Michaelmas Term

[2019] UKPC 45

Privy Council Appeal No 0075 of 2018

JUDGMENT

In the matter of Stanford International Bank Ltd (In Liquidation) (Acting by and through its Joint Liquidators Mark McDonald and Hugh Dickson) (Antigua and Barbuda)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda)

before

Lord Wilson

Lord Carnwath

Lord Briggs

Lady Arden

Sir Andrew Longmore

JUDGMENT GIVEN ON

16 December 2019

Heard on 23 and 24 July 2019

Appellant	Respondent
Justin Fenwick QC	Prof Mark Watson-Gandy
Nicole Sandells QC	Lenworth Johnson
(Instructed by Gowling WLG (UK) LLP)	(Instructed by Edwin Coe LLP)

LORD BRIGGS: (with whom Lord Wilson and Sir Andrew Longmore agree)

Introduction

1.
This appeal is about the rights of creditors, under the laws of Antigua and Barbuda, who have suffered loss by investing, through an Antiguan bank, in what turned out to have been a Ponzi scheme. Giving the advice of the Board in Fairfield Sentry Ltd v Migani [2014] UKPC 9, Lord Sumption said this, at para 3:

“It is inherent in a Ponzi scheme that those who withdraw their funds before the scheme collapses escape without loss, and quite possibly with substantial fictitious profits. The loss falls entirely on those investors whose funds are still invested when the money runs out and the scheme fails.”

2.
This uneven (some might say capricious) distribution of the loss occasioned to the victims of what might be described as a common misfortune has given rise to anxious consideration by the courts of Antigua and by the Board as to the remedies which might be available to the joint liquidators of the vehicle for this Ponzi scheme, namely Stanford International Bank (“SIB”), so as to enable them to achieve a re-adjustment of that loss among the bank’s depositors which would accord with the liquidators’ perception of fairness, justice and equity. They achieved limited success at first instance but suffered a comprehensive defeat in the Court of Appeal.

3.
Central to the analysis of the relevant legal issues is the fact that SIB was incorporated as an Antiguan International Business Corporation (“IBC”) under the Antiguan International Business Corporations Act (“the IBC Act”). As will be explained in more detail below, the IBC Act prescribes a rather unusual insolvency regime for the winding up of an IBC but it also contains, at section 204, a generously worded provision of discretionary remedies which may be sought from the court, both by shareholders and creditors, where there has been oppressive or unfairly prejudicial conduct, in order to rectify the matters complained of. This may conveniently be labelled “section 204 relief”.

4.
Three main issues have emerged from this litigation, which was initiated by an application to the court by the joint liquidators for directions. The first, which only emerged in the Court of Appeal, but which takes logical precedence over the others, is whether section 204 relief is available at all in respect of the affairs of an IBC in liquidation. The second issue, which arises only if (contrary to the judgment of the Court of Appeal) the first is answered in the affirmative, is whether section 204 provides a realistic basis for a claim by the joint liquidators to recover, for the benefit of the creditors generally, amounts paid by SIB to depositor creditors before its liquidation (“claw-back claims”). The third issue is whether section 204 provides a basis for the liquidators to re-adjust the claims of creditors in the liquidation so as to allocate the net proceeds of recoveries in favour of those depositors who have not been paid at all, as against those who have been partly paid prior to liquidation, otherwise than as would be achieved by a pari passu distribution of the proceeds of the liquidation in accordance with the insolvency scheme applicable to SIB. The judge’s directions to the liquidators effectively answered the second issue in the negative and the third in the affirmative.

5.
By way of summary, the Board has concluded:

(a) by a majority, that section 204 relief is not available in relation to an IBC in liquidation, so that this appeal should be dismissed;

(b) unanimously that, if section 204 relief had in principle been available, the judge was right to conclude that claw-back claims should not be pursued;

(c) unanimously, that re-adjustment of creditors’ claims in the liquidation should not have been permitted, even if section 204 relief was in principle available.

6.

While it may be said that the first of those three conclusions is sufficient to dispose of this appeal, the other issues were very fully argued and the Board thinks it appropriate to deal with them, out of respect for the quality of the competing submissions, the careful judgment of the judge, and because of the general importance of the legal issues at stake.

The Facts

7.
SIB started operations in Antigua under the IBC Act in 1990, having moved from Montserrat, where it was called Guardian Bank. Throughout its operations in Antigua it was controlled by Robert Allen Stanford. The liquidators say that Mr Stanford ran SIB throughout its operations in Antigua as a Ponzi scheme, so that it was probably insolvent for the whole of the period from 1990 onwards. Mr Stanford is now serving a 110 year prison sentence in the United States of America.

8.
SIB's modus operandi was to seek investments by the sale of certificates of deposit ("CDs"), promising repayment of capital together with contractual interest upon maturity, with provision for early redemption at a discount. The relationship thereby created between SIB and its depositors was therefore that of debtor and unsecured creditor rather than, for example, trustee and beneficiary.

9.
From about September 2008 there began a run on SIB, during which depositors sought to recover capital and interest, to the extent that US$1.3 billion of withdrawals were made prior to SIB being placed in receivership, and its operations being suspended, by the Antiguan Financial Services Regulatory Commission in February 2009. The appointment of receiver-managers was confirmed by the High Court of Antigua on 26 February 2009 and, on 15 April, the High Court converted the receivership into a liquidation, re-appointing the receiver-managers as liquidators. There have been some changes in the identity of the liquidators since then, but they are immaterial.

10.
Since for many years Mr Stanford had been misappropriating incoming payments from depositors rather than investing them in appropriate securities, there was by early 2009 only a fraction of the funds within SIB required to repay creditors in full. Leaving aside trade creditors, the depositors in SIB may, from a viewpoint in February 2009, broadly be divided into three classes. First, those who had been paid their contractual entitlements (capital and interest) in full prior to the onset of liquidation. Secondly those who had been paid part of their contractual entitlement before liquidation, who could therefore claim as creditors for the unpaid balance in the liquidation. Thirdly, those depositors who had received no part of their contractual entitlement.

11.
The liquidators applied to the court for directions in October 2013 and in May 2014 sought the appointment of the first respondent as amicus curiae, to present all arguments which might reasonably be advanced by creditors who would stand to be disadvantaged by the claims which the liquidators sought authority to pursue. In summary, the steps which the liquidators invited the court to authorise them to take were as follows:

(a)
The pursuit of claims, without limit of time, for disgorgement by depositors of any sums received from SIB in excess of their respective capital deposits. This sought disgorgement of amounts paid out as contractual interest from a class which the liquidators labelled "net winners". This was said to be

justified on the basis that those amounts could only have been taken from other depositors' capital, since at no time had SIB generated any investment profits sufficient to pay interest. Some US$200m was estimated to have been paid out in this way.

(b)
Claims against all depositors who had received payments during the run on the bank from September 2008 until it ceased trading. These payments were estimated to have amounted to US$1.3 billion. The basis upon which a claw-back of these payments was said to be justified was that, if SIB had been placed in liquidation before the run on the bank commenced, then these payments would not have been made, and they ought to be regarded as having amounted to wrongful preferences. The depositors thereby repaid were labelled by the liquidators "preference creditors".

(c)
Re-adjustment of depositors' claims within the liquidation, so as to disallow the claims of partly paid depositors in favour of depositors who had not been paid at all. This claim did not involve any element of claw-back. Rather, it sought to treat part-payments prior to liquidation as having been wrongful so that the amount of them could be, in effect, set off against what those depositors might otherwise have received from the liquidation proceeds on account of that part of their debts which remained unpaid.

12.
With one exception, all these proposed claims were put forward by the liquidators upon the basis that they could be acceded to by the court as a form of section 204 relief for oppressive or unfairly prejudicial conduct, namely the conduct of SIB's affairs as a Ponzi scheme to the detriment of its depositors generally. The exception relates to claim (b), against the preference creditors. In addition to being put forward as a form of section 204 relief, it was also pursued as a common law preference claim, upon the basis (which will be explained in more detail below) that because the IBC Act excluded the statutory regime for avoiding fraudulent preferences applicable to companies generally, a common law preference claim was all that could be advanced, outside the confines of section 204.

13.
It is not the function of the court, on an application of this kind for directions by liquidators, to determine whether or not particular kinds of claim will definitely succeed. Rather, and in much the same way as a judge hearing a In re Beddoe application by trustees seeking authority to commence proceedings, the court has to exercise a discretion whether to grant or refuse authority upon the basis of a judgment about the likely merits of such a claim, set against the drain upon the funds in the hands of the liquidators likely to be incurred by pursuing it.

