecured creditors of the principal BCCI companies. The main agreement is a Contribution Agreement dealing with those funds which will be available to the creditors of the principal BCCI companies who accept the offer, one of the terms of which is that they release any claims which they may have against the Government of Abu Dhabi, the Majority Shareholders, and related persons. The principal BCCI companies and the Government of Abu Dhabi, the Majority Shareholders, and related persons will also enter into wide-ranging mutual releases, and the Abu Dhabi parties will be admitted as creditors in the liquidation of BCCI Overseas and BCCI SA.

Consideration of the effect of the mutual releases is fundamental to the assessment of the Abu Dhabi offer. Before going further into that, I make one general comment. It goes without saying that this Court is exercising its own independent jurisdiction in this matter, and I was satisfied that Sections 162 and 163 of our Companies Law provide ample jurisdiction to make the orders and directions which I did make. Indeed, no submission to the contrary was made.

In reaching that conclusion, I was assisted, not only by the submissions made by Mr. Pascoe on behalf of the liquidators, but by those made at my request by Mr. Denman as Amicus Curiae, a friend of the Court. Nevertheless, I have to recognize, as I am glad to do, that these agreements are part of an immense international effort to salvage what can be salvaged for the creditors out of the BCCI debacle. In

that connection, I respectfully adopt what was said by the then Vice-Chancellor in England, Sir Nicholas Browne-Wilkinson, in earlier related proceedings about this situation. It was this:

> "It will require the most difficult and complicated attempts at cooperation between the different national jurisdictions which I hope will be forthcoming. I am told that such cooperation is already forthcoming from at least three other jurisdictions, including Abu Dhabi itself, with a view to coordinating what is an overwhelmingly difficult problem, given the absence of any international structure to deal with it. But whether the matter is dealt with by way of winding up --" as, of course, we now know it is being "-- or whether it is dealt with by schemes of arrangement, my present understanding is that all the assets worldwide will have to be taken into account, as will all creditors."

I do not doubt that the Cayman Islands was one of the jurisdictions referred to by the former Vice-Chancellor, and his successor, Sir Donald Nicholls, has expressly recognised in his judgment of the 8th of April, 1992 that the courts of England, Luxembourg and the Cayman Islands are striving to achieve the same object of conducting the winding up of the companies in question in the best interests of the creditors. In exercising its own jurisdiction, this Court is very cognizant of the importance of maintaining that approach.

Having made these general observations, I now turn to the recommendation by the liquidators that the Majority Shareholder Agreements, and the Pooling Agreements which I have yet to describe, be implemented. Under the Pooling Agreements the assets of BCCI Holdings and its subsidiaries, BCCI Overseas, CFC and BCCI SA, including participating branches of BCCI SA and BCCI Overseas, would be pooled and distributed rateably among creditors. I see no sensible

alternative to this. The liquidators' report speaks of the many ways in which the affairs of BCCI SA and BCCI Overseas are hopelessly entangled. To circumvent the hugely expensive and time-consuming task of trying to unravel the confusion must be in the best interests of the creditors. One important objective of the agreements is to conduct the processing of claims and the distribution to creditors in a more orderly fashion by treating the liquidations of foreign branches of BCCI Overseas and BCCI SA as ancillary to the principal liquidations in the Cayman Islands and Luxembourg respectively. BCCI Overseas has 63 branches in 28 countries, and BCCI SA has 47 branches in 13 countries. Those figures show the extent of the problem and the extent to which it is shared by BCCI Overseas and BCCI SA.

Not surprisingly, the approach of the liquidators in these two companies to the Majority Shareholder agreements and the Pooling Agreements has been similar. I have had the benefit of reading the judgment of the learned Vice-Chancellor delivered on the 12th of June in which he approved the proposals of BCCI SA. In what I now say, I have respectfully and freely drawn upon what he then said.

First, I revert to the mutual releases between the BCCI companies and the Abu Dhabi parties. I have seen on a confidential basis the legal advice given to the liquidators,and it would be quite wrong to canvass in public the strengths and weaknesses of the claims which it is proposed to be released. Those releases have not yet been achieved, and to do that would put the company and the liquidators at a disadvantage in any future negotiations or litigation. But anyone who reads the liquidators' report can see that court proceedings in respect of these mutual claims would be likely to be protracted (five to ten years is estimated) enormously expensive, and with an uncertain outcome both as to liability and to enforceability of recovery.

The first alternative to the proposals is further

negotiations. Affidavit evidence produced by the Abu Dhabi authorities in England was read to me. It was that the Majority Shareholders were themselves the principal victims of the fraud within the BCCI group, and that they have suffered loss exceeding $6,000 million. They point out that no one else has offered to make any substantial payment for the general body of creditors. They have repeated that the commercial terms of the proposals are not negotiable. They will not increase the amount of their offer. I do not believe that the door is open to further negotiations on those lines in realistic terms.