14.
In a thorough and careful judgment handed down in November 2015, Wallbank J (Ag) declined to authorise the pursuit of claims (a) or (b), that is claw-back claims in relation to payments made to depositors prior to liquidation. But he authorised the liquidators to pursue the re-adjustment claims of type (c). His reasoning may be summarised as follows. First, it was not submitted to him by the amicus that section 204 relief was, in principle, unavailable in relation to an IBC in liquidation. After a review of some of the relevant authorities, he concluded that it was available. Secondly, he concluded that the evidence about the operation of SIB as a Ponzi scheme disclosed a sufficient prima facie case of oppression and unfair prejudice as against those of the bank's depositors who lost money as a result. But thirdly, he concluded that there was no sufficient prospect that claw-back claims (types (a) and (b) above) would succeed, principally because depositors who had been paid all or part of their

contractual entitlements had a reasonable expectation that they would be able to hold on to them, sufficient to make it unfair to require them to disgorge by way of relief under section 204. Fourthly he concluded that the alternative claim against the preference creditors under the common law of fraudulent preference disclosed too many obstacles for it to have a reasonable prospect of success. Fifthly, he concluded that re-adjustment of claims within the liquidation was capable of amounting to a form of section 204 relief which, depending on particular facts about the depositors who would lose thereby, disclosed a sufficient prospect of success. Finally, he concluded that the liquidators were "proper persons" to make the application under section 204, within the meaning of section 200(b)(iv) of the IBC Act.

15.
On the liquidators' appeal and a cross-appeal by the amicus the Court of Appeal (Pereira CJ, Thom and Webster JJA) dealt with the matter on the simple basis that section 204 relief could not be sought in relation to the affairs of an IBC in liquidation. The judge's refusal to permit the alternative (within claim (b)) based upon common law preference was not the subject of any appeal to the Court of Appeal. The result therefore was that the liquidators were refused the relief sought in its entirety.

The Legal Framework

16.
This appeal is all about the interrelationship between two distinct forms of legal framework. The first, which may be labelled the insolvency scheme, is that which is applied to a company when it goes into insolvent liquidation. The second, which may be labelled the oppression/unfair prejudice regime, is that which enables the court to provide discretionary remedies for dealing with oppressive or unfairly prejudicial conduct. Most legal systems in the common law world provide some form of each of these two frameworks, and Antigua is no exception. In the present case it is necessary to focus not merely upon the general law of Antigua, but the specific versions of each of those frameworks applicable in relation to an IBC, under the IBC Act.

17.
Speaking generally, most insolvency frameworks establish a form of code or set of rules by which the competing claims of stakeholders in the company are valued as at the onset of the insolvency process (often called the cut-off date) and the then realisable assets of the company are collected in by the liquidators and distributed pari passu among unsecured creditors, subject to the proprietary claims of those with security, with the surplus (in the unlikely event there is any) distributable among shareholders, or any other class of stakeholder whose rights are postponed to those of the unsecured creditors. Transactions following the cut-off date are in general avoided and specific statutory provision is usually made for the avoidance or unwinding of certain pre-cut off date transactions such as, typically, wrongful preferences and transactions at an undervalue. In some jurisdictions, such as England, the insolvency scheme is now almost entirely statutory. In others, such as Antigua (and indeed England before 1986) the scheme consists of a mixture of statutory and judge-made rules. Invariably the insolvency scheme is recognised as serving not merely the private interests of the stakeholders in the company but also the public interest: see the recent judgment of the Board in Scandinaviska Enskilda Banken AB v Conway [2019] UKPC 36, paras 104-117.

18.
Another feature of insolvency schemes generally is that the application of a system of rules founded on the pari passu principle by no means always produces perfect justice or equity as between different stakeholders or classes of stakeholders. At best, it may be said to produce a form of rough justice,

constrained in particular by the fact that the liquidators have recourse only to the assets of the company still in its possession at the cut-off date, save where limited provisions for re-opening past transactions such as preferences are successfully deployed. In short, the tree lies where it falls. A feature of most insolvency schemes, including that generally in force in Antigua, is that they operate by reference to detailed rules which leave limited room for judicial discretion. Nor does the typical insolvency scheme leave room for special treatment to mitigate injustice to particular stakeholders. On the contrary, the essence of the pari passu principle is that all stakeholders within a particular priority class (whether unsecured creditors or contributories) should have the provisions of the scheme applied to them equally.

19.
The statutory part of the insolvency scheme which applies to Antiguan companies generally is to be found in the Companies Act 1995. For present purposes it is the provision about fraudulent preference which deserves attention. Section 458(1) provides that:

“458.(1) Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, or a fraudulent conveyance, assignment, transfer, sale or disposition, shall, if made or done by or against a company, be deemed in the event of its being wound up, a fraudulent preference of its creditors, or a fraudulent conveyance, assignment, transfer, sale or disposition, as the case may be, and be invalid accordingly.”

That cross-reference to the bankruptcy scheme leads to section 44 of the Bankruptcy Act which provides in subsection (1) as follows:

“Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, whether the giving of such preference is his sole view, or one view among others, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.”

20.
No statutory part of the general Antiguan insolvency scheme is applicable to an IBC. This is because section 372(2)(c) of the IBC Act completely dis-applies the Companies Act in relation to IBCs. Nonetheless there are, in Part IV of the IBC Act, a range of provisions governing the winding-up and dissolution of an IBC and conferring the requisite powers both on liquidators and upon the court. Provision is made in sections 289 and 290 for the priorities of claims in a winding up, which apply the pari passu principle among all the claimants with the same priority.

21.
Conspicuous by its absence is any statutory provision for the avoidance of fraudulent or wrongful preferences. Counsel on this appeal could offer no explanation for that apparent omission, nor even a reliable indication whether it was deliberate or accidental. But they were in agreement (and it has been common ground at all stages in this litigation) that the common law about fraudulent preference is applicable in the insolvent winding up of an IBC, in default of any statutory provision which replaces it.

22.
Fraudulent (now generally called wrongful) preference was originally a judge-made principle and therefore a creature of the common law. As is explained in the Scandinaviska case, at paras 61 and 64, it was originally developed in England in the 18th century in response to a perception, best explained by Lord Mansfield in Alderson v Temple (1768) 4 Burr 2235, 2240 that a fraudulent preference "is defeating the equality that is introduced by the Statutes of Bankruptcy". That originally common law doctrine was almost universally replaced by express statutory provisions in common law countries by the end of the 19th century, first in relation to bankruptcy and then, as in Antigua, by cross-reference, in relation to corporate insolvency.

23.
It is unnecessary to describe the precise parameters of the common law doctrine in detail, still less to speculate how it might have developed if it had not been almost universally overtaken by statute. For present purposes it is sufficient to note that, as was common ground between counsel, the common law doctrine posed certain burdens upon a liquidator seeking to rely upon it which were alleviated to some extent by section 44 of the Bankruptcy Act of Antigua. It was because of those difficulties in pursuing the common law remedy that Wallbank J concluded that there was no sufficient prospect of success in the pursuit of a common law preference claim to make it appropriate to authorise the liquidators to do so. The particular difficulty drawn to the Board's attention was that in Nunes v Carter (1866) LR 1 PC 342, at 348, Lord Westbury said that payment pursuant to a demand on the part of the creditor was not a fraudulent preference. This part of Wallbank J's analysis has not been the subject of an appeal.

Oppression and Unfair Prejudice

24.
The IBC Act contains, at section 204, a modern and broadly expressed provision for the grant by the court of relief in relation to oppression or unfairly prejudicial conduct, under the heading "Restraining Oppression". Before describing it in detail, it is appropriate to begin with a summary of its antecedents. In England, before 1948, the main remedy of a shareholder in a company who complained that its affairs had been conducted unfairly as against him was to petition for a just and equitable winding up: see generally In re Westbourne Galleries Ltd [1973] AC 360. A more flexible response to the same complaint than this draconian remedy was provided to the English courts by section 210 of the Companies Act 1948, and substantially modernised and expanded, in sections 459-461 of the Companies Act 1985.

25.
Speaking of section 459, in O'Neill v Phillips [1999] 1 WLR 1092, 1098-1101, Lord Hoffmann said:

"In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in In re Saul D Harrison & Sons Plc [1995] 1 BCLC 14, 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J said in In re J E Cade & Son Ltd [1992] BCLC 213, 227: 'The court … has a very wide discretion, but it does not sit under a palm tree'.

Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing

businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.

In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.

This approach to the concept of unfairness in section 459 runs parallel to that which your Lordships' House, in In re Westbourne Galleries Ltd [1973] AC 360, adopted in giving content to the concept of 'just and equitable' as a ground for winding up. After referring to cases on the equitable jurisdiction to require partners to exercise their powers in good faith, Lord Wilberforce said, at p 379:

'The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act [1948] and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents [the company] suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.'

I would apply the same reasoning to the concept of unfairness in section 459. The Law Commission, in its Report on Shareholder Remedies (1997) (Law Com No 246) (Cm 3769), para 4.11, p 43 expresses some concern that defining the content of the unfairness concept in the way I have suggested might unduly limit its scope and that 'conduct which would appear to be deserving of a remedy may be left unremedied. …'. In my view a balance has to be struck between the breadth of the discretion given to the court and the principle of legal certainty. Petitions under section 459 are often lengthy and expensive. It is highly desirable that lawyers should be able to advise their clients whether or not a petition is likely to succeed. Lord Wilberforce, after the passage which I have quoted, said that it

would be impossible ‘and wholly undesirable’ to define the circumstances in which the application of equitable principles might make it unjust, or inequitable (or unfair) for a party to insist on legal rights or to exercise them in a particular way. This of course is right. But that does not mean that there are no principles by which those circumstances may be identified. The way in which such equitable principles operate is tolerably well settled and in my view it would be wrong to abandon them in favour of some wholly indefinite notion of fairness.

I should make it clear that the parallel I have drawn between the notion of ‘just and equitable’ as explained by Lord Wilberforce in In re Westbourne Galleries Ltd and the notion of fairness in section 459 does not mean that conduct will not be unfair unless it would have justified an order to wind up the company. There was such a requirement in section 210 of the Companies Act 1948 but it was not repeated in section 459. As Mummery J observed in In re A Company (No 00314 of 1989), Ex p Estate Acquisition and Development Ltd [1991] BCLC 154, 161, the grant of one remedy will not necessarily require proof of conduct which would have justified a different remedy:

‘Under sections 459 to 461 the court is not … faced with a death sentence decision dependent on establishing just and equitable grounds for such a decision. The court is more in the position of a medical practitioner presented with a patient who is alleged to be suffering from one or more ailments which can be treated by an appropriate remedy applied during the course of the continuing life of the company.’

The parallel is not in the conduct which the court will treat as justifying a particular remedy but in the principles upon which it decides that the conduct is unjust, inequitable or unfair.

An example of such equitable principles in action is Blisset v Daniel (1853) 10 Hare 493 to which Lord Wilberforce referred in In re Westbourne Galleries Ltd [1973] AC 360, 381. Page Wood V-C held that upon the true construction of the articles, two-thirds of the partners could expel a partner by serving a notice upon him without holding any meeting or giving any reason. But he held that the power must be exercised in good faith. He said, 10 Hare 493, 523, that ‘the literal construction of these articles cannot be enforced’ and, after citing from the title ‘De Societate’ in Justinian’s Institutes, went on at pp 523-524:

‘It must be plain that you can neither exercise a power of this description by dissolving the partnership nor do any other act for purposes contrary to the plain general meaning of the deed, which must be this - that this power is inserted, not for the benefit of any particular parties holding two-thirds of the shares but for the benefit of the whole society and partnership …’

In the Australian case of In re Wondoflex Textiles Pty Ltd [1951] VLR 458, 467, Smith J also contrasted the literal meaning of the articles with the true intentions of the parties:

‘It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles. … To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him. … But this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the court to relieve a party from his bargain in such cases.’

I cite these references to ‘the literal construction of these articles’ contrasted with good faith and ‘the plain general meaning of the deed’ and ‘what the parties can fairly have had in contemplation’ to show that there is more than one theoretical basis upon which a decision like Blisset v Daniel can be explained. 19th century English law, with its division between law and equity, traditionally took the view that while literal meanings might prevail in a court of law, equity could give effect to what it considered to have been the true intentions of the parties by preventing or restraining the exercise of legal rights. So Smith J speaks of the exercise of the power being valid ‘in law’ but its exercise not being just and equitable because contrary to the contemplation of the parties. This way of looking at the matter is a product of English legal history which has survived the amalgamation of the courts of law and equity. But another approach, in a different legal culture, might be simply to take a less literal view of ‘legal’ construction and interpret the articles themselves in accordance with what Page Wood VC called ‘the plain general meaning of the deed’. Or one might, as in Continental systems, achieve the same result by introducing a general requirement of good faith into contractual performance. These are all different ways of doing the same thing. I do not suggest there is any advantage in abandoning the traditional English theory, even though it is derived from arrangements for the administration of justice which were abandoned over a century ago. On the contrary, a new and unfamiliar approach could only cause uncertainty. So I agree with Jonathan Parker J when he said in In re Astec (BSR) Plc [1998] 2 BCLC 556, 588:

‘in order to give rise to an equitable constraint based on “legitimate expectation” what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former.’

This is putting the matter in very traditional language, reflecting in the word ‘conscience’ the ecclesiastical origins of the long-departed Court of Chancery.”

26.
What emerges from this compelling analysis is that the essential basis of the remedy for oppression or unfairly prejudicial conduct, although entirely statutory, is derived from principles of equity, as Wallbank J correctly observed. A provision very similar to section 204, in section 241 of the Canada Business Corporations Act RSC 185, was described by the Supreme Court of Canada as providing an equitable remedy, in BCE Inc v 1976 Debenture holders [2008] SCJ No 37, 301 DLR (4th) 80, para 58.

27.
Building on the Canadian model, section 204 expands upon the English section 459 (now section 994 of the Companies Act 2006) in a number of significant respects. Its text is as follows:

“**RESTRAINING OPPRESSION**

204(1) A complainant may apply to the court for an order under this section.

(2) If, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any shareholder or debenture holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit, including without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending its articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase shares or debentures of a holder thereof;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the moneys paid by him for his securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 142 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 207;

(l) an order liquidating and dissolving the corporation; or

(m) an order requiring the trial of any issue.

(4) If an order made under this section directs the amendment of the articles or by-laws of a corporation,

(a) the directors must forthwith comply with subsection (4) of section 174; and

(b) no other amendment to the articles or by-laws may be made without the consent of the court, until the court otherwise orders.

(5) A shareholder is not entitled under section 191 to dissent if an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under paragraph (f) or (g) of subsection (3) if there are reasonable grounds for believing that

(a) the corporation is unable or would, after that payment, be unable to pay its liabilities as they become due, or

(b) the realisable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

(7) An applicant under this section may apply in the alternative for an order under section 301."

28.
Section 301 of the IBC Act, referred to in section 204(7) provides as follows:

"301(1) The court may order the liquidation and dissolution of a corporation or any of its affiliated corporations upon the application of a shareholder

(a) if the court is satisfied that, in respect of a corporation or any of its affiliates,

(i) any act or omission of the corporation or any of its affiliates,

(ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of any security holder, creditor, director or officer; or

(b) if the court is satisfied that

(i) any unanimous shareholder agreement entitles a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred; or

(ii) it is just and equitable that the corporation be liquidated and dissolved.

(2) Upon an application under this section, the court may make such order under this section or section 204 as it thinks fit.

(3) Sections 205 and 206 apply to an application under this section."

29.
Section 204, like everything else in the IBC Act, is to be purposively construed. Section 371 provides as follows:

"**PURPOSES OF ACT**

371(1) This Act is to receive such fair, large and liberal construction and interpretation as will best ensure the attainment of its purposes.

(2) The purposes of this Act are

(a) to encourage the development of Antigua and Barbuda as a responsible off-shore financial, trade and business centre;

(b) to provide incentives by way of tax exemptions and benefits for off-shore business carried on from within Antigua and Barbuda; and

(c) to enable the citizens of Antigua and Barbuda to share in the ownership, management and rewards of any business activity resulting therefrom."

30.
The word "complainant" in section 204 is defined in section 200 in the following way:

"200. In this Part,

(a) 'action' means an action under this Act;

(b) 'complainant' means, in relation to a corporation,

(i) a security holder, or a former holder of a security of the corporation or any of its affiliates;

(ii) a director or an officer or former director or officer of the corporation or any of its affiliates;

(iii) the Director; or

(iv) any other person who, in the discretion of the court, is a proper person to make an application under this Part."

Finally, "officer" within the meaning of section 200 is defined in section 2(1)(j) in a way which does not include a liquidator. It follows that for a liquidator to be able to bring a complaint under section 204 (if otherwise available) it would be necessary for the court to decide, in the exercise of its discretion, that the liquidator was the proper person to make the application: see section 200(b)(iv).

31.
Section 204 builds out from its English predecessor, section 459, in three main respects. First, it includes oppression and unfair disregard of the interests of the relevant complainant in addition to unfairly prejudicial conduct, as a trigger for the exercise of the jurisdiction. Secondly, it includes among those who may be identified as victims of unfair prejudice or oppression, debenture holders, creditors, directors and officers rather than just members of the company. Thirdly, it sets out a more comprehensive, but still non-exclusive, list of remedies to which the court may have recourse.

The First Issue: Does section 204 apply in relation to a company in insolvent liquidation?

32.
Arguments that section 204 relief should be available in relation to a company in insolvent liquidation include the following:

(a)
There is nothing in the language of section 204 to exclude its application in that context, where the requisite oppressive or unfairly prejudicial conduct is demonstrated.

(b)
Section 204 is most closely aligned with its Canadian equivalent and some authority there supports its application during liquidation.

(c)
Section 204 relief would help fill the gap left by the failure of the legislator to incorporate the statutory part of the Antiguan insolvency scheme into the provisions applicable to an IBC.

(d)
The extension of the remedy to complaining creditors sets it apart from its English predecessor.

(e)
As the representative of the interests of creditors, the liquidator is a proper person to act as complainant, within the meaning of section 200(b)(iv).