The second alternative, if the proposals are rejected, is court proceedings by the liquidators against the Abu Dhabi parties. In that event, distribution to creditors is unlikely to be made for years. The latest estimate is that the assets of the principal BCCI companies are expected to realise about $1.301 million. All this money would have to be retained by the liquidators to meet the $2.2 thousand million proprietary claims being asserted by the Abu Dhabi authorities. If those claims succeeded, the companies could well be wiped out. At best, the liquidators could make no distribution until after the claim has been resolved.

If the Abu Dhabi offer is accepted and its contribution of some $1,500 million is included, the likely dividend becomes a little over 32 percent with the first distribution to depositors probably being made by the middle of next year.

The liquidators have also applied for a set of directions which I will call, as they have, the "Cayman Directions". The primary object of the Cayman Directions is to provide for claims in the liquidation of BCCI Overseas to be dealt with in accordance with a defined set of rules. In the absence of the Court having made its own rules governing the winding up of companies, the matter falls to be dealt with in accordance with the general practice of the Court. In the present, case I accept the proposal that the rules contained in the Insolvency Rules 1986 of England and Wales,

insofar as they relate to winding up of companies by order of the High Court of Justice in England, should apply to the winding up of BCCI Overseas by order of this Court, to the extent that they are not inconsistent with the Companies Law.

In delivering his directions on the 2nd of March, 1992 and in his judgment of the 8th of June, the Vice-Chancellor considered whether or not directions should be given to the English liquidators to convene a meeting of the creditors. He considered the practical problems arising in the conduct of a far from ordinary liquidation involving large numbers of creditors located in different jurisdictions. In particular, he considered the problem of the timing of such a meeting against the background of the timetable laid down by the Majority Shareholder agreements.

The same sort of practical problems would arise in attempting to convene meetings of creditors of BCCI Overseas for the purposes of Section 104 of the Companies Law (Revised). However, by the same Section the Court is entitled to have regard to the wishes of creditors as proved to it by any sufficient evidence. The establishment of a committee of creditors will provide a convenient means for this purpose. In addition, the formation of such a committee will bring the liquidation of BCCI Overseas in the Cayman Islands into line in this respect with the proceedings relating to BCCI SA in England and Luxembourg. An order for the establishment of such a committee will be included in the Cayman Directions.

At the hearing yesterday the Majority Shareholders and other creditors were represented and expressed willingness and desire to serve on the creditors committee. The direction to be included in the Cayman Directions is a direction that a committee of creditors should be formed with matters relating to its constitution, function, and membership being adjourned for consideration in chambers, and that notice of that hearing should be served on the creditors to whom I have referred. That is to say, in addition to the

Majority Shareholders Visa International, National Bank of Oman Ltd., Petroservicios Ltda., and BCC (MISR) SAE. In other respects, the Cayman Directions were approved in accordance with the draft directions sought and set out in Appendix 1 of the liquidators' report dated 24th of March, 1992.

I have not attempted to go exhaustively into the factors for and against the proposals which the liquidators have set out in their report dated the 24th of March. That report has been quite widely circulated and was extensively referred to during the hearing yesterday.

I have considered them all carefully and conclude that, without a doubt, acceptance of the package of agreements proposed is in the best interests of the creditors as a whole. It is scant comfort to them to be told that half a loaf is better than no bread, but the alternative is a gamble and, in my judgment, a gamble against the odds. It hazards the present offer against speculative prospects of a better result through negotiation or litigation.

Like the Vice-Chancellor in England, I attach little importance to the fact that only creditors who relinquish any claims they may themselves have against the Abu Dhabi parties may share in the final contribution by them. There is no evidence of such independent claims, and the precautionary requirement is a reasonable one.

Of course, in spite of the efforts already made, all may yet be in vain, and a great deal of time and money may have been wasted on this proposed settlement, but to reject the proposals now converts that possibility into a certainty. The Abu Dhabi Government's offer is conditional on acceptance by creditors with admitted claims totalling $7,000 million. The Abu Dhabi Government can waive this high figure, but not without the liquidators' consent if acceptances are less than $4,750 million. The liquidators would not give such consent without returning to the Court for further directions. That is a very important safeguard for the creditors.

There is another important point with which I must conclude. Unlike the hearing here, the application by the liquidators of BCCI SA in London was strenuously opposed, and the decision by the Vice-Chancellor is under appeal. Should that appeal succeed, the liquidators of BCCI Overseas have undertaken to seek further directions from this Court.

I now turn to the application by the liquidators of ICIC Overseas in case number 286 of 1991. They seek approval in that capacity of an agreement substantially in the form of a draft ICIC agreement which they have already placed before the Court in their capacity as liquidators of BCCI Overseas and CFC. The agreement is one of the Majority Shareholder Agreements, and I need not repeat what I have already said with regard to aspects of those agreements viewed as a package. It is important, however, to understand the place of the ICIC agreement in that package and within the BCCI group.