Pausing there, Wallbank J was impressed by arguments (b) (d) and (e), although the absence of any submission that section 204 was inapplicable in a liquidation context meant that the issue was not a matter of contention before him.

33.
Arguments against the availability of section 204 relief in relation to a company in insolvent liquidation include the following:

(a)
The general thrust of the non-exhaustive list of remedies provided under section 204 is consistent with their being available as an alternative to, rather than during, a liquidation.

(b)
The relationship between section 204 and section 301, treating section 204 relief as an alternative to liquidation points in the same direction.

(c)
The general thrust of the Canadian jurisprudence about its similar relief for oppression is to the same effect, save only for one case (referred to below) which is distinguishable.

(d)
Section 204 cannot, in any event, be used by a liquidator, who represents all the creditors, as a means of obtaining relief for one group of creditors, at the expense of another group of creditors.

(e)
It would be an abuse of section 204 to use it to obtain relief for what is alleged to be a preference, where the applicable insolvency scheme would not deliver that result.

34.
All those contrary arguments were relied upon by the Court of Appeal in reaching its conclusion that section 204 relief was not available in a liquidation. It may be that points (i) and (j) above inclined the Court of Appeal to an alternative, slightly narrower, conclusion that even if possibly available for some purposes, section 204 could not be invoked by liquidators for the purposes for which the appellants seek to use it in the present case.

35.
It is convenient to address some of the above arguments separately, before expressing an overall conclusion. Starting with the arguments in favour, it is certainly true that there is, literally speaking, nothing in the language of section 204 which in terms renders it inapplicable to a company in insolvent liquidation. But it might be said that, if it had been intended to be widely available for the benefit of creditors in a liquidation, then the liquidator might naturally have been specifically included among the class of potential applicants identified in section 200. Furthermore, if the only constraint upon the use of section 204 within the context of liquidation is that the enabling condition, namely proof of some relevant oppressive or unfairly prejudicial conduct, is satisfied, then it will be very

widely available in liquidation. This is because it is a commonplace that the conduct of a company's affairs which leads to its insolvent liquidation treats one or more groups of its stakeholders, and unsecured creditors in particular, unfairly. Some get paid in full, because they receive payment before the onset of the liquidation process, while others get little or nothing. The conduct of a bank's affairs as a Ponzi scheme is merely an extreme example of that otherwise common type of event.

36.
There is indeed one Canadian authority on its similarly worded oppression jurisdiction which does, in terms, conclude that relief of this statutory kind is available during a liquidation, on the application of the office-holder. It is Olympia and York Developments Ltd (Trustee of) v Olympia & York Realty Corpn [2001] Can LII 28269 (ON SC), a decision of Farley J sitting in the Ontario Superior Court, upon the almost identically worded section 248 of the Ontario Business Corporations Act. But the judge departed, for reasons given, with a decision to the contrary by Houlden JA, also sitting at first instance in Ontario, in Attorney General of Canada v Standard Trust Co 5 OR (3d) 660, [1991] OJ No 1946. It is difficult to treat either decision as affording convincing binding precedent, even in Canada. The Board thinks it better to weigh the opposed reasoning in the two cases for their intrinsic merit.

37.
In the Standard Trust case, Houlden JA gave two reasons for his negative conclusion. The first was that:

"A trustee in bankruptcy takes the property of a bankrupt as he finds it. Subject to statutory provisions, such as those dealing with fraudulent preferences and settlements, he only succeeds to the rights of the bankrupt and has no higher or greater rights."

His second reason was that:

"If the trustee in bankruptcy were permitted to bring the application under section 247, it would be attacking as oppressive a transaction which was unanimously approved by the board of directors of the bankrupt corporation … if Trustco were not insolvent, could it have attacked the transaction as oppressive? Clearly, in my opinion, it could not. The remedy given by section 247 of the Business Corporations Act, 1982 is a personal remedy; it belongs to the person who has been oppressed by the actions of the corporation or its affiliate: … The trustee in bankruptcy, as I have said, has no higher rights than the bankrupt corporation, and consequently, it cannot bring the application under section 247."

38.
In the Olympia and York case, Farley J's reasoning may be taken from para 30 of his judgment as follows:

"It seems to me that while the bankrupt's trustee takes the property of the bankrupt as he finds it and that the trustee stands in the shoes of the bankrupt, the trustee has, as his primary obligation, the protection of the creditors of the estate of the bankrupt … Since it would seem that a creditor could bring such an oppression action, then it would seem to me that the Margaritis characterization of the trustee in bankruptcy as the creditors' representative should be recognized as allowing the trustee in bankruptcy to bring a 'representative' oppression action on behalf of the creditors in a proper case. Certainly the bankruptcy legislation generally encourages such a collective action on the part of the trustee as being the effective and efficient way of proceeding."

39.

In the Board's view the first of Houlden JA's reasons for declining to permit the office-holder to bring oppression proceedings is persuasive, and was not squarely addressed by Farley J in the Olympia and York case. The thrust of the point is that a liquidator takes the company's property and rights as he finds them, on the cut-off date when liquidation commences, and can only take steps to augment the company's property to the extent that the relevant insolvency scheme permits him to do so, for example by seeking to avoid prior transactions on the grounds of fraudulent preference or undervalue.

40.
The submission that relief under section 204 in relation to an IBC in liquidation fills an unsatisfactory gap in the liquidator's armoury under the applicable insolvency scheme is tempting but, in the Board's judgment, misconceived. The applicable insolvency scheme may be good, bad or indifferent, but the liquidator takes it as he finds it, and his statutory duty is to apply it, both for the purpose of getting in the company's assets, and for the purpose of deciding how they should be allocated among those, including creditors, with a claim in the liquidation. It is simply not the liquidator's job to seek to achieve some other outcome which he may perceive to be more equitable than that which is prescribed by the applicable insolvency scheme, still less to act as the standard bearer for creditors who have been the victims of oppression, in seeking to obtain for their benefit property, and in particular property clawed back from other creditors, which could never have been the company's property, save where the applicable insolvency code otherwise provides, as it may do in relation to preferences.

41.
It is of course the case that the extension in Canada and then in Antigua of the remedy for oppression to creditors, rather than merely to shareholders, is an important broadening of the jurisdiction beyond the scope of its English predecessor. Again, it is tempting to think that this was done specifically for the benefit of creditors in a liquidation context, but the Board considers that this is not a necessary conclusion to be drawn from their inclusion within the range of stakeholders entitled to complain. Creditors or groups of creditors may commonly find themselves the subject of allegedly oppressive conduct by those responsible for the conduct of the affairs of a company which is by no means in, or even approaching, liquidation. Companies may seek to improve their financial standing by, for example, cramming down the rights of classes of bond holders: see eg Assenagon Asset Management SA v Irish Bank Resolution Corpn Ltd [2012] EWHC 2090 (Ch), where a statutory remedy for oppression may be a useful adjunct to, or replacement of, equitable relief. Accordingly, while the extension of relief for oppression to creditors undoubtedly raises the possibility of its availability in the context of a liquidation, it does not, of itself, demonstrate that an extension of that jurisdiction into the insolvency context was positively intended.

42.
The question whether section 204 relief could ever be available in the context of a liquidation is not quite the same as the question whether the liquidator could ever be a proper party to bring the claim. If the only basis upon which he could is that he is the representative or standard bearer for the creditors as a class, then it is worth asking whether the individual creditors or groups of creditors could be permitted to bring a claim once the company was in insolvent liquidation. It is conceivable in theory that the liquidators could be accused, while in control of the affairs of the company in liquidation, of acting oppressively or unfairly prejudicially as against one or a group of creditors. But it is unnecessary for creditors with such a grievance to have to pursue it under section 204. If a liquidator has acted contrary to his duties as such (and oppressive conduct would prima facie at least

be an example of such a breach of duty) then the creditor has the simple remedy of issuing a summons in the liquidation, seeking appropriate directions from the court as to the future conduct of the liquidators.

43.
That aside, it seems inherently improbable that the court could properly entertain a claim for section 204 relief by a group of aggrieved creditors based upon the conduct of the company's affairs prior to its liquidation, brought with a view to adjust their rights as against those of other creditors or stakeholders in the liquidation. The onset of liquidation operates as a watershed, prior to which such individual rights and grievances may be pursued but, following which, all stakeholders with equal priority in a liquidation, such as the entirety of the unsecured creditors, are to be treated equally, by the application of the pari passu principle. A fundamental purpose of the liquidation process is to bring to an end contests between stakeholders designed to improve the position of one or more as against the others, such as the traditional rush to judgment.

44.
That leaves only the possibility of the oppression claim which is made by all the creditors, as a class, for which it might be said that the liquidator could be an appropriate representative. It would have to be a claim solely against persons who were not in any way stakeholders in the liquidation, ie a claim against "pure" third parties. But then, again, the principle that the liquidator takes the company's property as he finds it, subject to statutory exceptions, would appear to preclude the use of an oppression remedy for the purpose of doing better against such third parties than can be achieved by the application of the applicable insolvency scheme with its strictly confined provisions for the setting aside of prior transactions.

45.
All the claims which the liquidators seek permission to pursue appear to the Board to fall foul of that difficulty. The claw-back claims seek to obtain accretions to the liquidation fund mainly on the basis of alleged preferences which the liquidators expressly acknowledge would not succeed under the common law preference jurisdiction applicable to the liquidation of an IBC. The claims to re-adjust entitlements among proving depositors are, on their face, an attempt to alter the pari passu distribution of the company's property among those entitled to prove in the liquidation, contrary to the applicable insolvency scheme.

46.
Turning to the arguments against recognising a role for section 204 relief in the context of a liquidation, the Court of Appeal was persuaded, simply as a matter of construction of section 204 and of its relationship with section 301, that relief under section 204, otherwise than in the form of an order for the winding up of the company, was an alternative to winding up rather than something which could be pursued in the context of a winding up. The Board regards that analysis as persuasive but not, on its own, conclusive. It is true that very few of the different forms of relief listed in sub-paras (a) to (m) of section 204(3) would be capable of being deployed in the context of a liquidation. But section 204(3)(h) gives the court a general power to vary or set aside a transaction or contract to which the corporation is a party and to compensate the corporation or any other party to the transaction or contract. That is not inherently unusable during a liquidation, and bears some resemblance to the court's powers to re-open preferences, even at common law. Similarly, there is nothing inherently incompatible with liquidation in an order under section 204(3)(j) compensating an aggrieved person, save in the sense that compensation for a member of a class of persons entitled to

prove in a liquidation would be a departure from the pari passu principle, and its ordinary application under the insolvency scheme.

47.
The main reason why this analysis is not conclusive is that the list of orders in section 204(3) is not exclusive. The court has jurisdiction to make any interim or final order it thinks fit.

48.
Both the appellants and the respondent sought to draw comfort from the relationship between sections 204 and 301. In the Board's view the respondent's reliance upon it is the more persuasive, since it tends to show that, notwithstanding its expansion to include complaints of oppression against creditors, the type of relief headed "Restraining Oppression" under section 204 has retained its essential characteristic as an alternative to liquidation that was plainly true about its predecessors, in particular the English antecedent reflected in sections 459, and 994. But again, this pointer is not, of itself, conclusive.

49.
An attempt was made to counter the Court of Appeal's view that the balance of Canadian authority was against recognising the applicability of relief for oppression in a liquidation context, by a submission that even English authority was disposed to accept that some use of an oppression remedy in a liquidation might be appropriate.

50.
The appellant liquidators relied upon Maidment v Attwood [2012] EWCA Civ 998, a decision of the English Court of Appeal. It concerned a petition under section 994 of the Companies Act 2006 by a shareholder in relation to the affairs of a company, Tobian Properties Ltd ("Tobian") which was in creditors voluntary liquidation by the time that the petition was presented. The judge had decided that the three elements of conduct relied upon by the petitioner were not unfairly prejudicial in the relevant sense, but the Court of Appeal took a different view. Giving the leading judgment Arden LJ (as she then was) recognised that the fact that the petitioner was a shareholder in a company in insolvent liquidation presented a difficulty, unless there was a real prospect that the company might end up solvent as the result of an order that the allegedly delinquent director should compensate the company for his misconduct (which included taking excessive remuneration), so that the petitioner's shares would then have some value. In addition, (at para 11) Arden LJ noted that prejudice to a petitioner in his capacity as a member might not be limited strictly to a fall in the value of his shares, relying for that purpose upon Gamlestaden Fastigheter AB v Baltic Partners Ltd [2007] 4 All ER 164, a decision of the Board. At para 44 she continued:

"We have seen that the content of fairness is contextual. It is also flexible and open-textured. It is capable of application to a large number of different situations. The courts are also given wide powers to fashion relief to meet the circumstances of a particular case. Parliament clearly intended the courts to adopt a flexible approach to proceedings under section 994, and to be flexible in the exercise of their powers in relation to these proceedings. This is confirmed by the approach that the Privy Council took in Gamlestaden."

51.
It is fair comment that this English decision appears at least to recognise the possibility that relief for oppression or unfairly prejudicial conduct may be pursued in relation to the affairs of a company in insolvent liquidation, even in a jurisdiction which does not provide protection to creditors.

52.
It is not clear however whether the issue now before the Board was squarely addressed in that case or whether submissions made about it were of the kind which persuaded the Court of Appeal in this case to the opposite view, or the further submissions which had been made to the Board. In any event, the predicate for the English Court of Appeal's conclusion that an oppression remedy might be appropriate was that a remedy for the matters complained of might leave the company solvent, after payment in full of all creditors' claims. That is of course not even a remote possibility in the present case. Even if the relief which the liquidators seek permission to pursue by way of claw-back and re-adjustment were to be wholly successful, that would simply swell the class of creditors entitled to prove in the liquidation. By way of a simple example, if a fully paid creditor is required to disgorge his payment, he becomes an unpaid creditor entitled to prove in the liquidation.

53.
The liquidators also relied upon the judgment of the Board in Galantis v Alexiou [2019] UKPC 15. In that case a complaint of oppressive conduct was made against a company's directors, but the company was dissolved before it came to be heard. The relevant jurisdiction, in section 280 of the Bahamian Companies Act 1992, was also modelled closely on the Canadian remedy. There are pointers both ways about the applicability of that remedy after a company has been dissolved, but they are of little assistance here, because no insolvency process relating to the company preceded, or was triggered by, the dissolution.

Conclusion on Issue One

54.
The Board is persuaded, by a majority, that the Court of Appeal was right to conclude that relief under section 204 is not available in relation to the affairs of an Antiguan IBC in insolvent liquidation. The Board's reasons follow. Entry into insolvent liquidation is a watershed event for an IBC, as it is for any other company. Prior to that date (the cut-off date) the company's affairs are entrusted to its directors, officers and, to some extent, shareholders in general meeting, subject to the terms of its constitution, and its rights and liabilities as against third parties are governed by the general law. Those responsible for the control of the company's affairs are expected to act fairly vis a vis a company's stakeholders, that is, not oppressively or unfairly prejudicially, or in a way which unfairly disregards their interests. Section 204 provides to a wide body of the company's stakeholders a remedy for breach of those obligations by those in control of the company's affairs, and affords to the court a broad discretionary jurisdiction to do what is just and equitable in order to rectify the matters complained of.

55.
In sharp contrast, following entry into insolvent liquidation, the affairs and property are taken out of the hands of the company's directors, officers and shareholders and entrusted to a court-appointed office-holder, the liquidator, whose duties are laid down by statute and whose conduct may be regulated and directed by the court as part of the liquidation process. The getting in of the company's property and its distribution to stakeholders are governed by an insolvency scheme (in Antigua partly statutory and partly judge-made) which defines the priorities as between different classes of stakeholders and requires that, within each class, stakeholders' claims are to be met by a pari passu distribution from the available resources. Those resources are limited to those assets, rights and claims which the company enjoyed as at the cut-off date, subject to augmentation by the use by the liquidators of specific powers to re-open prior transactions. The company's claims as at the cut-off date of course include claims against the company's fiduciary directors and managers to recover

assets misappropriated, or to seek redress for breach of fiduciary duty committed by their wrongful disposal.

56.
There is nothing in section 204, construed as part of the IBC Act, which compels a conclusion that it provides relief in the context of insolvent liquidation. The breadth of the discretionary power given to the court and the broad range of stakeholders for whose benefit those powers may be exercised is perfectly consistent with an intention that they are designed and intended to be used entirely in the pre-liquidation context. Although it is difficult to discern a clear statutory prohibition of the use of those powers in an insolvency context, it is, in the Board's view, fundamentally inappropriate that they should be so used.

57.
This is mainly because relief from oppression or unfairly prejudicial conduct is conferred on essentially broad discretionary and equitable principles which simply cannot be made to fit within the implementation of the applicable insolvency scheme. The two frameworks (relief from oppression and the insolvency scheme) as described earlier in this judgment are simply incompatible with each other. They serve different objectives. One of them (the insolvency scheme) serves a recognised public interest whereas the other does not or, if it does at all, only to a much lesser extent, being concerned more with justice and equity as between stakeholders in the company's affairs. The two frameworks are like chalk and cheese.

58.
If the jurisdiction to relieve from oppression is, as a literal reading of section 204 suggests, engaged wherever the requisite oppressive or unfairly prejudicial conduct can be demonstrated, then the scope for its deployment in the context of insolvent liquidation is wide indeed, because so many corporate liquidations will have come about following, or because of, misconduct of that kind. If any stakeholder can seek to intervene in an insolvent liquidation by seeking a bespoke remedy for some prior act of oppression or unfairly prejudicial conduct against him, by showing no more than that the relevant misconduct has occurred, then the scope for rearranging, altering or even subverting the ordinary application of the insolvency scheme for the purposes of achieving the desired pari passu distribution of the remaining assets among all stakeholders will be virtually limitless.