It is apparent from the Provisional Liquidators' investigations to date that ICIC Overseas was established to provide banking services to clients on a confidential basis to facilitate the purchase and sale of BCCI Holdings shares, either directly or indirectly through an intermediary, and to engage in banking business to create profits for use by BCCI employees and for charitable purposes. BCCI Overseas functioned as a bookkeeping centre for transactions initiated, organised and approved elsewhere. It was the recipient of funds from BCCI Overseas and, perhaps, other members of the BCCI group, and it acted as a conduit for those and other funds to other members of the ICIC group.

All ICIC Overseas accounts and reconciliations were located in Grand Cayman, and the day-to-day booking of transactions was carried out in Grand Cayman. However, it is apparent from the Liquidators' investigations so far that the decision-making in ICIC Overseas was initiated and coordinated by BCCI management and others, and that the affairs of the ICIC group and the BCCI group were intertwined

further by cross-borrowings and deposits.

The link between ICIC Overseas and the BCCI group, the way in which the BCCI group managed its affairs, and the intervention of BCCI management in the affairs of ICIC Overseas, makes it difficult to distinguish clearly in some instances between the funds belonging to ICIC Overseas and those belonging to the BCCI group. There are depositors, customers and borrowers common to both the BCCI group and ICIC Overseas.

The background to the ICIC agreement is that the Majority Shareholders claim to have tracing or other proprietary and trust claims against ICIC Overseas, ICIC Investments, and other companies in the ICIC group, as well as the principal BCCI companies arising from the alleged misappropriation and misapplication of sums deposited by the Majority Shareholders with ICIC Overseas, which totalled in excess of $2,000 million. Pursuant to the ICIC agreement, it is intended that the ICIC group will be ring-fenced, the assets of the companies pooled and the companies liquidated.

Among the terms of the agreement are mutual releases between the Majority Shareholders, the principal BCCI companies and ICIC. From that it can be seen that the prospect of a conflict of interest situation arises for the liquidators in their capacities as liquidators of BCCI Overseas and CFC, and of ICIC Overseas.

I am satisfied that the ICIC agreement would be of considerable benefit to the creditors of ICIC Overseas. Indeed, they would, as far as can be foreseen, do comparatively well. Without the agreement, and even assuming that a claim against BCCI for $2 billion is sound with no viable claim the other way, what matters in the present situation more than the merits is the prospect of seeing any of the fruits of victory. They could be minimal or even non-existent without the rescue package of which the ICIC agreement is a part. However, there is no fully independent opinion before the liquidators or the Court dealing with the

merits of the mutual claims between ICIC and the principal BCCI companies. The liquidators act on both sides.

The Court undoubtedly has jurisdiction to approve the agreements no less than in the case of the others with which I have already dealt, but should I exercise it in these circumstances? In the ordinary case, I would be almost compelled to adjourn the matter for independent advice to be obtained, but this is the exceptional case. The ICIC agreement is an important building block in the structure in the overall scheme of partial rescue offered by the Majority Shareholders. Without it that structure collapses. Moreover, the whole matter is urgent, even taking into account the extended deadlines to which the Majority Shareholders have agreed. Their attitude is clear from the affidavit which they put in in Cause 284 of 1991. Further delays can jeopardize the whole negotiations and be catastrophic.

If the Majority Shareholders' tracing or other proprietary claims are left in place and succeed, they could not only wipe out any return to the creditors of ICIC Overseas, but by reason of their nature spill over against the creditors of the principal BCCI companies. It would be wrong for me to comment in more detail than is revealed in the Liquidators' report on the claims by the Majority Shareholders, but as the Liquidators themselves recognize, even the pursuit of such a claim would prevent any worthwhile distribution being made to creditors until it was resolved. That would be years ahead. The elimination of the claim is on any view an advantage of such an overwhelming kind that it is hard to envisage any independent expert advising against it.

This matter of conflict of interest is a serious and difficult one, but taking into account all the matters to which I have referred, I conclude that I should approve, without further delay, an agreement substantially in the form of a draft submitted to me, and authorise and empower the Liquidators to execute it and do the acts and things referred

to in paragraphs 18.3.1 and 18.3.2 of their report to the Court dated the 24th April 1992, and so order.

I also direct that the Insolvency Rules 1986 of England and Wales shall apply, as in the case of BCCI Overseas, to the liquidations of CFC and ICIC Overseas.

The liquidators' costs in each application will be paid as an expense in the respective liquidation, as will the expenses of the Government of the Cayman Islands in providing, through the good offices of the Attorney-General, the services of Mr. Denman as Amicus Curiae. The Majority Shareholders indicated that they sought no order for costs.

G.E. Harre

Judge

19th June 1992