59.
While it may be said that the court would be astute not to allow the section 204 jurisdiction to be abused in the context of a liquidation, neither the section itself nor the equitable principles upon which the court's intervention is based offer any sound basis for enabling the court to decide what types of intervention in or rearrangement of the applicable insolvency scheme are or are not to be regarded as appropriate. The animating principles behind the two frameworks are very different and there is no jurisprudence of which the Board is aware which would assist the court in deciding, in any particular case, which should prevail.

60.
The better view is that once a company has crossed the threshold into insolvent liquidation, the framework for granting relief from oppression is wholly displaced. This is not a conclusion based simply upon the construction of section 204, and its relationship with section 301. Nor does the provision for purposive construction in section 371 offer any real help, not least because it is far from clear that treating section 204 relief as available in the context of a liquidation would encourage the development of Antigua and Barbuda as a responsible off-shore financial, trade and business centre. It

is better to say that the deployment of section 204 relief in the context of an insolvent liquidation is simply inappropriate, even if technically it is not prohibited as a matter of jurisdiction. There are plenty of statutory provisions in the common law world which confer an apparently limitless jurisdiction to grant certain forms of relief, but where it is well established that there are circumstances where it could never appropriately be granted. For example, section 37(1) of the English Senior Courts Act provides that an injunction may be granted wherever the court thinks it just and convenient to do so. But it is established beyond question that an injunction will not be appropriate, where damages provide a sufficient remedy.

61.
Even if there may be cases, of a type which the Board cannot at present envisage, where section 204 relief may have some appropriate role to play in the context of an insolvent liquidation, the present case is plainly not one of them. It is no exaggeration to say that the whole purpose of the liquidators in seeking permission to pursue claims under section 204 is precisely to transform their powers to set aside prior transactions, contrary to the applicable insolvency scheme, and to rearrange the distribution of assets as between competing stakeholders having the same priority otherwise than on a pari passu basis. In short, the liquidators seek a bespoke regime for the conduct of the liquidation of SIB, contrary to that which the law otherwise provides, by the invocation of an equitable discretionary power which, they claim, enables the judge to achieve whatever form of outcome he or she considers equitable in the circumstances. This would represent an invasion by equity into the business and banking sphere which is both unprincipled and unconstrained by any clear or proper limits, against which the court should set its face.

Issue Two: Claw-Back Claims

62.
Even if there had not been a majority of the Board of the view that section 204 relief was unavailable in relation to an IBC in insolvent liquidation, the Board is unanimously of the view that the judge was right to refuse permission to the liquidators to pursue either of the two types of claw-back claim. These were claims to recover (a) without limit of time, any payments to depositors in excess of their invested capital and (b) all payments to depositors from September 2008 until SIB ceased trading in early 2009.

63.
The judge’s reasoning was that relief from oppression should not be granted if it would constitute an instrument of oppression against those required to make repayment, and that such a requirement would contravene the reasonable expectation of those receiving payment from a regulated bank like SIB that they could keep the money, where there was no basis within the applicable insolvency scheme upon which they could be treated as having been preferred.

64.
The Court of Appeal did not address this issue at all, having concluded that section 204 relief was not available. The liquidators sought before the Board to have the judge’s determination of this issue reversed on the following grounds.

65.
First, the liquidators submitted that the depositors who received payments from SIB in excess of their capital had no contractual entitlement to the excess, because it did not represent profits earned by SIB by the re-investment of their money. Rather it represented payments made by later depositors under the Ponzi scheme. As to the payments made in and after September 2008, the liquidators

submitted, again, that the depositors had no contractual right to receive those payments, because their entitlement was limited to payments which SIB could afford to make. In the result, it was submitted that the liquidators could recover both types of payments by a restitutionary claim based on unjust enrichment.

66.
In the Board's view, this analysis is completely misconceived. Depositors had a contractual entitlement to receive capital and interest by virtue of the simple terms of the Certificates of Deposit used by SIB, either upon redemption or by way of early redemption subject to a discount. There is no suggestion in the liquidators' evidence that depositors against whom it is proposed to advance claw-back claims were paid in excess of those entitlements as stated in the Certificates of Deposit. But Mr Justin Fenwick QC for the liquidators submitted that the Certificates of Deposit conferred express entitlements subject to the bank's general terms and conditions, and that those conditions included warnings to investors about the risk that, upon maturity, the bank might be unable to pay capital or interest to depositors.

67.
In the Board's view those risk warnings did not form part of the bank's general terms and conditions so as to detract in any way from the clear contractual entitlement to payment of principal and interest stated on the face of the Certificates of Deposit. The result is that the depositors received no more and no less than their contractual entitlement. There can be no claim to recover money paid pursuant to a contractual entitlement on the basis of unjust enrichment: see the Fairfield Sentry case (supra) at para 18 and Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349 at 408B per Lord Hope.

68.
In relation to the payments from September 2008 onwards to the preference creditors, the liquidators submit in the alternative that the court should treat the recipients as having been wrongly preferred, applying section 458 of the Antiguan Companies Act and section 44 of the Bankruptcy Act, quoted above, on the basis that it would afford a better discretionary form of relief for the unfair prejudice caused to the general body of creditors by the Ponzi scheme than the limited relief available under the common law in relation to preferences.

69.
The Board's unanimous view is that, even if in principle the court had jurisdiction to do so, it would not be a proper exercise of discretion to grant relief from oppression, both for the reasons given by Wallbank J and for this additional reason. Relief from oppression under section 204 is, as the judge acknowledged, essentially equitable in origin. Depositors who were paid by SIB prior to its ceasing to trade received the money as bona fide purchasers for value without notice. They were bona fide because no suggestion was made that they were aware either of the bank's insolvency or of the underlying Ponzi scheme. They were purchasers for value because they were paid pursuant to a contractual entitlement: see Snell's Equity (33rd ed) para 4-022; Thorndike v Hunt (1859) 3 De G & J 563 and Taylor v Blacklock (1886) 32 Ch D 560 at 568, 570. They were purchasers without notice because it is not suggested that any of them knew or ought to have known the facts giving rise to a claim based on section 204.

70.
Equity has a special fondness for bona fide purchasers for value without notice. That is why they are called equity's darlings. There is a stark difference between a claim based upon equitable principles, which will not in general lie against equity's darling, and a claim to avoid a transaction as a wrongful

preference. A preference claim will lie, and is very commonly brought, against equity's darlings, because the targets are usually creditors of the company, and it is no part of a claim in wrongful preference that the recipient creditor is party to or even aware of the requisite intention to prefer.

71.
In the present case, the liquidators are seeking by reference to an equitable jurisdiction to replace one (common law) scheme for recovering preferential payments which does not serve their purposes with another one, not applicable by statute to this liquidation, which they think does, and to do so by the invocation of a form of essentially equitable relief, against persons all of whom are equity's darlings. It is impossible to think, in those circumstances, that such a claim is anything other than unprincipled.

The Re-Adjustment Claims

72.
This proposed claim is to re-adjust the distributions which would otherwise be made to proving creditors in the liquidation by requiring partly paid creditors to have the part payments of their debt prior to the cut-off date brought into account, not merely to ascertain the amount of their debt, but to reduce the amount of any distribution to them. It looks at first sight less invasive of depositors' reasonable expectations, less oppressive and less inequitable than claw-back claims. This is how it must have appeared to Wallbank J because he permitted them to be brought.

73.
The purpose of the proposed re-adjustment is to bring about an element of convergence between the misfortune suffered by partly paid depositors, and those who have received no payment at all prior to the cut-off date. Nonetheless the Board is not persuaded that this proposed claim proceeds from any more principled application of equitable relief under section 204 than the claw-back claims, even though its immediate effect is less draconian, because it requires no depositor to disgorge money actually received. What it does do is to require a partly paid depositor to bring his part payment into account against the amount which, as a creditor for the balance of his debt, he would otherwise receive from distributions made in the course of the liquidation. It therefore achieves, by a process of accounting, a similar effect to that achieved by a claw-back. In particular, it requires him to give a form of credit for that which he has received as equity's darling, against that which the insolvency scheme applicable to SIB would otherwise generate for him in the liquidation.

74.
Furthermore, this proposed re-adjustment would operate in a strangely counter-intuitive way as between depositors who have been partly paid, and those who have been paid in full, before the cut-off date. Those receiving payment in full escape scot-free. Those only receiving part payment are required to bring the whole of their amount received into account. For those reasons the Board considers that they should not have been authorised.

Common Misfortune

75.
At the prompting of the Board, recourse was made by the liquidators during oral submissions to a principle which has developed in cases about the distribution of trust funds to beneficiaries, which may be labelled the common misfortune principle. It has been used to regulate the distribution to contributors to a common fund which has incurred a shortfall to ameliorate what would otherwise be the injustice of a "first in-first out" methodology generally known as the rule in Clayton's case, in

favour of a rateable distribution of the funds to all those contributing to it. Its origin may be said to derive from the following scathing condemnation of the rule in Clayton's case by Judge Learned Hand in In re Walter J Schmidt & Co, Ex p Feuerbach (1923) 298 F 314, 316:

"When the law adopts a fiction, it is, or at least it should be, for some purpose of justice. To adopt [the fiction of first in, first out] is to apportion a common misfortune through a test which has no relation whatever to the justice of the case."

76.
The common misfortune principle was applied to the distribution of a common investment fund in Barlow Clowes International Ltd (in liquidation) v Vaughan [1992] 4 All ER 22, by the English Court of Appeal. Money paid into the common fund had been misappropriated by the trustee in unauthorised investments, including the purchase of a yacht. At p 46 Leggatt LJ said:

"The court goes by what must be presumed to have been the intention of the investors. If I am right, they contributed to what they thought was a collective investment fund. It matters not, once the contributions had become mixed whether the depredations were committed on a small or large scale, systematically or sporadically, according to a plan or on the spur of the moment: what matters is that the combined fund was depleted. Misconduct by Barlow Clowes is relevant as explaining why the fund was depleted. But it would make no difference if Barlow Clowes was conducting its business in a lawful manner which gave effect to the general intention of its investors. The investors did not expect that their money would be kept in a bank account or used for the purchase of a yacht, or of anything other than gilts. Whatever the reason why losses were suffered by the fund, it accords with what presumably would have been the intention of the contributors that they should share rateably in what remains of it."

77.
In the present case the liquidators say that this principle ought to inform the exercise of discretion by the judge under section 204 in prescribing a scheme for distribution of recoveries made by the liquidators among depositors in a way which, as nearly as possible, inflicts equal loss among them from the common misfortune of having invested in a Ponzi scheme.

78.
The Board considers that, even if section 204 relief were otherwise available, it would not be in accordance with principle to transplant the concept of common misfortune from its place of origin into the insolvent liquidation of a bank. The deep dividing line which separates the two types of case is that depositors in a bank have a creditor debtor relationship with the bank where nothing is held by the bank on trust in a common fund or otherwise, whereas the common misfortune principle has emerged and, thus far, only been applied where there is indeed a common fund held on trust in which all contributors have a beneficial interest, but where a shortfall requires them to receive less than what would otherwise have been their expected entitlement. The creditor debtor relationship which depositors have with a bank is, of course, to be resolved in accordance with the insolvency scheme if the bank goes into liquidation, and that produces a form of rough justice in which outstanding claims of equivalent priority are all dealt with pari passu. It would be a recipe for uncertainty in the law if that form of rough justice were liable to be supplanted by another form of, perhaps, less imperfect justice, wherever the liquidation in question can be said to have been a consequence of some form of unfair prejudice or oppression capable of being viewed as a common misfortune.

79.
For those reasons, the Board will humbly advise Her Majesty that this appeal ought to be dismissed.

LADY ARDEN: (with whom Lord Carnwath agrees)

80.
This judgment is concerned principally with the question whether a liquidator may bring proceedings for unfair prejudice under the laws of Antigua and Barbuda. As part of that question I need to start by explaining how I see the context to these proceedings.

Achieving equal distribution in insolvency among investors past and present

81.
Stanford International Bank Ltd (in liquidation) ("SIB") operated a collective, or pooled, investment scheme (a "CIS"), under which investors bought certificates of deposit. The scheme was also a Ponzi scheme. SIB used a company formed in Antigua and Barbuda under its International Business Corporations Act ("IBC Act") to operate its scheme, and that company entered insolvent compulsory liquidation in Antigua and Barbuda in 2009. The appellant liquidators are its liquidators.

82.
A number of Ponzi schemes have come to light in different jurisdictions since the global financial crisis in 2008. Such schemes usually involve investors and assets located in many different jurisdictions. Faced with a massive insolvency, as in this case, some courts have sought to make, and in some cases have gone on to make, orders to facilitate an equal distribution between private investors, past and present. For example, in the United States courts have made orders that the claims of private investors are admitted to prove in the liquidation, not for the amount that the scheme declared to be the amount of their investment but according to the amount of their cash investment less amounts repaid ("the net investment method") (see, for example, In re Bernard L Madoff Inc Sec , (2011) 654 F 3d 229). Other methods to achieve equal distribution have also been used. In the United States, at least, this appears to have been achieved under special legislation, the Securities Investor Protection Act ("SIPA"), which requires a trustee to distribute the property of "customers" and otherwise satisfy the net equity claims of investors in a process that operates in combination with a liquidation process but to the exclusion of certain dealers in securities who are creditors in the liquidation.

83.
The high level of protection given to private investors in the United States may not be uncontroversial, but it is easy to see that there may be thought to be merit in treating investors, past and present, in a Ponzi scheme consistently. The difficulty, however, is that, unlike the position in the US, there is as I understand it no special legislation in Antigua and Barbuda applying to this liquidation and the liquidators of SIB have therefore sought to find a way within existing legislation applying to IBC liquidations generally. The liquidators are of the view that it is mere happenstance whether an investor made a request for repayment of his investment before the date of the winding up which resulted in his becoming a winner.

84.
This appeal concerns whether SIB's liquidators can under the law of Antigua and Barbuda achieve an equal distribution as between those persons whose investment has not been repaid (known in these proceedings as "the losers") and those more fortunate persons (known as "winners") whose investment was repaid before the liquidation and is not repayable, and also received profits or at least were so repaid in part so that they remain creditors of SIB for their outstanding investments.

85.

It is of course a cardinal feature of a liquidation in Antigua and Barbuda as in the UK that creditors of the same rank should be treated on the same footing. This is the pari passu principle. Under this principle, dealers and private investors are (unless the law otherwise provides) treated in the same way and without distinction. The principle is not universal because it is subject to major exceptions (for example, set-off). It is different from a principle of equal distribution because not all creditors of the same description, for example private investors, are treated in the same way. On the face of it, investors who have been repaid are entitled to retain their repayments unless the transaction can be impeached under one of the reach-back provisions such as fraudulent preference whereas losers can only prove in the liquidation and may recover only a small dividend on their investment.

86.
In this case, the liquidators seek to bring a claim in respect of a liability which has been repaid before the date of the liquidation, and such a claim has been referred to in these proceedings as a "claw-back" claim. Under the law of England and Wales, at least, a claw-back claim cuts across another cardinal principle of liquidation, namely the principle that the line is drawn at the date of the liquidation. It is discussed in In re Lines Bros Ltd (in liquidation) [1983] Ch 1, M S Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) [1993] Ch 425, 432-3 where Hoffmann LJ referred to it as "the retroactivity principle" and Pearson v Primeo Fund [2017] UKPC 19, paras 20-22.

87.
There are some exceptions to the "retroactivity principle" (to use Hoffmann LJ's term) and these apply principally where the law allows the liquidator to make a claim for fraudulent preference or a fraudulent conveyance, but in each case, there is a special law for this purpose. Unless an exception to the principle applies (which is assumed not to be the case for the purposes of this appeal), only the assets as at the date of the liquidation, including intangible assets such as claims, form part of the estate in liquidation. Those, therefore, are the assets, and the only assets, which the liquidators have a statutory duty to collect in.

88.
The liquidators can only achieve their particular objective of equal distribution if the applicable law of Antigua and Barbuda, namely the IBC Act, can be used to achieve it. The liquidators have therefore looked to section 204 of the IBC Act, which is concerned with acts which are "oppressive" and "unfairly prejudicial".

Do the liquidators have standing to bring proceedings under section 204 to achieve equal distribution among investors?

89.
I would answer this question: yes. In material part, section 204 provides:

"RESTRAINING OPPRESSION

204(1) A complainant may apply to the court for an order under this section.

(2) If, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any shareholder or debenture holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of."

90.
Section 204(3) provides an unlimited number of orders which the court can make to restrain oppression or unfair prejudice, once found:

"(3) In connection with an application under this section, the court may make any interim or final order it thinks fit, including without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending its articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase shares or debentures of a holder thereof; …

(k) an order directing rectification of the registers or other records of a corporation under section 207; …"

91.
Because section 204(3) confers very wide powers to grant relief, a complainant may very well choose to use section 204 even if he has a perfectly good alternative cause of action at law. It is a well-established principle of law that, if a person has more than one cause of action, he is entitled to choose which one to pursue.

92.
The required feature of the act or omission under section 204 is that it is

"oppressive or unfairly prejudicial to or that unfairly disregards the interests of any shareholder or debenture holder, creditor, director or officer of the corporation"

93.
The UK was probably the first jurisdiction to adopt a remedy for oppression and unfair prejudice in its companies legislation. It was enacted in the UK in response to the recommendations of the Report of the Committee on Company Law Amendment (the Cohen Committee) (1945, Cmd 6659), para 60, under the chairmanship of the Rt Hon Lord Cohen, and amended in response to the recommendations made in the Report of the Company Law Committee (the Jenkins Committee) (1962, Cmd 1749) paras 199-212 under the chairmanship of the Rt Hon Lord Jenkins. In the UK, the remedy was initially for

conduct amounting to oppression, but this was replaced by the concept of unfair prejudice by section 75 of the Companies Act 1980.

94.
The oppression/unfair prejudice remedy has been expanded beyond its initial UK concept in other jurisdictions, including that of Antigua and Barbuda. Unlike the UK, where the remedy has only ever applied to members, section 204 of the IBC Act extends beyond members. This can be seen from the definition of the term “complainant” in section 200 of the IBC Act, which is as follows:

“200. In this Part,

...

(b) ‘complainant’ means, in relation to a corporation,

(i) a security holder, or a former holder of a security of the corporation or any of its affiliates;

(ii) a director or an officer or former director or officer of the corporation or any of its affiliates;

(iii) the Director; or

(iv) any other person who, in the discretion of the court, is a proper person to make an application under this Part.”

95.
For completeness, under section 2(1)(m), a “security” is defined as:

“a share of any class or series of shares of a corporation or a debt obligation of a corporation and includes a certificate evidencing any such share or debt obligation;”

96.
So, in Antigua and Barbuda the remedy for oppression and unfair prejudice extends to a creditor, secured or unsecured. However, notably, no duty has been cast on directors to have fair regard to any set of creditors or class of creditors. Likewise, no such duty has been placed on liquidators. That is a clear indication that it is not the primary purpose of section 204 to create new duties, merely to provide a remedy to redress existing wrongs at law.

97.
In my judgment, section 204 was designed in part to provide a statutory basis for the wrong known as fraud on the minority. As is well known, it is a principle of company law that a majority must vote in the interests of the entire class and that if they procure a transaction at the expense of the minority the minority may contend that their actions constituted a fraud on the minority (see generally, Greenhalgh v Arderne Cinemas [1951] Ch 486 and In re Holders Investment Trust Ltd [1971] 1 WLR 583). The same principle applies to meetings of classes of creditors, such as creditors holding debentures of a particular issue (Allen v Gold Reefs of West Africa, Ltd [1900] 1 Ch 656, 671) . This would account for the fact that the persons who are complainants under section 200(b)(i) as of right are security holders. Such persons are likely to be holders of a security, such as a loan note, of a series or class.

98.
That leads to the next point, which is this: that in origin section 204 was in part not intended to create a new remedy but to provide a statutory basis for the enforcement of an existing right. Of course, the section may have been extended beyond the purpose for which it was originally intended but it

remains the case that it is available for a wrong for which some other remedy exists. On the basis that it was designed originally as I have indicated, section 204 provides a remedy in respect of matters actionable by some other proceeding: there is an overlap between section 204 and the general law.

99.
If that is so, then, in my judgment, there is no reason why a liquidator should not be able to seek approval to his acting as a complainant within section 200(b)(iv) in order, for example, to obtain a remedy for the benefit of unsecured creditors.

100.
Independently of that point, at a purely textual level, there is nothing in the wording of section 204 which disqualifies a liquidator from being a complainant. A complainant does not have to be, or represent, a member of the company. Moreover, there is nothing in section 204 to limit the award of relief to members of SIB. Section 204 does not require the company to be solvent where the claim is brought on behalf of a creditor.

101.
Of course, in the normal way of things, unsecured creditors take the risk that a company may be mismanaged and become insolvent. But that does not mean that they will never be able to contend through the liquidator that the actions of the directors have unfairly prejudiced unsecured creditors. Take the case where the directors of a company authorise the payment of a dividend without making proper provision for its actual and foreseeable liabilities and so in breach of duty (see Peter Buchanon v McVey [1955] AC 516), and the company enters liquidation as a result. In that situation, unsecured creditors are prejudiced. The liquidator may be able to bring a misfeasance claim, but there would seem to be no reason why he should not also, if his status as a complainant is approved by the court, bring proceedings under section 204.

102.
In the shortly-reported Canadian case of Prime Computer of Canada Ltd v Jeffrey 6 OR (3d) 733, an unpaid judgment creditor brought a claim under the Canadian equivalent to section 204 against director/shareholders who had paid themselves excessive remuneration and the court made an order for the payment of compensation directly to the creditor who had been unfairly prejudiced. The company was insolvent in that case but not in a formal insolvency proceeding. It is difficult to see why if there had been a liquidator a liquidator could not have brought a claim for unfair prejudice on behalf of the unfairly prejudiced unsecured creditors.

103.
I accept that when the courts of Antigua and Barbuda come to interpret section 200(b)(iv) they may interpret that provision as one which requires the court to be satisfied at some level as to the liquidator’s prospects of success. But we do not have to decide that point on these appeals. It is enough to say that it appears that the liquidator can proceed under section 200(b)(iv) and leave open that further point.

104.
So, in my judgment the liquidators in this case have standing to bring proceedings under section 200(b)(iv).

Can the claw-back claims be brought under section 204 in this case?

105.

I have already made the point that the Companies Law of Antigua and Barbuda has not imposed any duty on the company or any officer of the company to have fair regard for the interests of unsecured creditors. The imposition of such a duty would be a radical departure from the normal contract-based approach to the position of unsecured creditors.

106.
The expectation of the unsecured creditors of a company is contract-based: their expectation is that the company will perform their contract with it, no less and no more. The position of members is, as Lord Briggs has explained, altogether different because members frequently owe equitable obligations to each other, and thus the notion of unfair prejudice can be applied to disputes between members without any difficulty.

107.
There is no indication in the IBC Act that section 204 was intended to alter the normal basis of the relationship between a company and unsecured creditors. The IBC Act imposes a statutory scheme under Part IV of the IBC Act for the distribution of the assets of a company in its winding up. The statutory scheme ring-fences the assets and liabilities of the company in liquidation. The liquidator must collect in those assets (section 307) and subject to the payment of the expenses of the winding up and priority debts, he must pay the debts and the liabilities of the company pari passu (see section 289(3)). If the company is insolvent, he needs the court's directions: section 307(g).

108.
As explained in paras 22 and 23 above, a meaning can be found for section 204 which does not involve any incompatibility with the mandatory statutory scheme under Part IV of the IBC Act for the distribution of the assets of a company on its winding up.

109.
That mandatory scheme means, in my judgment, that section 204 cannot be used by the liquidators on behalf of the creditors as the springboard for claw-back claims against the winners in favour of the losers where the creditors have no cause of action for such disgorgement apart from section 204. It follows that, if the legal rights of investors in a winding up are to be adjusted otherwise than voluntarily and without the individual consents of the investors concerned, there must be a scheme of arrangement: see In re Trix Ltd [1970] 1 WLR 1421, where in the absence of a scheme of arrangement Plowman J refused to sanction a compromise with creditors proposed to be made by a liquidator which might not have given creditors their entitlement in a liquidation; and see also In re Calgary and Edmonton Land Co Ltd (in liquidation) [1975] 1 WLR 355, where Megarry J refused to sanction a stay of a liquidation to which not all members had consented . These cases demonstrate the rigour with which the statutory scheme in winding up is required to be followed. In addition, there are safeguards in the statutory provisions relating to schemes of arrangement: there must be meetings convened by the court, a special majority and the sanction of the court. But these provisions cannot be used to bind the winners, who are no longer creditors and against whom SIB has no claim.

110.
There have been some specific submissions which I should address. Professor Watson Gandy, for the amicus curiae, argues that the list of forms of relief in section 204(3) which the court may give is to be interpreted eiusdem generis. The list already includes power to order a liquidation and so, submits Professor Watson Gandy, it does not anticipate that the company will already be in winding up. In my judgment, it is clear that Parliament did not intend the list in section 204(3) to limit the forms of relief

that might be given. The section expressly uses the words: “without limiting the generality of the foregoing”.

111.
Counsel submitted that Parliament deliberately chose not to amend section 204 when it amended the law to include a provision for preferences in relation to banks. In my judgment there could be many reasons why the legislature decided not to amend section 204, including that advanced by Mr Justin Fenwick QC, for the liquidators, namely that the section was already in force and Parliament did not wish to make any amendment which might prejudice existing proceedings, and affect the interpretation of the Act for other purposes without seeing first an authoritative interpretation by the courts.

112.
It was also submitted that the liquidators do not control the company. However, there is nothing in section 204 which limits the complainant to a person who actually controls the company. The complainant could be a national agency which decided to bring proceedings within its competence for the purpose of assisting those who were not able to help themselves.

113.
Subject to my different conclusion on the status of a liquidator to bring a claim under section 204, on which I agree with Wallbank J, and subject as otherwise appears in this judgment, I agree with the judgment of Lord Briggs and with his proposal as to the humble advice to be given to Her Majesty.

LORD CARNWATH:

114.
Save that I agree with Lady Arden that there is no reason in principle to exclude a liquidator from the scope of section 204(b)(iv), I agree with the judgment of Lord Briggs and the advice proposed by him.